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"ENCOURAGING A BETTER ASEAN COMMUNITY RELATIONSHIP"

GRADUATE PROGRAMS OF
UNIVERSITAS ATMA JAYA YOGYAKARTA

LAW, BUSINESS, AND SOCIAL JUSTICE (IC-LBSJ 2016)

"ENCOURAGING A BETTER ASEAN COMMUNITY RELATIONSHIP"

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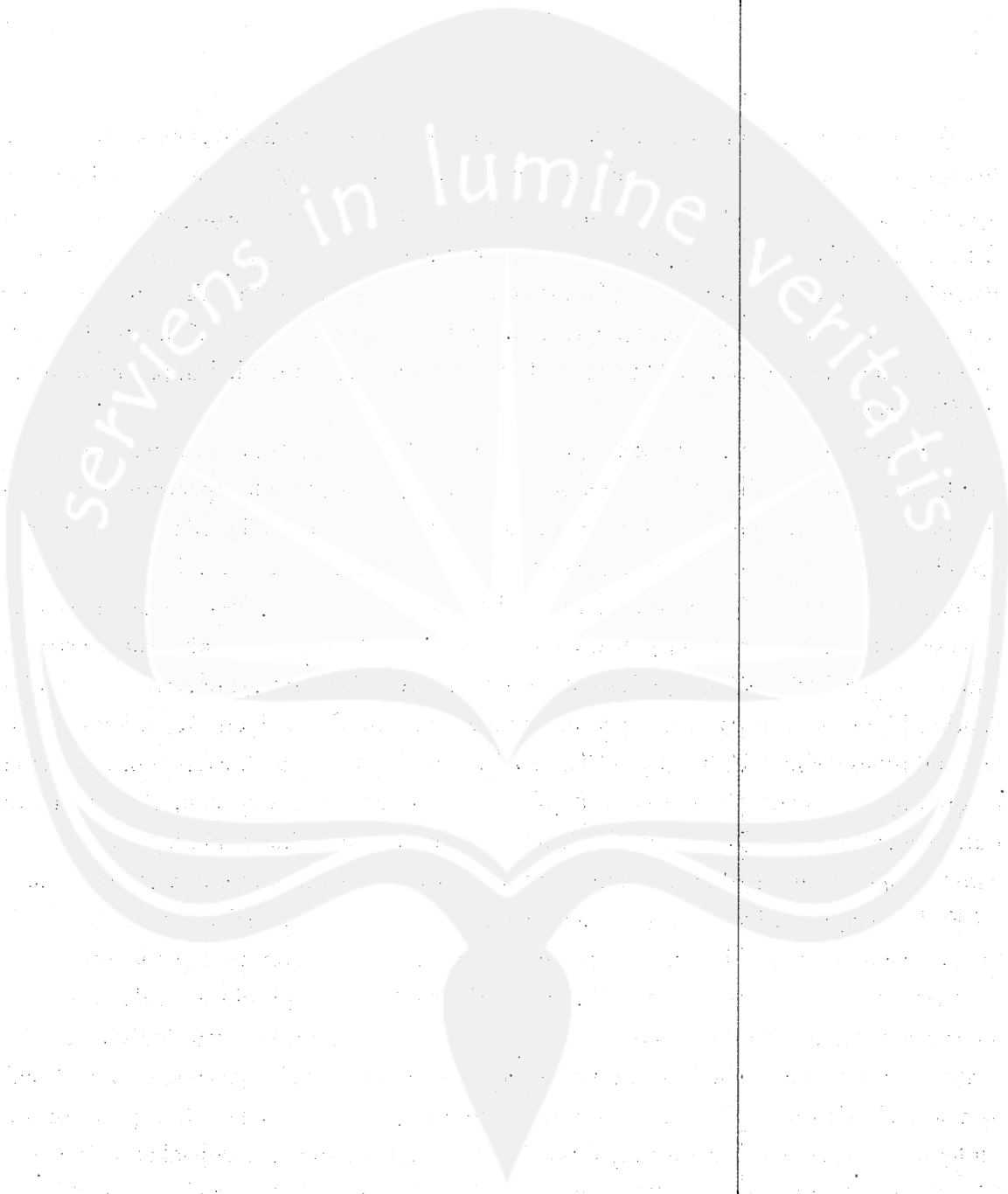
PREFACE

The 2016 International Conference On Emerging Issues In Law, Business, And Social Justice (IC-LBSJ 2016) was held on the campus of Universitas Atma Jaya Yogyakarta in Yogyakarta Province, Indonesia during 16-18 June 2016. The 112 participants, had many fruitful discussions and exchanges that contributed to the success of the conference. Participants from some countries (Timor Leste, South Korea, Lesotho, Yangon, Philipina) made the conference truly international in scope. The 41 abstracts and full papers that were presented on three days formed the heart of the conference and provided ample opportunity for discussion.

The abstracts and full papers were split almost equally between the three main oral session at different rooms. Of the total number of presented abstracts and full papers are included in this proceedings volume. There were 3 Invited speakers who talk collaboratively in plenary speech in their expert on the emerging issues in law, business and social justice especially to encourage a better ASEAN communities relationship. They are: Professor Gabriel Moens, Professor of Law, Curtin Business School, Departemen of Law, Curtin University, Australia, with the topic: Business Dispute Resolution perspective, in the context of ASIA community relationship; Professor Danture Wickramasinghe, Chair in Management Accounting Adam Smith Business School, University of Glasgow, United Kingdom, with the topic: international accounting perspective in the context of ASIA community relationship; Dr.M.Parnawa Putranta, MBA, Ph.D, Director of Graduate Program of Universitas Atma Jaya Yogyakarta, with the topic: Business ethic perspective, in the context of ASIA community relationship; and FX Endro Susilo, S.H,LLM, Dean of Law Faculty of universitas Atma Jaya Yogyakarta, with the topic: environmental law perspective, in the context of ASIA community relationship.

These confefrence covered the full range of the conference topics in three days. Among the speakers were several law, business, and social justice expert, young scientists, namely, postdocs and students, who brought new perspectives to their fields. This session was closed by a special gala-dinner to honor all of the presenters, and to honor the best paper of the conference. The conference was fully funded by Universitas Atma Jaya Yogyakarta. The next IC-LBSJ will be held in 2018. We expect that these future IC-LBSJ conference will be as stimulating as this most recent one was, as indicated by the contributions presented in this proceedings volume.

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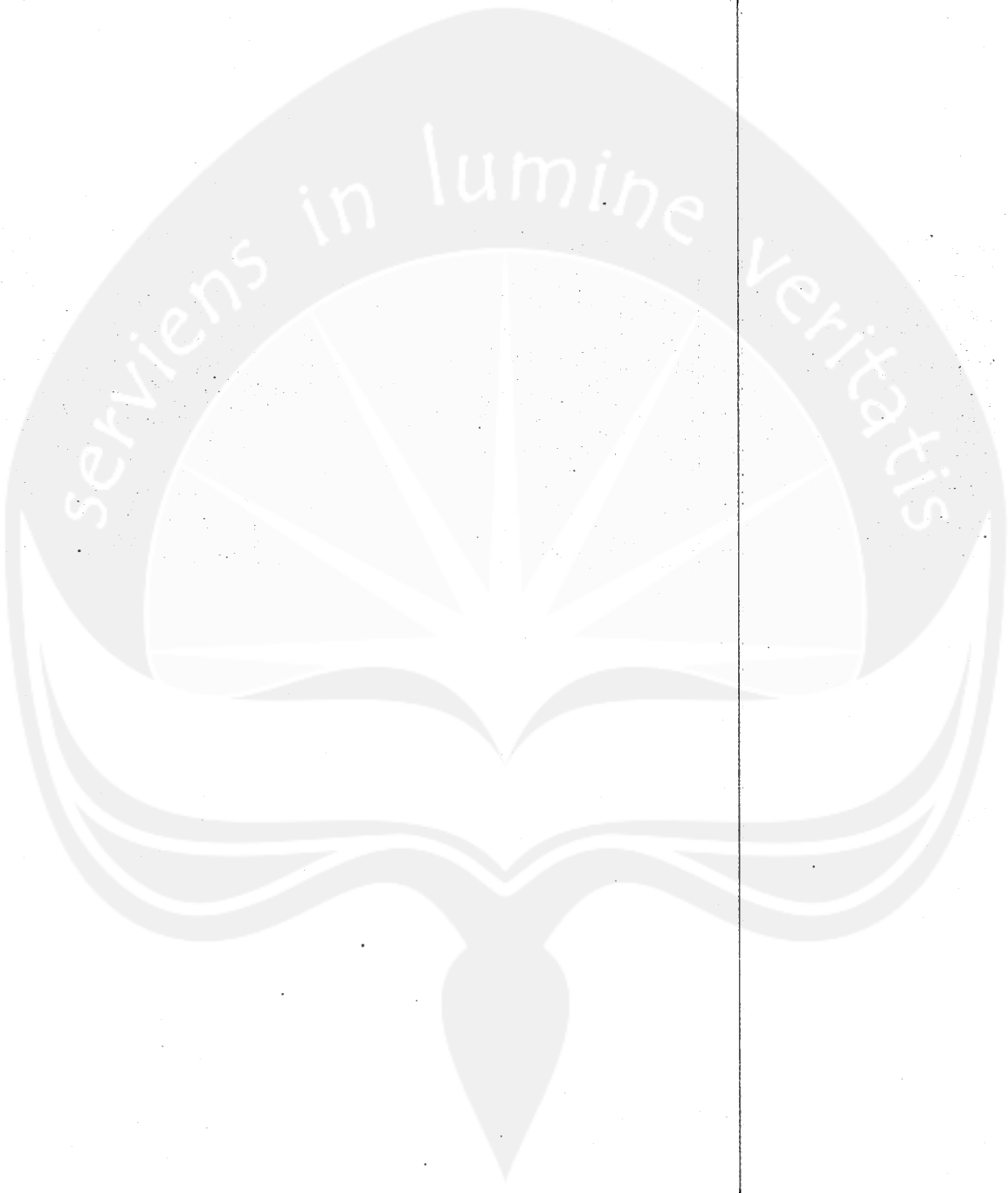
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THE ASEAN ECONOMIC AND TRADE LIBERALIZATION AGREEMENT
Competition or Cooperation ?

By : Triyana Yohanes[1]

ABSTRACT

The ASEAN economic and trade liberalization had been done by the establishment of the ASEAN Free Trade Area (AFTA) based on the Agreement on the Common Effective Preferential Tariff Sceme Towards the AFTA, 1992, and then followed by he establishment of the ASEAN Economic Community (AEC) based on the Kuala Lumpur Declaration, December 2015. Basically, the ASEAN economic and trade liberalization was performed through the application of the principles of liberalism economic, is the ideological belief in organizing the economy on individualist and voluntarist lines (laissez faire). The application of the liberalism economic principles has caused the economic free competition among the ASEAN countries member, so there will be the winner and the looser. The application of the liberalism economic principles seems is not in accordance with the spirit of cooperation and solidarity among the ASEAN countries, based on the Bangkok Declaration 1967 and the ASEAN Charter. Furthermore, most of the countries member of the ASEAN, such as Indonesia with Pancasila Economic, are doing their national economic life based on socialist economic principles. Therefore, there shall be a harmonization and compromise between the principle of competition in one hand, and the spirit of cooperation (solidarity) and social economic principles in the other hand, in implementing trade and economic liberalization among the ASEAN countries through the AFTA and the EAC. Some flexibilities and positive special treatments for the ASEAN low income countries shall be given in helping them to increase their economic capability.

Key words : ASEAN economic and trade liberalization, cooperation, competition, justice (fairness), flexibilitiy, positive special treatment.

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1 *Lecture of the University of Atmajaya Law School and Student of PhD Program of the Sebelas Maret State University Law School, Surakarta, Indonesia .*

I. Introduction

"The Association of South East Asian Nations" (ASEAN) was founded in 1967 based on Bangkok Declaration, 8 August 1967. The ASEAN is a regional organization for the countries in South East Asia region.

The aims and purposes of the establishment of the ASEAN based on Bangkok Declaration, 1967 are :

1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations;
2. To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter;
3. To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields;
4. To provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres;
5. To collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples;
6. To promote South-East Asian studies;
7. To maintain close and beneficial cooperation with existing international and regional organizations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves.[2]

At the early of the establishment, the the ASEAN had five member states, that was, Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Now, the ASEAN has ten member states by the joining of Brunei Darussalam, Cambodia, Laos, Myanmar, and Vietnam in the membership of the ASEAN. Two states, Timor Leste and Papua New Guinea, become observers at the ASEAN.

Until the year of 1976, the ASEAN faced some problems (weaknesses) as an international organization. The ASEAN had no Secretariat (Headquarter) and had no charter or statute. But this problems (weaknesses) had been overcome by the establishment of the ASEAN Secretariat in Jakarta in the year of 1976 and the adoption of the ASEAN Charter in the year of 2007. The ASEAN Charter, as the basic rules of the operation of the ASEAN, has come entry into force in October, 2008.

Untill in the recent time, the ASEAN has developed some cooperation among it's member states, and one of the cooperation is cooperation in economic relations. In developing

2 See the second declaration of the Bangkok Declaration, 1967.

economic relations, the ASEAN also was influeced by the trend of globalization and economic liberalization, especially after the the World Trade Organization Agreement come entry into force on the first January, 1995.

II. Economic and trade liberalization under some ASEAN Agreements

As mentioned above, one of the purposes of the estbalishment of the ASEAN is to promote economic collaboration (cooperation). The economic cooperation among the ASEAN member states has been started by the establishment of the ASEAN Economic Ministerial Meeting (AEM) in 1976. In the ASEAN Summit Meeting in Bali, 1976, ASEAN also adopted a guideline for the policy and program of cooperation action in the field of economic, and stated a priority economic cooperation in the field of food commodity, energy, industry and trade.

Somes agreements in the field of economic and trade has been made by the ASEAN, included, the "Agreement on ASEAN Preferential Trading Arrangement" (ASEAN-PTA) 1977, "The Framework Agreement on Enhancing ASEAN Economic Coopperation" 1992, "The Agreement on the Common Effective Preferential Tariff (CEPT) Scheme Toward the ASEAN Free Trade Area" (AFTA) 1992, and the Kuala Lumpur Declaration on the Establishment of the ASEAN Economic Community (AEC) 2015. The ASEAN also adopted somes specific agreement in certain economic fields, for examples :

a. Cooperation in the field of banking and finance,
b. Cooperation in the field of food, agricatural and forestry products,
c. Cooperation in the field of industry, mineral and energy, and
d. Cooperation in the field of transportation and communication.

The ASEAN economic and trade liberalization had been begun since the establishment of the ASEAN-PTA in the years of 1977, an ASEAN trade agreement on the tariff reduction in trade in goods for goods were traded among the ASEAN countries. The ASEAN PTA was implemented through :

a. Exchange of Tariff Preference
b. Long Term Quantitave Contracts,
c. Preferentials Procurements by Government Entities,
d. Liberalization of Non-Tariff Measures on Preferential Basis, and
e. Preferential Terms for the Financing of Imports.[3]

The implementation of the ASEAN-PTA wasn't succesfull due to the voluntary character of the trade liberalization.

Due to the failure of the ASEAN-PTA, the ASEAN member states looked for other ways for realizing the economic and trade liberalization among them. In the year of 1990 idea of the establishment of "ASEAN Free Trade Area" (AFTA) was launched. The idea got positive responses in the ASEAN Ministerial Meeting 1991 in Kuala Lumpur. In the ASEAN

3 Dirjen Kerjasama ASEAN, Deplu RI, 2000, hlm. 62.

Ministeral Meeting was agreed : *1)*. Establishment of the AFTA in 15 years, *2)*. AFTA would be performed based on the Indonesian proposal on the "Common Effective Preferential Tariff" (CEPT), *3)*. CEPT would regulate all of the manufacture industry products, but not for capital goods and military product.

In the fourth ASEAN Summit Meeting in Singapore, 27 to 28 January 1992, were agreed :

a. "The Framework Agreement on Enhancing ASEAN Economic Coopperation"
b. "The Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area" (AFTA). Based on this agreement ASEAN trade liberalization was performed within fiveteen years beginning the first January 1993.

The primary goals of AFTA seek to: 1). Increase ASEAN's competitive edge as a production base in the world market through the elimination, within ASEAN, of tariffs and non-tariff barriers; and 2). attract more foreign direct investment to ASEAN. The primary mechanism for achieving such goals is the Common Effective Preferential Tariff scheme, which established a phased schedule in 1992 with the goal to increase the region's competitive advantage as a production base geared for the world market.[4]

Based on AFTA agreement, ASEAN trade liberalization was performed through the abolishment of tariff and non tariff barriers to trade for products were traded among the ASEAN member states. A product could be implemented tariff and non tariff concessions based on the CEPT if the product was included in "Inclusion List" by the state of origin and the imported state based on the reciprocal principle, and the products fullfil the requirement of minimum 40% ASEAN content. "Inclusion List" consist of item subject to tariff reduction immediately to bring them down to range of 0 – 5% by the year of 2003.

The implementation of the trade liberalization under the AFTA Agreements contains some flexibilities, especially for the sensitive and important products for the ASEAN member states. Under the AFTA framework, ASEAN products are divided into four categories :

1) "Inclusion List" (IL), consist of products subject to tariff reduction to the range of 0 – 5 % by the year of 2003;
2) "Temporary Inclusion List", consist of products subject to denunciation of the tariff reduction, but latest by the year of 2000 the tariff shall be reduced to the range of 0 – 5 % by the year of 2003;
3) "Sensitive List" (SL), consist of sensitive agricultural products subject to the tariff reduction by the year of 2010,
4) "General Exception List" (GE), consist of products are not subject to the tariff reduction.

4 ASEAN Free Trade Area, Wikipedia, the free encyclopedia.

For enhancing the implementation of the AFTA Agreement, AFTA Council was established.[5] AFTA Council supervise the implementation of the AFTA Agreement and help the member states of the ASEAN in settling trade disputes among them.

In some ASEAN Summit Meetings and ASEAN Economic Minister Meetings, the ASEAN member states had agreed to accelerate the trade liberalization under the AFTA Agreement. Finally, ASEAN trade liberalization under the AFTA Agreement had been fully implemented by the year of 2010 for all ASEAN member states. And, since 1 January 2010 the ASEAN also implemented trade liberalization with People Republic of Cina.

After the successfull of the implementation of trade liberalization under the AFTA Agreement, now the ASEAN member states is in the way of establishing "ASEAN Economic Community" (AEC). The blue print of the AEC was signed by the ASEAN member states leaders in 2007, together with the signatoring of the blue prints on establishing the "ASEAN Security Community" and "ASEAN Social Cultural Community". Through the establishment of the AEC will be realized the integration of the ASEAN economic and broader liberalization of trade in goods, services, investment and free movement people (skill labor) among the ASEAN member states.[6]

In the twentieth ASEAN Summit Meeting, in Phnom Penh, Cambodia, April 2012 were agreed Phnom Penh Declaration on ASEAN : One Community, One Destiny, Phnom Penh Agenda on ASEAN Community Building and Drug-Free ASEAN 2015. In the document of *Phnom Penh Agenda* the ASEAN member states leaders were agreed to accelerate to establishment of the AEC and to realize an ASEAN single market and one basic of production, to enhance the ASEAN economic power in the global competition and to do an fair and integrated economic development.

The establishment of the AEC was started based on the Kuala Lumpur Declaration on the Establishment of the EAC, beginning 31 December 2015. The implementation of the AEC will follow the European Community (European Union) model. This type of economic cooperation can be named as an "Economic Union". Through an Economic Union, usually the member states beside implement a common market, also agree to create the same (unify) policies in fiscal, monetery and social economic matters.

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5 Article 7 of the CEPT for AFTA : *"Institutional Arrangements*

1. *The ASEAN Economic Ministers (AEM) shall, for the purposes of this Agreement, establish a ministerial-level Council comprising one nominee from each Member State and the Secretary-General of the ASEAN Secretariat. The ASEAN Secretariat shall provide the support to the ministerial-level Council for supervising, coordinating and reviewing the implementation of this Agreement, and assisting the AEM in all matters relating thereto. In the performance of its functions, the ministerial-level Council shall also be supported by the Senior Economic Officials' Meeting (SEOM).*
2. *Member States which enter into bilateral arrangements on tariff reductions pursuant to Article 4 of this Agreement shall notify all other Member States and the ASEAN Secretariat of such arrangements.*
3. *The ASEAN Secretariat shall monitor and report to the SEOM on the implementation of the Agreement pursuant to the Article III (2) (8) of the Agreement on the Establishment of the ASEAN Secretariat. Member States shall cooperate with the ASEAN Secretariat in the performance of its duties."*

6 See Triyana Yohanes, *Masalah Hukum Masyarakat Ekonomi ASEAN*, article, Kedaulatan Rakyat Newspaper, Yogyakarta, 8 August, 2012.

At the recent time the AEC hasn't fullfil the criteria of an *economic union*. The AEC has no real agenda on the ASEAN economic integration and liberalization. Beside that, the Kuala Lumpur Declaration on the Establishment of the AEC dosen't provide an agenda to make a unification policies in fiscal, monetary and social-economic matters among the ASEAN member states. Eventhough the AEC hasn't fullfil the criteria of an Economic Union, but there are some optimism for the full establishment of the AEC ini the future, so it will make the ASEAN economic become more liberal.

III. Reducing the negative impacts of the ASEAN economic and trade liberalization

Based on AFTA Agreement and the AEC Declaration, the ASEAN performed economic and trade liberalisazation. Under the AFTA Agreement and the AEC Declaration, principles of economic liberalism is applied in the economic and trade relation among the ASEAN member states. Commonly, the application of the economic liberalism system in some countries could bring high efisiency in industry and could accelerate the economic growth, so the ASEAN member states prefer to apply the economic liberalism system in their economic and trade relation than the other economic system, such as socialist and structuralist economic system.

The economic liberalism system has it's root on the economic theory of Adam Smith (1723 – 1790) in his book *"An Inquiry into the Nature and Causes of the Wealth of Nations" (The Wealth of Nation).* The theory of economic liberalism had been developed by David Ricardo (1772 – 1823) and Herbert Spencer (1820 – 1903) and economic neo-liberalism thinkers after the Second World War.[7]

Basically, according the economic liberalism theory, there should be a freedom in doing economic activities for all persons, and the intervention of the state government in individual economic activities is forbidden. The international trade should be performed without any kind of barriers. The economic activities are directed to achieve the high economic growth. Based on the economic liberalism theory, there shoud be a free competition in individual economic activities, without any government intervention. The motto of the Adam Smith economic liberalism is "*laissez-fair, laissez-passer*".[8]

Consequenly, the application of the economic liberalism system in economic and trade relations among the ASEAN member states will result a free economic competition among them. In this free economic competition there will be the winner in one hand and the looser in the other hand. The stronger will get economic benefits, and on the contrary the weaker will suffer of economic looses. Consequently, respectively the ASEAN member states will become more selfish in the ASEAN economic relations. In one side, economically strong ASEAN member state will get more benefits in the ASEAN economic and trade liberalization, but in the other side the economically weak ASEAN member state will suffer of economic

7 Munir Fuady, Munir Fuady, *Hukum Dagang Internasional (Aspek Hukum dari WTO)*, PT. Citra Aditya Bhakti, Jakarta, 2004, hlm. 3.

8 Neoliberalime, http://id.wikipedia.org, 27 Juli 2006.

looses. Based on the global Competitiveness Report 2014-2015 the economic competitiveness index of the ASEAN member states are vary from : Singapore grade ranking 2 (score : 5.65), Malay grade ranking 20 (score : 5.16), Thailand grade ranking 31 (score : 4.66), Indonesia grade ranking 34 (score : 4.57), the Phillipine grade ranking 52 (score : 4.40), Vietnam grade ranking 68 (score : 4.32), Lao Republic grade ranking 93 (score : 3.91), Cambodia grade ranking 95 (score : 3.89) to Myanmar grade ranking 134 (score : 3.24).[9]

Considering the negative impact of the application of the economic liberalism principles, in the past time Indonesia denied the idea of the establishment of AFTA, because AFTA would result liberalism and capitalism. Liberalism dan capitalism are not accordance with the Indonesian economic system, the Pancasila Economic. The Pancasila economic system is built on the basic of principles of cooperation, Indonesian socialism, togetherness, justice and equality.

In the fact, all of the ASEAN member states have no root of economic liberalism in managing their economic life. The spirit of togetherness, solidarity, cooperation are the basic principles in establishing the ASEAN and building the relations among the ASEAN member states. So, the ASEAN economic and trade liberalization also should be performed in the light of the spirit of ASEAN solidarity and principle of cooperation".

The ASEAN economic and trade liberalization agreement should be performed with some limitations, so the economic and trade liberalization will be able to give fair (justice) and equal benefits to all of the ASEAN member states. Justice (fairness) is one basic principle of law and in doing international relations, included economic relations.[10] There are some theories of justice, and for the relations among the ASEAN states members, John Rawls theory of justice and the concept of Pancasila justice are proper theories of justice that can be considered to be applied.

John Rawls theory of justice give stressing on principle of equality and freedom for all persons, but also give probability to give ineguality based on the law and this inequality is directed to the benefits of all persons. According to the John Rawls theory of justice, the strong of justice as "fairness"[11] is laid on the principle that inequality is permitted as far the

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9 See Triyana Yohanes, *Membatasi Liberalisasi Ekonomi ASEAN*, Kedaulatan Newspaper, Yogyakarta, 13 October, 2014.

10 As Frank J. Garcia dan Lindita Ciko stated :"The relationship between poverty, inequality, development and trade is a paradigmatic example of the link between trade and justice. The distribution of social goods has always been a central concern in justice theory. The connection between the global economic system (of which trade and trade law are foundational elements) and the uneven allocation of wealth among states and among individuals is widely recognized, even if its precise nature is hotly contested. Given this relationship, what obligations do we owe to developing states in structuring our trade relationships? To poor individuals in developing states? To the poor, as a group, in every state?", Frank J. Garcia and Lindita Ciko, *Theory of Justice and International Economic Law*, Boston College Law School Paper, 2011, p. 6

11 Frank J. Garcia and Lindita Ciko stated : "The question of justice and international economic law is at heart nothing more (or less) than the question of fairness: are the rules, institutions and outcomes in transnational economic relations "fair" or "unfair?" However, it is deceptively simple to ask such a question, because the answers lead us into some of the most complicated and contentious issues of economic and political theory today., *ibid.*, p. 7

inequality treatment will give advantages to all of peoples and also give priority to the principle of freedom.[12] According to John Rawls, justice (fairness) doesn't always has a meaning that all of persons has the same treatment without seeing the important differencies, which is objectively owned by every person. Shortly, inequality in the distribution of social values can be justified, as far the policy is directed to give benefits to all peoples. So, John Rawls give oppurtunities and appreciate the rights to all persons for having a reasonably comfortable life as a human being, especially for them who suffer of disadvantages.

The John Rawls theory of justice in accordance with the concept of justice based on Pancasila values, Indonesian state ideology. The second "value" of Pancasila states : "Kemanusiaan Yang Adil dan Beradab" (Justice and civilized humanity). The fifth "value" of Pancasila states : "Keadilan Sosial Bagi Seluruh Rakyat Indonesia" (Social justice for all of Indonesian peoples).

According to Mr. Soeharto (the second Republic Indonesia President), the Pancasila concept of justice contents a teaching to give respect and treat every human beings as well as the nature of human being as the creature of God. From the attitude of respect to every single person as the creature of God, will be resulted justice, peace, harmony in the society. The Indonesia peoples rejected any kind of eksploitation by one person over the other person, included any kind of colonialism, included colonialism in the field of economy.[13] Based on the "value" "Keadilan sosial bagi seluruh rakyat Indonesia" (Justice for all of Indonesian peoples), increasing eguality in prosperity shoul be achieved by all of the Indonesian people. Social justice means giving protections to the weaks, but it doesn't means that the weak person just only enjoy protection without doing any works, on the contrary the weak person also has obligation to work based on his/her capability. Protection to the weak was given for the purpose of preventing eksploitation by the strong over the weak person and for granting justice.[14]

The John Rawls theory of justice and the concept of justice according the Pancasila, are proper concept of justice that can be applied in the economic relations of ASEAN members states, especially for preventing injusticeness in ASEAN economic relation that can raise from the implementation of the ASEAN economic and trade liberalization agreements. Beside that, for giving justice and mutual benefits in the economic relations of the ASEAN member states based on the ASEAN economic and trade liberalization agreement, it can be done by this following ways :

a. Giving some more "fleksibilities" in the implementation of the AFTA Agreement and AEC Decalaration,

12 John Rawls stated that the first statement of the two principles of justice reads as follows. First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all. John Rawl, A Theory of Justice, the Belknap press of Harvard University Press Cambridge, Massachusetts, London, England, 2005, p. 60.

13 Krissantono (editor), *Pandangan Presiden Soeharto Tentang Pancasila*, CSIS, Jakarta, 1976, pp. 39-40.

14 *Ibid*, p. 70.

b. Giving some positive special treatments to low income states of the ASEAN member states as a protection from suffering looses in the ASEAN economic and trade relations,
c. Implementing the ASEAN Development Program, supported by an ASEAN Development Agency, for helping the low income the ASEAN member states for the the purpose of enhancing their economic growth and prosperity. Development can be used as a tool of reducing the gap in social economic prosperity among the ASEAN member states.
d. The adoption of the principles of the New International Economic Order principles (The United Nations General Assembly Resolution Number 3201) in the regulations of ASEAN economic and trade relations.[15]

IV. Conclusion

The application of the principles of economic liberalism in ASEAN economic and trade relations based on the AFTA Agreement and the AEC Declaration tends to result a free competition in economic among the ASEAN member states. Some ASEAN economically strong states will get economic benefits in this free economic competition, but on the contrary some ASEAN economically weak states will suffer of economic looses. The free economic competition also will cause hegemony in ASEAN economis relations by some ASEAN economically strong states. For reducing these negative impacts, the implementation of agreements on ASEAN economic and trade liberalization (AFTA and AEC) shall be based on spirit of ASEAN solidarity and economic benefits mutually cooperation among member states of the ASEAN.

The application of ASEAN solidarity spirit and principle of mutually economic benefits cooperation in ASEAN economic and trade liberalization will be able to bring ASEAN in a high economic growth and enhance the economic prosperity of all the ASEAN peoples based

15 See Triyana Yohanes, Hukum Ekonomi Internasional, Perspektif Kepentingan Negara Sedang Berkembang, Cahaya Atma Pustaka, 2015, Chapter IV. The New International Economic Order (NIEO) is a concept of the World Economic Order proposed by developing countries group in the year of 1970. Unfortunetaly this concept was rejected by some developed countries, especially the United States of America. Ten important principles of the New International Economic Order based on the United Nations General Assembly Resolution Number 3201, 1 May 1974 on the Establishment on the NIEO, are :
1) Obligation for all states to cooperate for the achievement the World economic prosperity ,
2) Developed countries have obligation to provide development aids for the interest of developing countries through transfer of financial resources and transfer of knowledge and technology,
3) The right of economic independence for developing countries,
4) State permanent sovereignty over their natural resources, prosperity and their economic activities,
5) Positive special treatments for developing countries in all of international economic relations,
6) Equal Partisipation of developing countries in all of international economic, monetary and financial,
7) Compensation for the former kolonialized states over their natural resources, which had been exploited by colonialist states,
8) Cooperation in economic and technology among the developing states,
9) Sustainable development,
10) Principle of *common heritage of mankind* over natural resources in the high seas, and other international territory.

on the principles of equality and justice (fairness). In the implementation of the ASEAN economic and trade liberalization, some economic protections should be given to the ASEAN low income states, through the application of some positive special rights for them and the creation of financial and non financial aids in doing their development.

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FOREST FIRE'S PHENOMENON: AEC REIFICATION PITFALL VERSUS DEEP ECOLOGY

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ABSTRACT

Human being and living quality of their global community very depends on environmental condition. Then, various policies, regulation managements, law enforcement and technical supervision are conducted in attempts of biological environment conservation. However, a single market of such the ASEAN Economic Community (AEC) style gives a complex homework in ecological sector. On the Markplus Conference 2015, Hermawan Kartajaya reminded that the single market initiated by the AEC is potentially more dangerous than the AFTA (ASEAN Free Trade Area) and CAFTA (China-ASEAN Free Trade Agreement). He stated that if AFTA and CAFTA are concerned only with flow of goods, but MEA covers free flow of goods, people, services and money (capital and investment). Purpose of the writing is actually to show challenges that should be addressed when MEA establishes a single ASEAN market, especially be related to forest fire's phenomenon. Results of the study showed that forest fire and the single ASEAN market has, consciously or not, created a new myth called rationality of commodity efficiency. Horkheimer and Adorno in their ' enlightenment dialectic' explained that efficiency, in economic, is a principle of market surpassing all kinds of feudal and religious restrictions. Thus, rationality is equated with efficiency. When efficiency is applied in dynamics of capitalist economy, then the entire field of human life is considered a commodity. Consequently, reification is in effect, namely when everything is a commodity so people is no longer enjoying but consuming and consuming without building any social relationships in a real sense. At such nadir, ecological damage is inevitable or it is even considered a reasonable price worth paying. The Law which is essentially an ethical conversation of human beings to produce justice is easily forgotten because of greed. However, all such excesses of reification can be avoided when the law is still pursued progressively, so the law must arrive at radicalism in order to demolish assumptions of law. Thus, it can be concluded that forest should not only be explored for its resources solely according to the reification trap of ASEAN single market, but it must be preserved for future human posterity because of considering the deep ecology.

Keywords: *forest fire, AEC, deep ecology.*

Background

Indonesian forest territory reaching 99.6 million hectare is promising a great resource in facing of the ASEAN single market. However, a single market of such the ASEAN Economic Community (AEC) style gives a complex homework in ecological sector. For example, Global Forest Watch Fires has detected over 127,000 fires across Indonesia this year, the worst since 1997. Many of these fires were the result of clearing forested peatlands to make way for plantations of commodities such as palm oil. Much of the clearing and burning has been financed by small- and medium-sized investors. Peat stores some of the highest quantities of carbon on Earth and also emits methane resulting in up to 200 times more damage to the global climate than regular fires of a similar extent[1]. The smog is especially toxic.

As a result of these fires, toxic smog has enveloped a wide area across Indonesia, Malaysia and Singapore, reaching as far as Thailand and the Philippines, closing schools, disabling airports, and forcing six Indonesian provinces to declare a state of emergency. Haze from this year's fires likewise caused more than 500,000 cases of haze-related respiratory illnesses in Southeast Asia and resulted in the deaths of at least 19 Indonesians. Many more will die from the longer term impacts of breathing the foul air for weeks on end. All told, more than 40 million Indonesians have been affected[2].

Observing dialectic of the clearing and burning has been financed by small and medium sized investors for increase economic products is actually not a new discourse. Long ago, such liberalization and free competition conditions had actually been reminded by thinkers of Critical Philosophy. For example, Horkheimer and Adorno with their book, *dialectic der Aufklarung,* published firstly in 1944 provided in-depth critique on 'commodity' and 'economic efficiency'.[3] As rationality of capitalism theory says '*let the market work, because the market creates the most pure efficiency*', then a new myth comes, equating rationality with efficiency. Inefficient product will be eroded and destroyed in a market field. At a later stage, all areas of human life would be commodities. All values are commodities meaning that the real value vanishes, and production is no longer to meet needs, but to bring new needs that are created continuously for the sake of production growth.[4]

On the Markplus Conference 2015, Hermawan Kartajaya reminded that the single market initiated by the AEC (ASEAN Economic Community) is potentially more dangerous than the AFTA (ASEAN Free Trade Area) and CAFTA (China-ASEAN Free Trade Agreement). He stated that if AFTA and CAFTA are concerned only with flow of goods, but MEA covers

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1 Nancy Harris et.all, 'With Latest Fires Crisis, Indonesia Surprisses Russia as World's Fourth-Largest Emitter, World Resources Institute, October 29, 2015, p.1-3.

2 Nancy Harris et.all, 'With Latest Fires Crisis, …*ibid.* p.3

3 Franz Magnis-Suseno, *Dari Mao ke Marcuse, Percikan Filsafat Marxis Pasca-Lenin,* lih "Teori Kritis Marx Horkheimer dan Theodor Wiesengrund Adorno" (From Mao to Marcuse, Sparks of Marxist philosophy of Post-Lenin, cf. "Critical Theory of Marx Horkheimer and Theodor Adorno Wiesengrund) (Jakarta: Gramedia Utama), p. 203-249

4 Franz Magnis-Suseno, 'Aktualitas Filsafat Kritis' (Actuality of Critical Philosophy), Makalah Kuliah Umum PDIH UNDIP, Semarang, 8 December 2014, p. 2

free flow of goods, people, services and money (capital and investment).[5]However, a more anxious thing than the readiness of Indonesia and other ASEAN countries to participate in the MEA's single market relying on 'commodity' and 'economic efficiency' as main weapon is ecological aspect. When production is growing rapidly, needs are no longer limited. Raw materials of the production are taken from nature and consequently, it can reduce ecological balance for sure. Moreover, there is no any jointly agreed regulation of ASEAN ecological preservation. It creates 'a vacuum space' enhancing potential of environmental damages when the ASEAN single market is in effect. The abundance of Chinese products in early periods of CAFTA with their very competitive prices is, again, a real example of the presence of such threat to ecology. It is, of course, a logical thing to ask 'how can the Chinese product dominate various parts of the world with their relative low prices? In fact, the answer is their very efficient process of mass production process. Word 'efficient' here is referred to too lose environmental regulations, and weak law enforcement in China, so that it enables Chinese producers to get low cost of production. It means efficiency as a component of competitiveness is, in fact, requiring a sacrifice, namely ecology. One of sacrificed ecologies is serious air pollution in China as showed in Benxi Town.[6] Navarro's record stated that, at one time, the center of heavy industry had burnt about 7 million tons of coals per year, and it produced more steels per capita than other towns in China. Furthermore, the Benxi town had ever disappeared from satellite imaging because of very thick smog and carbon covered sky of China.[7]

When we highlight the ecological aspects of Indonesia, new analysis reveals even more troubling news about Indonesias fires crisis. Emissions from this year's (2015) fires have reached 1.62 billion metric tons of CO_2—bumping Indonesia from the sixth-largest emitter in the world up to the fourth-largest in just six weeks. The analysis from Guido van der Werf with the Global Fire Emissions Database also reveals that: Emissions from Indonesia's fires alone are approaching the total annual emissions of Brazil. Indonesia's current total emissions hover around 760 Mt CO_2 (excluding land-use change), meaning the fires alone have tripled Indonesia's entire annual emissions. Indonesian fires during 38 of the past 56 days (as of October,26) have released more greenhouse gas emissions than the entire U.S. economy on those days.

Such conditions are contemporary reality of imbalanced pendulum of ecological and fairness equilibrium. If all of them are submitted to mechanism of the ASEAN single market, then a question arises: will the deep ecology and justice for future generations (Intergeneration Justice) attain a chance? This is a focus of the article discussing the law as not only a technical

5 Hermawan Kertajaya, Markplus Conference 2015: 'Indonesia WOW!', Jawa Pos, 11 December 2014, p. 7

6 Benxi is located in eastward mountains range of Lioning Province. The town is a center of raw materials for important industries, namely iron and steel, coals, construction materials and chemical products. Population of Benxi was 1.5 million people and for last decade, it was one of the 17 biggest towns in China. http://www.chinacp.com/eng/cpcities/co_benxi.html

7 Peter Navarro, *Letupan-letupan Perang China Mendatang (The Coming China Wars),* (Jakarta: Elex Media Komputindo, 2008), p.49


serviens in lumine veritatis

knowledge but also ethical knowledge as MEA opens the ASEAN single market. As woods and forest are spread and their wealth is exploited, a question arises: is the law being a human ethical conversation yet to produce justice, and the base is interests of civilization? If such things are still used as a reference, then the law must be pursued progressively. Consequently, the law must arrive at a radical demolition to assumptions considered fixed so far of the law. It is time to put the law to be not only there to check on fairness, but it should produce justice, fairness and, new kind of justice even, namely an intergeneration justice.

Problem Statement

Problem statement of the article is focused on criticism of the maximum utilization of Indonesian forest resources in the ASEAN Economic Community arena which is considered to be potentially trapped at Reification and put aside the concept of Deep Ecology. Welcoming the new era of national leadership that is paying more attention to Indonesian forest resource in the face of the MEA, a criticism regarding to potential ecological damage (forest fire) is worthy proposed as a balancer of pendulum of the planned rapid economic activities.

Result and Discussions

Indonesian forest territory reaching 99.6 million hectare is promising a great resource in facing of the ASEAN single market. But a single market of the ASEAN Economic Community (AEC) style intended to create a single market of ASEAN is consciously or not, in the eyes of critical philosophy, bringing with it a new myth called the rationality of commodity efficiency. Horkheimer and Adorno's dialectic of enlightenment[8] explains that, according to economic, efficiency is the law of market replacing all kinds of feudal and religious restrictions. Then, rationality is equated with efficiency and as the efficiency is applied in the dynamics of capitalist economy, the entire field of human life is a commodity. Human beings are no longer free and equal, but they will be stratified in the process of modern economy as upper class and lower class. Furthermore, Horkheimer and Adorno suggested that decisions for human being are taken by hierarchy starting from trade associations to national government, and of course, in a private room (domestic domain) by mass culture system taking over the last inner urge of an individual. In this position, the individual is forced to consume what is offered to them.[9]

Horkheimer and Adorno reviewed further that production is no longer to meet the needs, but to raise new needs continuously for the sake of production growth. Then, what so-called reification[10] comes, namely when all things are converted into commodity, people are no longer enjoying a product or service, but they make many consumptions for the sake of

8 The relevant original book title is *Dialektik der Aufklarung (1944)* and its English version was published with title *Dialectic of Enlightenment* (1947) by Querido Amsterdam.

9 Max Horkheimer, Theodor W. Adorno, *Dialektika Pencerahan, Mencari Identitas Manusia Rasional,* translated by Ahmad Sahidah from book *Dialectic of Enlightenment*, (Jogjakarta: IRCisoD, 2014), p. 346

10 Franz Magnis-Suseno, *Aktualitas Filsafat Kritis… ibid*, p.2

consumption itself[11] without building social relationships in a real sense. In this case, what is happened is someone else being a means of meeting the needs of an expanding consumption of egoism. The pride is no longer measured by a real achievement (*to be*-Erich Fromm), but by capability to consume (*to have*-Erich Fromm). A new myth is shaped, namely the belief of capitalist society that their pattern of capitalist society will bring a rational and humane human life into reality.[12]

Focus on the MEA context, phenomenon of such single market is presumably inseparable from the new rationality and human values brought by the new myth. At such point, the MEA creates a cause of criticism target by critical philosophy. Restrictions removal for efficiency taking the forms of free market, class stratification in the establishing economy as well as a new myth cultivated in mind of ASEAN community raises a 'problematic' side that a reminder and warning is crucial. Of course, such reminder should not only in the realm of thought, but it must penetrate deeper in practical level. It has been known that the historical background of criticism philosophy was developed within Karl Marx's style of thinking. Through his exposition, Marx wanted to say that philosophy should not just to stay in the mind, but it should criticize reality.[13] In the end, the critics would be able to 'burn' problems hidden in the reality. Further, practical change can be initiated. By similar statements, Horkheimer with his critical theory revealed that philosophy should focus on things considered negative, conflicting, or to look from perspective of the bottom, thus gaining greater truth and bring a movement of change.[14]

A problematic side of the contemporary reality around the passing of the MEA is no any commitment about ecological treatment has been signed yet. In fact, the ecology is a 'large container' within which economic activity of the single market is run. It was not happened as the opening of European Economic Community (EEC). Thigh regulations on environmental ethic and treatment preceded the EEC opening. Some contrary things happened in ASEAN region. Forest fire, the cases of imported B3 waste,[15] reclamation of Singapore beach,[16]

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11 Lukacs stated the condition of all lines become commodities as reification (Georg Lukacs, Karl Krosch, Antonio Gramsci). Franz Magnis-Suseno, *Dalam Bayang-bayang Lenin, Enam Pemikir Marxisme dari Lenin Sampai Tan Malaka,* (Jakarta: Gramedia Pustaka Utama), p. 87-204

12 Franz Magnis-Suseno, *Aktualitas Filsafat Kritis… ibid*,p. 2

13 Marx said, "The philosophers are only explaining world differently; the important thing is to change it", Marx, Thesis 11 about Feuerbach, NEW3, p. 7

14 Franz Magnis-Suseno, *Aktualitas Filsafat Kritis… ibid*, p. 2

15 Member of Parliament, Director General of Customs and Ministry of Environment performed sudden inspection in end of January 2012 and they seized 113 containers/20 fits of second irons containing B3 wastes imported by PT. HHS from United Kingdom (89 containers) and Netherlands (24 containers). News.viva.co.id/news/read/287121, '*DPR Sidak Impor Sampah dari Belanda dan Inggris'*.

16 Seashore reclamation by Singapore, in addition to be categorized as marine pollution damaging marine ecology of Johor Strait, Malaysia, was also indicated to violate UNCLOS 1982. For this, Malaysia filed legal suit to Singapore through International Marine Court. Unfortunately, sand used in the reclamation of Tekong and Tuas Islands was, in fact, coming from Riau Islands traded as an attractive commodity to the tender winner of Singapore's beach reclamation. www.unisosdem.org/article_detail.php 'Malaysia Gugat Singapura ke Mahkamah Kelautan Internasional'.

construction of a runway in Spratly by China by changing reef into an artificial island,[17] a flood of imported low-quality goods that were not meeting national standards of Indonesia (SNI) as well as illegal fishing using trawlers and fish bombs destroying coral reefs,[18] all of them are pictures of efficiency without ecological sensitivity, especially in sea landscape of ASEAN regions[19], Many of these fires were the result of clearing forested peatlands to make way for plantations of commodities such as palm oil. The 'attention vacuum' to ecology of the ASEAN regions is considered worriedly to lead the process of ASEAN single market into reification and Shallow Ecology thought.

Fritjof Capra suggested that (Shallow Ecology is an ecology putting human being above or outside of nature, namely in a position of dominating nature. Thus, nature is positioned only as a tool with its usable value (utilitarian value) or instrumental value. Shallow ecology is based on technocratic individualism. As individualistic ethics is disguised behind a progress, rude and greedy behavior is cultivated. Followers' attitudes of the idea on environment change into 'Cowboy Ethics'.[20] Illustrations of the Cowboy Ethics can be found in era of the Wild, Wild West. The cowboys slaughtered American Indian tribes, rummaged through natural lands and forests, and even almost destroyed herds of bison living wildly in savannas of the Indians.

It is a true picture of the outdated old paradigm that should be abandoned, but surprisingly, there are some attempts trying to revive it. The paradigm consists of some ideas and values locking the thinking with a focus of anthropocentrism.[21] Such the thought is, among the others, covering a view of the universe as a mechanical system composed of basic pillars of a building; the view considering a human body is a machine-like; the view that the life within society is a competitive struggle for the sake of existence, a belief that unlimited material progress can be achieved through economic and technological growth. The paradigm has been dominating for hundreds of years and formed Modern Western society today and exerts strong impact for the peaceful of the world.[22] Then, is such action pattern tried to develop

17 It is not only causing strain in ASEAN regions (Today, Spartly islands is claimed by 8 countries (China, Taiwan, Philippine, Vietnam, Brunei and Malaysia), construction of a runway by China in the islands has been causing damages of marine ecology and removing available marine resources. JawaPos, 'Tiongkok Bangun Landasan Pacu di Spratly', Saturday, 18 April 2015, p.3

18 Data of Coral Reef Rehabilitation Management Program of Indonesian Science Institution (LIPI) showed that only 6,38 percent of 85,707 km^2 of the coral reefs in Indonesia is categorized as excellent. The very well condition of coral reef was spread in 556 locations. Report of COREMAP, LIPI, 2014.

19 In marine landscape of ASEAN region, there is a coral reef triangle called "Amazon of the Seas" covering territories of middle and east waters of Indonesia, Timor Leste, Philippine, Sabah-Malaysia, Papua Nugini, and Salomon Islands and it was approximated that 3,000 species of fishes lived in the coral reef triangle. www.pusakaindonesia.org/potensi-laut-indonesia-senilai-rp-7-200-triliun/&ei=4d38X0eh&lc=id-ID&s=1

20 Liek Wilardjo, *Menerawang Di Kala Senggang (Kumpulan Tulisan Liek Wilardjo)*(Reflection at Leisure Time [Collection of Lik Wilardjo' Works]), (Salatiga: UKSW, 2009), p. 265-266

21 Antropocentrism is a concept centered on human being *(anthropos*=human being; *centrum*-central). Why human being is the central? Because human being is a creature equipped with capabilities of creation, feeling, language, willing and work as God permits it (instinct, logic, conscience and gauging). Liek Wilardjo, *Menerawang Dikala Senggang* ...lih. 'Antroposentriositas dan Peradaban'. p.253-254.

22 Fritjof Capra, *Jaring-jaring Kehidupan (Visi Baru Epistemologi dan Kehidupan)*- Original :*The Web of Life (A New Synthesis of Mind and Matter)*, (Yogyakarta: Fajar Pustaka Baru, 2002-London: Flamingo,

in implementation of MEAs that will be in effect immediately in 2015? Of course, when considering excesses that had ever occurred in the Western World, we must agree to say no.

Focusing on idea of the Indonesian government in facing MEA through optimization of forest resources potency, then direction of the Shallow Ecology-styled idea should be changed. In contrast to the understanding of Shallow Ecology viewing environment as a means of fulfilling needs in economic optic lens, the deep ecology is a theory of environmental ethics based on biocentrism. The main thesis states that a human being is not just a social, but also ecological creature. Liek Wilardjo interpreted such view by a stating that the full meaning of human life cannot be found only in community, in socializing with each other, but only found in ecological community, in embodiment of herself/himself as an ecological being.[23]

Meanwhile, with similar spirit, Arne Naess expressed a view of ecosophy,[24] advocating a lifestyle pattern conforming to wisdom of preserving nature as a household for all living creatures. In this case, the ecosophy and ecology are 'tweedledum and tweedledee' with Environmental Holism. Followers of Environmental Holism according to a study by Liek Wilardjo are doing movements and thoughts in order to oppose greed, callous and ignorance underlying attitudes and actions of the technocratic individualists against nature. The followers of Environmental Holism are strongly condemning greed and extravagance that are typical characters of developed nations polluting environment mercilessly and depleting out natural resources.[25]

Observing more serious environmental damage as a result of unethical industrialization, Aldo Leopold very insisted that we had to abandon anthropocentric ethics. He and people with similar understanding view that all creatures - human being and the world of fauna, as well as flora – are eligible for the same dignity as fellow citizens of a biotic community.[26] A similar sentiment was expressed by a Deep Ecologists who argued that human being is only an intrinsic part of the nature. They are merely a special thread in a weaving of the fabric of nature (*human beings are nothing but a special stand in the fabric of nature*).[27]

Furthermore, when the MEA with their design enforces the free flows of goods, people, services, and money among ASEAN countries meaning an establishment of a regional single market of the ASEAN region, what lessons can be kept in mind through this deep ecology ? with this such awareness, then, the emergence of new legal subject with their inherent rights, namely, the rights of mountain to remain protuberant vertically, the rights of sea to remain in blue and deep, the rights of trees to grow, the rights of river to keep flowing clear, the rights of roses to remain thorny, all of these are a sureness and containing a new kind of justice. Our

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1997), p.15-16

23 Liek Wilardjo, *Menerawang Dikala Senggang ... Ibid*,p. 265

24 Ecosophy is composed of two words, namely *oikos* (home) and *sophia* (wisdom). Liek Wilardjo, Ibid, p.265

25 Liek Wilardjo, *Menerawang Dikala Senggang ... Ibid*, p.266-267

26 Aldo Leopold, *A Sand County Almanac,* (New York: Oxford University Press, 1949)

27 Aldo Leopold, *Ibid*

thought say, if you want to be fair, then enable a tree to present in court.[28] This means that there is now a much stronger impetus ethically to 'do not harm the environment'.

Legal right for a tree to stand before the court was put firstly by Crystoper Stone in the 1970s. He said the tree has a right to defend itself. So, a Theory of Legal Standing emerged and it is known to date. Through his writings questioning about 'should a tree have the rights?', the idea is still in effect and it gives us a background for our rights to at present to discuss about the environment.[29]

Then, when the law is one of important instruments in challenging the MEA, a development of the progressive law with its care to the deep ecology deserves to pay attention to pursue. It can be assumed that at implementation of the MEA, the free flow of goods will occur by eliminating non-tariff barriers according to international standards; a free flow of trade is running with the removal of restrictions on the provision of services related to establishment of cross-ASEAN companies that has been not standardized in each member state; free cash flow is characterized by full establishment of a free and open investment regime.[30]

Considering the legal conditions experiencing a 'pull up'[31] by such globalization, an impartial law that is not passive in its neutral condition and impartial is required. Satjipto Rahardjo had expressed very early that law is not only the text of rules, but it can also in tangible behavior. It was stated further that behavior or human action can add and change the text. At the empirical level, it is found that role of human in the working of the law is too great to ignore. The law is not what is written and said by text. Chambliss and Seidman (1971) even say "the myth of the operation of law is given the lie daily". Therefore, in attempts of being able to see human behavior as a law, it would require a willingness to change our concept of the law, which is not only a rule, but also behavior.[32] Therefore, the neutral behavior showed, in fact, by the law is actually making some parties will increasingly in 'weak position' within a fierce arena of the world driven by globalization with its free competition in all lines. For that reason, the law is said to be progressive because it precisely defends the weak. At the next level, the concept of 'weak' should be defined naturally, materially, and concretely. At this position the ecology is placed in a 'weak position' of the law and, in fact, it is a legal subject

28 Muhammad Rustamaji, "Mempertimbangkan Filsafat Kritis dan Deep Ecology dalam Pergumulan Masyarakat Ekonomi Asean" dalam Prosiding Seminar Nasional Kesiapan Indonesia: Harmonisasi Hukum Negara-negara Asean Menuju Komunitas Asean 2015, (Considering the Critical Philosophy and Deep Ecology in the ASEAN Economic Community Arena" in the Proceedings of the National Seminar of Indonesia Readiness: Law Harmonization of ASEAN countries Towards ASEAN Community by 2015) (Surakarta: Universitas Muhammadiyah Surakarta, 2015), p.103

29 Rocky Gerung, Paparan Narasumber Konsorsium Hukum Progresif ke-2 (Informant's Exposure of 2nd Progressive Law Consortium), UNDIP Semarang 14-15 November 2014

30 Akhmad Aulawi, 'Arah Pembangunan Hukum dalam Menghadapai Asean Economic Community 2015' (Direction of Law Development in Facing ASEAN Economic Community 2015), (Jakarta: BPHN, 2014), Jurnal Rechvinding-RechtsVindingOnline.

31 Adi Sulistiyono & Muhammad Rustamaji, *Hukum Ekonomi Sebagai Panglima* (Economic Law as a Commander) (Sidoarjo: Masmedia Buana Pustaka, 2009), p.29

32 Satjipto Rahardjo, *Menegakan Hukum Progresif,* (Enforce the Progressive Law) (Jakarta: Kompas, 2010), p.14-15.

that has been ignored for long period of time without any effort to care about it. Ideas that have been declaring to be pro-environment so far are actually not based on ecological reasons but economic interests.

Therefore, perception of justice is said to have been worn (obsolete) now if there is no any effort of trying to find undiscovered new sources of the justice. MEA can also be said to have no care about justice if it only puts economic interests as a spearheading to create a single market. Accordingly, in effort of avoiding the MEA from exploitative practices on ecology in free trade of ASEAN region the fair law is required to regulate it. A Fair law is one paying attention to new sources of the new law for achievement of the justice. It is important to organize a transition from the day to the next, namely justice for future generations.

A critique directed to higher education seems also necessary, when curriculum of law school has not arrived yet at a study on the rights of future generations (Intergenerational Justice). In other words, is position of the future generations as a source of future legal justice (a new source of the justice) taken into account when competition with all freedoms is held on each side of life? Or is the current law used only in utilitarian matter and deplete all available resources, yet democratically (sound of many people) it is desirable?

As an illustration, when President Jokowi explained the importance of the sea and its sea tolls and harbors of various islands in Indonesia, experts are busily analyzing development and reclamation technics required to implement the plan. Especially, as the plan is intended, one of many purposes, to meet deficit of beefs and they should be imported from Australia, then a massive development in East Nusa Tenggara (NTT) is planned . It is projected that NTT will be a location of raising calves provided by government and then, ready-to harvest cows of the region will be distributed by using special livestock ships to transport over Indonesia. A model of cattle grazed in wide savanna of NTT and supported by livestock transporters and sea toll aiming to meet the needs of national meat. This step is projected as a solution to overcome meat deficit of the nation. However, such thinking is seemingly not to pay attention about why do people of Nusa Tenggara look as if 'anemic' to re-develop large farms as option of livelihood? In fact, empirical research showed what actually makes the farmers reluctant to pursue the very ecological friendly profession. They do afraid of livestock theft! The 'street crime' is actually a scourge for farmers of NTT since the theft has been transformed into a very massive, organized theft of livestock and involving parties with authorized power. Dahlan Iskan explained that the livestock theft occurred because the legal system was not running properly, even there was a phenomenon in which the cattle thieves demanded a ransom to the cattle owners if they want their cattle back.[33] It is really not a figment. As a result, the solution by buying a special ship to transport of livestock, calves provided by the government, seashore reclamations and mangrove ecosystems supporting the establishment of sea tolls, are just as if confirming the view of Dahlan Iskan, namely it is like a physician prescribing wrongly.

33 Dahlan Iskan, "Soal Daging yang Ibarat Dokter Salah Resep", (About meat, It is Like a doctor writing a prescription wrongly) New Hope, (Surabaya: Jawa Pos, 2015), 23 February 2015, p. 1&11

The illustration depicts how the economy is still positioned as a major pendulum of prosperity achievement by ignoring the existing ecology. However, the unmatched solutions due to prioritize an unrelenting exploitation of ecology and at the same time, ignore the creative potential of the nation people is precisely what explains why forest resources as if never enough to meet nutritional needs of Indonesian people.

At the culmination of it, a notion of Yuswohady about five precepts to win competition in the arena of MEA[34] is worthy to ponder. Creative and struggle-powered measures are more emphasized for every citizen of the nation who wants to be entrepreneur rather than solution promoting ecological exploitation for the sake of expansion of economic range. It can be seen in precept 1, *the use of local advantages to kick the competitions*, businessmen should use smartly local uniqueness to win the competition. A businessman with the characteristics of is called a local champion. Precept 2, *create local innovation to the make competition irrelevant*, businessmen should use innovation and create a new market with minimal competition. A businessman with the characteristic is called a creative master. Precept 3, *boost excellence to beat the giant*, this type of businessmen takes all-out measures to boost quality of their products or services in order to beat the competition. A businessman with such characteristic is called a quality challenger. Precept 4, *build bigness mass through partnership*, entrepreneur of this type is a small player who plays in a market niche, but if these small players are organized into a unity, they will have tremendous power. A businessman with the characteristics is called a longtail collaborator. Precept 5, *achieve global best practices to win the foreign market*, entrepreneur of this type is one focusing and concentrating highly to compete seriously in international market. A businessman with such characteristics is very special because they pursue excellences in all aspects such as capital, technology, management, human resources (HR) with world standards before entering an international market. The entrepreneur with the character is called a global chaser who has been put themselves from beginning as an entrepreneur in the best ranks of the world (global best practice).

Guided by the exposure and examples of environmental neglect above, it is time the law should be run progressively by taking creative ways to promote fighting spirit of the nation's people. Therefore, the law must arrive at the radicalness of demolishing assumptions of the law that have been considered well established textually. In the context of MEA, the law established in the trade sector of ASEAN single market should not be indifferent to ecology and future source of justice, the nation's children, as our future generation. That is, where the law is not for itself, but for something wider and bigger. So whenever a problem is found within and with the law, then the law should be reviewed and corrected and not the human who is pushed and forced to enter schemes of the law.[35] Therefore, Satjipto Rahardjo

34 Yuswohady,"Panca Sila Juara MEA",(Five Precepts of Winning MEA),(Jakarta:Koran Sindo,2015), 5 April 2015,p. 3

35 Satjipto Rahardjo, *Hukum Progresif: Sebuah Sintesa Hukum Indonesia* , A Progressive Law: A Synthesis of the Indonesian Laws) (Yogyakarta: Genta Publishing, 2009), p. 32.

also wrote about the necessary of putting the legal system in a large path of deep ecology.[36] Thus, as the law shifts to the context of the universal life, then man is no longer the only central point. On a broader spectrum, the law is functioned not only to check the fairness, but it should produce justice, and yet a new kind of justice, namely justice for environment (ecology) and future generations (intergeneration justice). In the smaller scope, utilization of forest resources as a venue for holding of the MEA should not negate the principles of deep ecology requiring sustainability of it for future generations.

Conclusion

When woods and forest with their varied wealth are spread to welcome the immediate running of MEA, a legal framework is very necessary to uniform regulations in supporting the ASEAN single market. When such direction and renewal of law establishment are completed, there is a good reminder derived from the view of critical philosophy and deep ecology that is worth considering. That the law should not be stuck in the reification and only prop up the economy with commodities and efficiency, but it should indicate a generosity to ecology and future generations, is worth to reconsider by creative steps with struggling power . In turn, the law will be put as ethical conversation of humans to produce justice, and the foundation is the interest of civilization. Therefore, the law must be pursued progressively, and it must arrive at radicalness by demolishing established textual assumptions of the law. The Law is not only there to check on fairness, but it should produce justice, fairness and yet new type of justice, namely an intergeneration justice thinking about the fate of future generations in understanding a well-maintained deep ecology of earth.

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36 Satjipto Rahardjo, *Lapisan-lapisan dalam Studi Hukum,* (The layers of Legal Studies) (Malang: Bayumedia, 2009), p.11

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THE RECONSTRUCTION OF ISLAMIC BANKING DISPUTE RESOLUTION THROUGH MEDIATION IN THE POST THE SUPREME COURT REGULATION NUMBER 1 OF 2016

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ABSTRACT

Mediation as an alternative dispute resolution people's choice in the resolution of civil disputes that arise in the practice of Islamic banking outside the court, or better known as non-litigation dispute resolution. Dispute resolution through mediation become the people's choice in the hope that the dispute settlement process can provide impartial settlement for both the Customer of Islamic Banking and Islamic Banking is a "win-win solution". Goals to be achieved through this research was to determine the reconstruction of Islamic banking dispute resolution through mediation post the enactment of Supreme Court Regulation No. 1 of 2016 and know the model of the judicial procedure for dispute resolution through mediation Islamic banking in religious courts, with the target of the research is composed amends Law No. 30 Th. 1999 on Alternative Dispute Resolution (ADR), composed of academic texts as well as the bill on Sharia ADR derivative of the Supreme Court Regulation No. 1 of 2016.

Urgency of this study was to determine the reconstruction of Islamic banking dispute resolution through mediation post the enactment of Supreme Court Regulation No. 1 Year 2016 on Procedures for Mediation in the Court. For researchers, the importance of this study is to realize the competence of researchers in developing a program of legal studies and the development of sharia-minded Judiciary Religion in dispute resolution of Islamic Financial Institutions in Indonesia, particularly Islamic Banking.

The method in this research, using qualitative tradition, the operasionalization is done according kostructivisme paradigm. The relative position (stand point), the author of the problem in this study at the level epiteme not as a participant but rather as an observer. Strategy Research carried out by the two strategies, namely research library (Library Research) and case studies (Case Study). This study uses a socio-legal rules governing studie.Technic data collection, secondary data obtained through library research and a legal document. Primary legal materials, composed of Law No. 21 Th, 2008, Article 39 of Law No. 30 Th, 1999, Law No. 50 Th. 2009, the Constitutional Court Decision No. 93 / PUU-X / 2012 and Law No. 21 Th. 2011 and PERMA No. 1 Th. 2016. Materials secondary law, consists of book-nails about

the legal system, the judicial system, mediation, the agreement (contract), Islamic banking, political law, legal theory, legal research methodology, journals. The primary data obtained through research in the field (Field Research) with observations, interviews and Focus Group Discussion (FGD) / Workshop which include: 1) Law sanction institution: Judge at the Religious Courts, Legal Section staff at Bank Syariah; 2) Role Occupant: Management Islamic Banking, Islamic Banking Customers, who performed with hermeneutics, sociology of law and phenomenology. The analysis data using qualitative descriptive analysis that describes the reconstruction of Islamic banking dispute settlement through mediation.

The results obtained from this study is the reconstruction of Islamic banking dispute resolution through mediation in religious courts based on Article 2 (1) PERMA No. 1 Th. In 2016, with this provision of human resource issues, especially the limitations and skills of judges who understand Islamic banking dispute can be resolved by allowing the mediator other than judges based on Article 1 point (1) PERMA No. 1 Th. 2016. The presence of this mediation will be able to increase public confidence in the Religious Court in carrying out the mandate in the resolution of disputes of Islamic banking. Model judicial procedure for dispute resolution through mediation of Islamic banking in the Religious Courts applied with effectiveness and efisiens. That could be done with the implementation of the principle of good faith in the sense of subjective meaning in the sense of honesty and objective meaning both parties in the mediation process should be based on decency and justice. If both parties apply the good faith both subjective and objective in the sense that the mediation process will work effectively and efficiently.

Keywords: Reconstruction, Dispute Resolution, Islamic Banking, Mediation.

A. INTRODUCTION

The existence of Islamic banking as one of the Islamic financial institutions strongly support the fulfillment of human needs in the field of economics. In fulfillment of human needs in the economic field must be accompanied by legal certainty in order to create effective and efficient. Therefore, the relationship between the economy and the legal certainty of the apparent existence of a close relationship between law and economics. Based on this relation appears that the legal system as an embodiment of the economic system, and vice versa, the economic system of a nation will be reflected in the legal system. Islamic banking industry is growing since the issuance of Law No. 3 of 2006 on the Amendment of Act No. 7 of 1989 on Religious Courts.

In the implementation of the contents of Law No. 3 Th. 2006 as amended by Act No. 50 Th. 2009 on the Second Amendment of Law No. 7 Th. 1989 Religion Court require support for legal and judicial systems effective in order to ensure the realization of legal certainty for all parties. Especially after the publication of the Constitutional Court Decision No. 93 / PUU-X / 2012 which returns the absolute competence of Islamic banking dispute settlement to the Religious Courts. On the one hand there is legal certainty, but on the other there is an injustice and the non-achievement as one of the effects of the Constitutional Court ruling

mentioned above, namely the existence of a slowdown in the growth of the Islamic banking in Indonesia. This can be seen in the following data.

Internationally, Indonesia is seen as strength and has great potential in the development of global Islamic finance. Indonesia ranks 9th out of 10 countries that develop Islamic finance. The sequence in question can be seen in the following table:

Tabel 1.
Top 10 Islamic Finance Asset ($ Million)

No.	Nama Negara	Jumlah Asset
1	Malaysia	423,285
2	Saudi Arabia	338,106
3	Iran	323,300
4	UAE	140,289
5	Kuwait	92,403
6	Qatar	81,027
7	Bahrain	64,644
8	Turkey	51,161
9	Indonesia	19,938
10	Bangladesh	14647

Sources: OJK: Islamic Banking Road Map 2015-2019

Internationally, Indonesia is seen as strength and has great potential in the development of global Islamic finance. Indonesia ranks 9th out of 10 countries that develop Islamic finance. The sequence in question can be seen in the following table: Nationally, the development of Islamic banking industry is still growing, but growth is slowing down. The data development nationally Islamic Bank can be seen in the table below:

Tabel 2.
Perkembangan Perbankan Syariah

Indikator	2011	2012	2013	2014	Mar 2015	April 2015	Juni 2015
Jumlah Bank Umum Syariah	11	11	11	12	12	12	12
Jumlah UUS-Bank Konvensional	24	24	23	22	22	22	22
Jumlah BPRS	155	158	163	163	162	162	162
Jumlah Jaringan Kantor (BUS+UUS)	1,737	2,262	2,588	2,517	2,463	2,458	2,448
Total Aset (Rp. Trilliun)	145.47	195.02	242.28	272.34	268.36	269.47	273.49
Pertumbuhan Aset	49 %	34 %	24 %	12.41%	11.39%	10.35%	8.57%
Market Share	3.98%	4.58%	4.89%	4.85%	4.68 %	4.69%	4.61%
DPK (Rp. Trilliun)	115.41	147.51	183.53	217,86	212.99	213.97	213.48
Pembiayaan (Rp. Trilliun)	102.66	147.51	184.12	199,30	200.71	201.53	206.06

NPF (gross)	2.52%	2.22%	2.62%	4.33%	4.81%	4.62%	4.73%
CAR	16.63%	14.13%	14.44%	16.10%	13.85%	14.06%	14.09%
FDR	88.94%	100.0%	100.32%	91.50%	94.24%	94.18%	96.52%

Sources: OJK: Islamic Banking Road Map 2015-2019

Legal certainty is important to maintain the sustainability of the growth of Islamic banking industry as well as for the development, product, risk management and efficiency of the bank. One thing that is important (urgent) currently requires concentration and thinking for the management of Islamic banking associated with the judicial system and dispute settlement mechanism in an effective, efficient and equitable. Urgency requires attention especially after the Court Decision Konstutusi No. 93 / PUU-X / 2012, dated August 29, 2013, related to the testing of Article 55 paragraph (2) and (3) of Law Number 21 of 2008 concerning Sharia Banking (hereinafter Islamic Banking Act was written). Based on the ruling, the Constitutional Court to restore the competency of Islamic banking dispute settlement to the Religious Courts. This gives a positive correlation that the absolute competence dispute settlement Islamic banking is in the Religious Courts.

Following the Ruling of the Constitutional Court No. 93 / PUU-X / 2012 consequence will be the revision of Law No. 21 Th. 2008 concerning Sharia Banking (hereinafter written Islamic Banking Act) and its implementing regulations as well as the adjustment of the dispute settlement process. Another consequence is the need for the judiciary religious readiness to implement the Constitutional Court ruling and the readiness of human resources (HR) Judges and law clerks who understand the material and formal Islamic financial institutions. Besides, the ability to understand the legal and judicial system in resolving cases arising. In the Constitutional Court ruling that gives concequences that in addition to the settlement of disputes through the Religious Courts, possible settlement through Alternative Dispute Resolution (ADR). Among the alternative dispute resolution is regulated in Law Number 30 of 1999 on Alternative Dispute Resolution (ADR), based on the results of previous research interesting to do further research is about Mediation.

The provisions on mediation in court referring to the rule of the Supreme Court (PERMA) No. 1 of 2008 as amended by PERMA No. 1 Th. In 2016 on Mediation Procedure in the courts. The integration of mediation in court proceedings can be one effective instrument to overcome the possibility of a court buildup. In addition to the institutionalization of the mediation process in the judicial system can strengthen and maximize the functions of the judiciary in resolving disputes in addition to litigation that is disconnected (adjudicative).

Law applicable during this kind is based on Article 130 of the Reglement Indonesis Herzien (HIR) and Article 154 Rechtsreglement buitengewesten (Rbg), encourage the parties to take the peace process can be intensified by way of integrating this process in the courts. Following the Ruling of the Constitutional Court No. 93 / PUU-X / 2012 which returns the absolute competence dispute settlement Islamic banking allows a peaceful resolution of disputes is also in the Religious Courts. However, in practice, the settlement of disputes by

mediation referred to in Article 130 HIR and 154 Rbg, or SEMA No. 1 of 2002 has not been implemented and there is a problematic start.

The use of mediation in the peaceful institutes It began with the issuance of the Supreme Court Circular (SEMA) No. 1 of 2002 (ex Article 130 HIR / 154 Rbg) about empowering the court of first instance to apply the peace institute. SEMA was issued to address one of the problems faced by the judiciary in Indonesia in terms of pending lawsuits in the Supreme Court (MA) and dissatisfaction with those seeking justice against the decision of the judiciary who are considered not solve the problem.

The existence of the SEMA is a real step in optimizing the peace efforts so that the implementation is not just a formality. However, because some of the basic things that have not been explicitly stipulated in the SEMA, the Supreme Court issued PERMA No. 2 Th. 2003, which contains general provisions, the stages, the place and the cost of mediation in court and then the latter enhanced by the release of PERMA No. 1 of 2008 on Mediation Procedure in the court as amended by PERMA No. 1 Th. 2016 on Mediation Procedure in court. In addition to mediation through the courts, it is also possible mediation by the Financial Services Authority (FSA) and the National Sharia Arbitration Board (BASYARNAS). However, in practice the Islamic banking operations and the settlement of the problem has not been well documented.

Based on the above, the researchers are interested in doing research on the reconstruction of Islamic banking dispute settlement through mediation after the entry into force of PERMA No. 1 Th. 2106. The formulation of the problem is:

1. How is the reconstruction of Islamic banking dispute resolution through mediation after the entry into force of PERMA No. 1 Th. 2016?
2. How to model the judicial procedure for dispute resolution through mediation of Islamic banking in the Religious Courts.

Goals to be achieved through this research are:

1. Knowing the reconstruction of Islamic banking dispute settlement through mediation.
2. Knowing the model of the judicial procedure for dispute resolution through mediation of Islamic banking in the Religious Courts.

The target of the research, among others, composed of:

a. Guidelines for the hearing as the technical guidelines of the Supreme Court Regulation No. 1 Year 2016 on Mediation Procedure Court in structuring the mediation process in Peradulan Religion and the stages and steps.
b. Model judicial procedure for dispute resolution through mediation of Islamic banking in the Religious and patterns of communication and dissemination to stakeholders of Islamic banking.

Urgency of this study was to determine the reconstruction of Islamic banking dispute resolution through mediation after the entry into force of PERMA 1 Th. 2016 and find out which models the judicial procedure for dispute resolution through mediation Islamic

banking in religious courts. For researchers, the importance of this study is to realize the competence of researchers in developing the legal studies program sound sharia.

B. METHODS

B.1. Point of View / Stand Point

In this study used a qualitative tradition, operasionalization done according construktivisme paradigm. Constructivism paradigm is a set of beliefs on a legal reality (Islamic banking) as a result of the construction of the relative / relative, and contextually specific. The relative position (stand point), the author of the problem in this study at the level epiteme not as a participant but rather as an observer. As an observer, the writer will seek answers to any formulation of the problem posed by studying the reality of Islamic banking dispute settlement through mediation (constructed) which share in legislation or related policies and their implementation in the religious court. Understanding plenary obtained a product of the interaction between researchers with products observed object. There is a relatively subjective transactional relationship between researcher and research subjects. The researcher is the instrument, and thus at the level of axiology notch researchers is to facilitate the bridging diversity of existing data and subjects.

B.2. Strategy Research

The study was conducted with two strategies, namely research library (Library Research) and case studies (Case Study). Literature study conducted on all documents or literature about Islamic banking dispute settlement through mediation. Documents then grouped according to the dimension of time or the period. The case studies in this research is the case nationwide, particularly the case of Islamic banking disputes. Research with this case study, carried out to record the social facts that accompany the development of society in supporting and sustaining human needs in the field of economics in society.

This study uses the codes of socio-legal studies, ie understanding the law not as a normative normologik entities and esoteric merely the law of Islamic banking in this study is understood as an entity which is heavily influenced by non-legal factors. Formulation of the substance or content, choice of goals and the means used to achieve the objectives of Islamic banking or dispute settlement is believed to be interaction with non-legal factors.

B.3. Teknik Data Collection

a. Secondary data was obtained through the Research Library (Library Research) and Legal Document, which includes:
   1) Material Primary Law, include:
      a) Law No. 21 Th, 2008 and its implementing regulations, Article 39 of Law No. 30 Th, 1999, Law No. 50 Th. 2009, PERMA No. 1 Th. 2016.
      b) The Constitutional Court Decision No. 93 / PUU-X / 2012.

2) Secondary Legal Materials, consisting of books about the legal system, the principles of law, the agreement (contract), Islamic banking, political law, legal theory, legal research methodology, journals.

b. Primary data obtained through research in the field (Field Research) with observations, interviews and Focus Group Discussion (FGD) / workshop, which includes: 1) Law sanction institution: Judges Religion, Staff Legal Department at Bank Syariah, Notary, Advocate , the Registrar. 2) Role Occupant: Management Islamic Bank, Islamic Bank Customer-do with hermeneutics, sociology of law and phenomenology.

B.4. Data Analysis

Data were obtained either from the research literature and field research is processed by qualitative descriptive analysis. As is the descriptive is clearly describe actual circumstances and qualitative analysis of the data revealed by informants and sources later elaborated in order to obtain an understanding. So it is a qualitative descriptive analysis that describes the reconstruction of Islamic banking and dispute resolution model of the judicial procedure for dispute resolution through mediation of Islamic banking in the Religious Courts.

C. ANALYSIS

C.1. Reconstruction of Islamic banking dispute resolution through mediation after the entry into force of PERMA No. 1 Th. 2016?

Islamic banking is a part of a financial institution regulated by the Minister of Finance Decree No. 792 of 1990. Under these provisions, Financial Institutions are all entities whose activities in the fields of finance, conduct the collection and distribution of funds to the public especially to finance financial institutions preferred to support finance investment companies, but by no means limiting the financing activities of financial institutions. The legal relationship between the Islamic financial institutions and customers is part of the muamalah. Muamalah in Islamic law in the broadest sense are the rules (laws) of Allah to organize man in relation to worldly affairs in social intercourse.

Islamic Banking is an institution that operates in accordance with the principles of Islamic law, namely financial institutions refer to the procedures for the operation of the provisions of the Qur'an and Hadith. The meaning is that in the operation of financial institutions to follow the provisions of Islamic law, especially concerning the procedures of muamalah in Islam. In the procedure of muamalah shunned practices that feared contain elements of usury to be filled with activities on the basis of profit sharing investment and trade financing.

In operational for Islamic financial institutions in order not to deviate from the guidance of sharia then at any Islamic financial institution (LKS) only appointed manager and head of the bank that is a bit much mastered the principles muamalah Islam, other than that established the Sharia Supervisory Board (DPS), which oversees the operations of the bank of syariahnya corner.


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The main legal basis in operationalization if LKS, especially Islamic banking is the Qur'an and Hadith. The following will take the several verses in the Qur'an, among others:

a. Al-Baqarah: 275, which means: "people who eat (take) usury can not stand but as stands one whom possessed devil because of the (pressure) insanity".
b. Al-Imran: 130, which means: "O ye who believe, do not take usury doubled and fear Allah and that ye may prosper."
c. An-Nisa ': 29, which means: "O ye who believe, do not eat each other neighbor's property with a false way, except by way of commerce that applies to consensual among you".

In addition to some verses of the Quran and based on positive law, a cornerstone in operasionalization especially for Islamic banking is Law No. 21 of 2008 concerning Sharia Banking (Islamic Banking Act). Government Regulation No. 72 of 1992 concerning Bank Based on Principles of Sharing, in which among other things regulates the provisions on the establishment of a Commercial Bank Nirbunga. Pursuant to Article 28 and 29 of the Decree of Directors of Bank Indonesia Number 32/34 / KEP / DIR dated May 12, 1999 of the Bank based on the Principle Sharing, set about some business activities that can be done by Bank Syariah, PBI 10/32 / PBI / 2008 dated 20 November 2008 on the establishment of Sharia Banking Committee

Other rules specifically governing the contract in a business based on sharia principles is Bank Indonesia Regulation Number 10/16 / PBI / 2008 on Amendment to Bank Indonesia Regulation No. 9/19 / PBI / 2007 regarding the implementation of Sharia in the Activity Fund Raising and Disbursement as well as Islamic Banking Services. Other regulations that provide the basis for Islamic Banking operasionalization is Law No. 50 of 2009 on the second amendment of Law No. 7 of 1989 on Religious Courts. In the law on Religious Courts are syariah economic sense and their absolute competence of the Religious Court in resolving disputes sharia economy. This is affirmed in Article 49 of Law No. 1 letter 3 Th. 2006 on the Religious Courts.

Islamic banking activity, since the enactment of the Law on Islamic Banking to date have shown very postitif prospects for economic progress and in practice showed a very good development. Internationally, Indonesia is seen as strength and has great potential global Islamic finance. As has been described above that Indonesia ranks 9th out of 10 largest countries in the field of finance. Nationally, the development of Islamic banking industry is still growing, but growth is slowing according to the data in Table 2 above on the development of Islamic banking. Therefore, in order to accelerate the growth of Islamic banking is getting stronger then some persilan is a constraint in practice need to be addressed.

Muamalah activities concerning economic aspects include activities to improve the welfare and quality of life, such as: purchase, savings and loans, debts, joint ventures and so on. Community activities in the field of Islamic banking in muamalah known aqad. Aqad is part of tasharruf. Tasharruf is all that comes out of a man, with his will and Personality 'establishes some rights.

Tasharruf divided into two, namely tasharruf fi'li and tasharruf qauli. Tasharruf fi'li is the work done by the power of man and his body apart from the tongue, such as utilizing the land barren, received the goods in the sale, damaging somebody else's property. Tasharruf qauli is tasharruf that comes out of the human tongue is divided into two, namely aqdi and not aqdi. Tasharruf qauli aqdi is something that is formed from the words of both parties are interrelated, such as the sale, lease and joint venture. Tasharruf qauli not aqdi there are two kinds, namely: (a) Represents the procurement of two rights statement or revoke a right, like Wakas, thalak and liberating; (B) not declare a will, but he is making these demands rights, such as a lawsuit, iqrar, vow to reject the lawsuit.

In implementing muamalah there are general principles of law (rechts beginselen) or also called psinsip law, not the law of the concrete, but the mind of a common base nature. The principle of the law is the background in the formation of positive law that is not eternal / fixed. According Sudikno Mertokusumo is the legal principle is: "Fundamentals or directions in the formation of positive law". The principles can be used in the manufacture of the agreement (contract sharia), among others: konsensualisme principle, the principle of freedom of contract and the principle of good faith in the subjective sense. While the principles used in the implementation of the treaty is pacta sunt servanda principle and the principle of good faith in the objective sense.

In Islamic law are the principles of the treaty. This principle affect the status of the contract. When this principle is not met, it will lead to void or the validity of the engagement / agreements made. The principles are as follows: Al-Hurriyah (Freedom), Al-Musawah (Equality or Equality), Al-'is (Justice), Al-Rida (willingness), Ash-Shidq (Honesty and Truth), Al -Kitabah (Written).

In the application in practice of Islamic banking muamalah reflected in the legal relationship between the Customer and Bank Syariah Bank Syariah as outlined in the Agreement. The type of contract that is of concern in this paper is the Islamic Financing Agreement. Device contract in Islamic sharia law is the fulfillment of the pillars and the terms of a contract. Rukun element is an absolute must (inherent) in things, events and actions. While the terms are elements that must exist for a certain thing, event, and the action, but not the essence of the contract.

The scholars differed in defining pillars of this contract. Differences emerged in terms of the essence of the contract itself. Here there will be discussed the divergent views. In the opinion of jumhur especially those written by Wahbah Zuhaili. Wahbah states that consent and granted is one important element in an agreement, other than that there are other elements. The elements are as follows: sighat al-aqad (statements to bind themselves), Al-ma'qud alaih / considering al-'aqd (contract object), Al-muta'aqidain / al-'aqidain (parties which berakad), Maudhu'al-aqd (contract purposes).

Terms aqad consists of general terms and conditions of a special nature. Terms of a general nature, among others: two men who perform contract ably act, which made the object of the contract can receive the law, the contract was authorized by Personality ', carried out

by people who have the right to do so, although he was not aqid who has the goods, do not contract the contract prohibited by Personality ', such as trade mulasamah, the contract may provide faidah, it is not valid if rahn regarded as a counterweight to the trust, consent that goes on, not revoked prior to kabul, then when people berijab retract ijabnya before kabul, then batallah ijabnya, qabul consent and must be continued, so if someone berijab already separated before their kabul, then that consent is void.

In the financing agreement implementing the Islamic banking practices necessary legal certainty for the parties so that there is justice and expediency. According Sudikno Mertokusumo, legal certainty is a guarantee that the law is executed, that are entitled by law can gain their rights, and that the decision can be implemented. Although closely related to the legal certainty of justice, but the law is not synonymous with justice. General law, binds everyone, is a leveler, while justice is subjective, individualistic, and not generalize.

Meanwhile, according to M. Fernando E. Manullang, legal certainty is an implementation of the law in accordance with sound so that people can make sure that the law is implemented. In understanding the value of legal certainty should be noted is that the value of it is related closely with the legal instruments and the positive role of the state in the actualization of positive law.

Legal certainty is a question that can only be answered normatively, not sociological. Normative legal certainty is when a rule is made and enacted exactly as set out clear and logical. Obviously in the sense not to cause hesitations (multi-interpretation) and logical in the sense that it becomes a system of norms with other norms so as not to clash or conflict norms. Conflict norms arising from the uncertainty of rules can be shaped contestation of norms, reduction or distortion norm norm.

So legal certainty is the certainty of the rule of law, not a certainty action against or act in accordance with the rule of law. Because the phrase of legal certainty is not able to describe the behavior of legal certainty completely. Likewise with Newtonian mechanics. Even Newtonian mechanics was already twice against in the development of natural science itself, that of Einstein's Theory of Relativity and Quantum Physics.

In the legal relationship between the Islamic Bank and the customer begins with the signing of the contract which apply to them. Implementation of the agreement was originally intended for the objectives of the parties can be realized, but in practice not all contract goes well. Implementation of the agreement began plagued with problems. According Mahmoeddin, the problem is the existence of a difficulty that needs solving, or an obstacle that interfere with the achievement of goals or optimal performance. The problem may also be a deviation or inconsistency between necessity and reality. The core of the problem formulation should get an answer is correct the error if it encountered an error and remove obstacles if any problems were found.

Legal relationship between Islamic banks and customers arising from their financing. Financing problems is one of the five major problems facing the national banking system. Understanding the meaning of troubled bank financing is financing that are classified as

doubtful and loss (non performing loans). In the event of any financing problems, the bank seeks to maintain liquidity with the completion of the problems it faces. Based on the principles in the contract then applied principle of Pacta sunt servanda, which means that the agreement of the parties made legally binding on the parties as the law. In the dispute resolution clause of the contract through Islamic banking there is a stage of completion include:

1. Resolution by consensus;
2. Settlement through Alternative Dispute Resolution, among others: Mediation, Basyarnas and Conciliation;
3. Settlement through the Religious Courts.

Basyarnas dispute resolution have not been regulated in separate legislation. During this time the parties may agree with reference of the Indonesian Ulema Council Decision No. Kep-09 / MUI / XII / 2003 dated December 24, 2003 set including a name change Bamui be Basyarnas and changing the shape of its legal entity which was originally a foundation to "entity" under the MUI and a device MUI organization.

Basyarnas dispute resolution based on Law Number 30 Year 1999 on Alternative Dispute Resolution, known as Alternative Dispute Resolution (ADR). Model solution through: arbitration, mediation, negotiation and reconciliation. Problems in the legal system is required after the enactment of Law No. 3 Th. 2006 relating to the content of Article 3 and Article 11 of Law No. 30 Th. 1999.

Article 3 of Law No. 30 Th. 1999 provides: "The Court has the authority to adjudicate disputes that have bound the parties in the arbitration agreement". Article 11 (1) and (2) of Law No. 30 Th. 1999 provides:

Paragraph (1): "The existence of an arbitration agreement in writing to eliminate the right of the parties to submit the dispute or difference of opinion contained in the agreement to the Court".

Paragraph (2): "District Court must reject and will not intervene in a dispute that has been established through arbitration, except in certain matters set forth in this law".

Given the rules governing the arbitration sharia yet then settling disputes Islamic banking can refer to the dispute resolution guidelines that have been made by Basyarnas using Ekstensif Interpretation Method with Argumentum Peranalogia of Law No. 30 Th 1999. Definition of the District Court within the meaning of the Act No. 30 Th. 1999 can analog to the Religious Court after the enactment of Law No. 50 Th. 2009.

If the enforcement of arbitration the parties do not abide by the decision because of their forgery, dishonesty and deceit of one party, the party who feels aggrieved can file a cancellation of the arbitral award. However, if one party does not want to obey the letter adverse arbitration decision and other parties then attempt to do is apply for the execution of the decision of the Religious Court.

Definition Mediation is a dispute resolution process through a process of negotiation or consensus of the parties, assisted by a mediator who has no authority to decide or impose a settlement. The main characteristic of the mediation process is essentially the same negotiations with the process of consultation or consensus. In accordance with the nature of negotiation or consultation or consensus, then there should be no compulsion to accept or reject the idea or settlement during the mediation process underway. Everything must obtain the consent of the parties.

The legal basis for the implementation of Mediation in the Court is the Supreme Court Regulation No. 1 Year 2008 on Procedures for Mediation in the Court that a revision of the Supreme Court Regulation No. 2 of 2003 (PERMA No. 2 Th. 2003), where the PERMA No. 2 of 2003, there are still many weaknesses that make PERMA normative does not reach the desired maximum target, and also a wide range of input from the judiciary on the issue of problems in the PERMA.

Background on why the Supreme Court (MA-RI) requires the parties to take a mediation before the case decided by the judge described below. MA-RI policies impose mediation proceedings in the Court was based on the following reasons:

1. The mediation process is expected to overcome the problem of accumulation of cases. If the parties can resolve their own disputes without the need to be tried by a judge, the number of cases to be examined by the judge will decline. If the dispute can be resolved through peace, the parties will not take legal action appeal for peace is the result of a common will of the parties, so that they will not propose a remedy. Conversely, if the case decided by the judge, the decision is a result of the views and the judge's assessment of the facts and the legal position of the parties. The view and the judge's assessment is not necessarily in line with the views of the parties, especially the losing party, so that the losing party to forge an appeal and cassation. In the end it all boils down to the Supreme Court case that resulted in the accumulation of cases.
2. The mediation process is viewed as a means of dispute resolution that is faster and cheaper than the litigation process. In Indonesia there has been no research to prove the assumption that mediation is a process that is faster and cheaper than litigation. However, if it is based on logic as described in the first reason that if the case is terminated, the loser often filed legal actions, appeals and cassation, thereby making the settlement of the case in question could take many years, from the examination in court The first level up to the Supreme Court level examination. Conversely, if the case can be solved by peace, the parties themselves can accept the outcome because it is their work that reflects the common will of the parties. In addition to logic as previously described, the literature it is often stated that the use of mediation or other forms of settlement were included in the definition of alternative dispute resolution (ADR) is a dispute resolution process that is faster and cheaper than litigation.
3. The implementation of the mediation is expected to expand access for all parties to gain a sense of justice. Sense of justice not only be obtained through litigation, but also

through the process of deliberation by the parties. With the enactment of mediation into the formal justice system, people seeking justice in general and the disputing parties in particular can first try to resolve their disputes through consensus approach aided by a mediator called mediators. Even if in fact they have been through the process of deliberation before either party to bring the dispute to the Court, the Supreme Court still considers it necessary to oblige the parties to take the peace efforts were aided by the mediator, not only because the provisions of the procedural law, namely HIR and Rbg, require judges to first reconcile the parties before deciding process begins, but also because of the view, that the better solution and satisfactory settlement is a process that provides an opportunity for the parties to jointly seek and find the final result.

4. The institutionalization of mediation into the judicial system can strengthen and maximize the functions of the judiciary in resolving disputes. If in the old days judicial institutions function more prominent ones is the function of deciding, with the enactment of PERMA Mediation reconcile or mediate the expected functionality can go hand in hand and balanced with functionality disconnected. PERMA Mediation is expected to drive change in the way the actors in civil judicial proceedings, the judges and lawyers, that the courts are not only cut off, but also to reconcile. PERMA Mediation provides guidance for achieving peace. Inspiration Mediation Procedure In order to follow the decision MARI revise PERMA No. 2 of 2003, has formed a working group to assess the weaknesses in PERMA PERMA and prepare a revised draft, the result is PERMA No. 1 Th. 2008. The Working Group is chaired by Dr. Harifin A. Tumpa, SH.MH., followed by Atja Sondjaja, SH.

In performing its duties, the Working Group has conducted activities to complete the process of drafting the revision PERMA. The work of the Working Group was then submitted to the Steering Group (Steering Committee), which consists of Vice Chairman MARI judicial field, and all the presidents of the Young MARI and expert consultants. Steering Group determines the final word on every formulation of clauses in PERMA revised. Results briefing include:

(1) In Act No. 30 of 1999 mediation is defined as a written agreement of the parties, disputes or differences of opinion resolved through the help of "one or more expert advisor" or through a mediator.

(2) The Agreement reached in a mediation process to be made in writing, shall be final and binding on the parties. And also must be registered in the District Court within a period of 30 (thirty) days from signing. The resulting agreement in writing, shall be final and binding on the parties. And also must be registered in the District Court within a period of 30 (thirty) days from signing. The agreement shall be implemented within a period of 30 (thirty) days from registration.

Recent developments related to the mediation process is based on PERMA No. 1 Th. 2016 on Mediation Procedure in court. Based on the research literature and interviews with

judges well in the Yogyakarta District Court or Judge in Pengadulan Religion in DIY obtained difference between PERMA No. 1 Th. 2008 and PERMA No. 1 Th. 2016 as follows.

1. Related to the mediation deadline shorter than 40 days to 30 days since the establishment of the command did Mediation;
2. The requirement for the parties (inpersoon) to attend a mediation meeting directly with or without accompanied by an attorney, unless there are legitimate reasons such as health conditions that do not allow attendance at the meeting Mediation by a doctor's certificate, under guardianship, homeless , residence or position in foreign or state business, profession or job demands that can not be abandoned.
3. There are rules of good faith in the mediation process and the legal consequences for the parties who are not of good will in the mediation process. This is the most recent regulations.

Based on the above discussion, the reconstruction of Islamic banking dispute settlement through mediation in religious courts based on Article 2 (1) PERMA No. 1 Th. 2016 states that the provisions of the Mediation Procedure in the Supreme Court Regulation is applicable in the process of litigating in court, either in general courts and religious courts. Under these provisions the issue of human resources, especially the limitations and skills of judges who understand Islamic banking dispute can be resolved by allowing the mediator other than the judge. It is based on Article 1 point (1) PERMA No. 1 Th. 2016 mentions the mediator is a judge or other parties who have a Certificate Mediator sebagau neutral third party who helps the parties in the negotiation process for a wide range of possibilities for the settlement of disputes without using a way of breaking or impose a settlement.

The presence of mediation by PERMA No. 1 Th. 2016 is expected to increase public confidence in the religious courts in carrying out the mandate in the resolution of disputes of Islamic banking. The results achieved through the mediation of religious courts will also give the process of peaceful settlement of disputes between the two sides and will manifest a common understanding in resolving sengkta happened. In terms of legal certainty is obtained then should be justice and benefit will also be realized. If all of the components in the development of Islamic banking has had the understanding and behavior of the money at the growth of Islamic banking will continue to rise.

C.2. Model judicial procedure for dispute resolution through mediation of Islamic banking in the Religious Courts.

In determining the model of mediation in resolving disputes Islamic banking must consider the content PERMA No. 1 Th. 2016. Pursuant to Article 7 PERMA No. 1 Th. 2016, stated that:

1. The Parties and / or their attorneys shall take the mediation in good faith;
2. One party or the Parties and / or their attorneys may not be a good faith belief expressed by the Mediator in the case in question:

a. Not present properly called two (2) times in a row in Mediation meetings without a valid reason;
b. Attend the first mediation meeting, but was never present at the next meeting has been properly called, although two (2) times in a row without a valid reason;
c. Absence annoying repetitive schedule Mediation meetings without a valid reason;
d. Mediation attend the meeting, but did not file and / or do not respond to other parties Case Resume; and / or;
e. Did not sign the concept of "Peace Agreement" has been agreed without a valid reason.

In the event that the plaintiff declared no good intention in the Mediation process referred to in Article 7 (2), based on Article 23, the lawsuit can not be accepted by the Examining Judge Case. This is confirmed in Article 22 PERMA 1 Th. 2016. Plaintiff declared good will are not referred to in paragraph (1) shall be subjected Mediation fee payment obligation. For the next Mediator plaintiff did not submit a report to the judge of good will Examining the Case with recommendations Mediation fee imposition and calculation of the amount in the report unsuccessful or can not be implemented Mediation.

Based Mediator report referred to in paragraph (3), Case Examiner Judge issued a decision which is final and that the lawsuit is unacceptable accompanied condemnation Mediation fee payments and court fees. Mediation costs as a punishment to the claimant can be taken from the down payment fee or a separate payment by the claimant and submitted to the defendant through the court clerkships. If the Defendant declared good will are not referred to in Article 7 (2), subject to liability for payment of fees Mediation. Mediator to submit a report to the defendant is not a good faith belief the Examining Judge Case with recommendations Mediation fee imposition and calculation of the amount in the report unsuccessful or can not be implemented Mediation.

Based Mediator report referred to in paragraph (2), before resuming the examination, the Examining Judge Case in the trial are set next states must issue a determination that the defendant is not of good will and punish the defendant to pay a mediation fee. Mediation costs referred to in paragraph (3) is part of the mandatory court fees mentioned in the final verdict. In the event that the defendant referred to in subsection (1) is won in the verdict, the verdict stated Mediation fee charged to the defendant, while the fixed court fee is charged to the plaintiff as the losing party.

In civil cases and economic disputes Islamic religious courts, the defendant referred to in paragraph (1) was sentenced to pay a mediation fee, while the court fees charged to the claimant. Payment of Fees Mediation by the defendant to be handed over to the plaintiff by the Court clerkships to follow the implementation of decisions that have been legally binding. In the event that the Parties jointly declared no good intention by the Mediator, the lawsuit can not be accepted by the Examining Judge Mediation Costs Case unpunished.

Based on some of the above description and the provisions of Article 7, Article 22 and Article 23, which is significantly different from the provisions PERMA 1 Th. 2008. Therefore,

it can also be shown the essential spirit and an indication of the effectiveness of the process of mediation in resolving the case. With the good i'tikad this that the mediation process will be carried out effectively and efficiently, "If studied more thoroughly PERMA 1 Th. 2016 reaffirmed the role of independent mediator to play a more active role in resolving disputes in court or out of court, which then results agreed mediation may be filed stipulation to the Court through the mechanism of a lawsuit.

Based on the previous description, the effectiveness and efficiency of the mediation process can be accomplished with implemented of the principle of good faith. Pursuant to Article 1338 paragraph (3) of the Civil Code which said that the agreement be implemented in good faith. Good faith has two meanings. The first in a subjective sense, in the sense of subjective good faith means honesty. In this case, the parties to make an agreement or contract and the mediation process should be with honesty. Secondly, good faith in the sense of objective meaning both parties in the mediation process should be contained decency and justice. If both parties apply the good faith both in the sense of subjective and this obyective the mediation process will work effectively and efficiently. Therefore, it is highly expected that the win-win solution will materialize and both sides will get justice with peace and mutually support each other.

D. Conclusions and suggestions

D.1. Conclusions

Based on the description in the discussion, the conclusion is:

1. Reconstruction of Islamic banking dispute resolution through mediation in religious courts based on Article 2 (1) PERMA No. 1 Th. In 2016, with this provision of human resource issues, especially the limitations and skills of judges who understand Islamic banking dispute can be resolved by allowing the mediator other than the judge. It is based on Article 1 point (1) PERMA No. 1 Th. 2016. The presence of the mediation is expected to increase public confidence in the religious courts in carrying out the mandate in the resolution of disputes of Islamic banking. The results achieved through the mediation of religious courts will also give the process of peaceful settlement of disputes between the two sides and will manifest a common understanding in resolving the dispute.
2. Model judicial procedure for dispute resolution through mediation of Islamic banking in the Religious Courts applied to effectiveness and efficiency of the mediation process. That could be done with the implementation of the principle of good faith both in the sense of subjective meaning in the sense of honesty and objective meaning both parties in the mediation process should be contained decency and justice. If both parties apply the good faith both in the sense of subjective and this obtektif the mediation process will work effectively and efficiently. Therefore, it is highly expected that the win-win solution will materialize and both sides will get justice with peace and mutually support each other.

D.2. Suggestion

In terms of legal certainty has materialized with the PERMA No. 1 Th. In 2016 it should be justice and benefits will also be realized. This will be achieved by cooperation, interconnection and integration and communication of all components in the development of Islamic banking. The component in question is the Supreme Court (MA), the National Sharia Council (DSN), the Financial Services Authority (FSA), the Association of Islamic Banking Indonesia (Asbisindo), Notary, Customers Bank Syariah Judge, Registrar, Advocate and society observers and users of Islamic banking has had the same understanding and behavior of the growth of islamic banking will continue to rise.

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PROTECTION FOR INDONESIAN MIGRANT WORKERS IN ASEAN COUNTRIES

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ABSTRACT

Since December 2015 Indonesia has signed a contract to join the ASEAN Economic Community (AEC), meaning Indonesia has agreed to make a free trade area for goods, services, human resources, professional and intellecual property rights. Given its large population, Indonesia is in an advantageous position to manage its human resources for professional advancement. Our constitution provides a guarentee for decent work and livelihood for all people. Migrant workers should receive government protection in every sector (i.e. economic, social, legal) for realizing their rights. When these workers feel that their country can not provide them with these lifelong protections, they move out to another country seeking a better way of life. Likewise, when migrant workers remain in-country are not educated, they can become susceptible to crime and illegal activities. Although these workers leave abroad, they are still Indonesian citizens and they should be protected by Indonesian law. The goverment has a responsibility to educate these individuals about their rights and responsibilities through professional training and guidance. As of yet, these problems have not been addressed in our country. In my hypothesis, I believe that if the goverment can make necessary regulations for migrant workers, we can utilize greater human resources for AEC. In this paper, I will use quantitative and qualitative methods to identify what progress can be done in one to two years for migrant workers in order to improve human resource management for AEC in Indonesia.

Keywords: migrant workers, AEC, whole protection, human resource

I. PREFACE

Development and international public relations are the things that underlie the growing number of needs and dependence of a society in a region of the country. In order to survive in the current continues, the state is required to be able to answer the needs of society. Indonesia as a developing country, participate in building the country's economic strength to survive in the international arena, including in strengthening factors of production. The excellence of Indonesia as a developing country is an abundant amount of labor with minimum wage. This

situation makes the labor of Indonesia highly respected by countries with a small number of their employees like Singapore and Malaysia.

The large population is a potential development that can make a positive contribution to the prosperity of the nation and the state. One of the positive value is the availability of abundant labor, although the data in 2014 showed the number of unemployed as much as 7.39 million (6.25%). This may imply that jobs and businesses are very limited. Because of these conditions, then the worker is still in productive age trying to find alternative jobs overseas, or popularly called the Indonesian Workers (TKI). The placement of workers abroad is one way to tackle the problem of unemployment. In 2014, workers who are registered in Malaysia as many as 1.25 million people, 588 075 people in Saudi Arabia and other countries 32 073 people.

Job availability and wage that more promising overseas make more and more citizens of Indonesia that undertake economic migration. However, not many of those migrating have sufficient knowledge and ability. Although they set off with the official employment agency, but the debriefing given very limited. They are only prepared for approximately one month. The problem of Indonesian workwrs are not only about the capabilities and knowledge of the work, but also about domination of cultures and languages in countries aim to work. The situation like these that often cause problems for Indonesian workers while abroad.

The Data of National Agency for Placement and Protection of Indonesian Workers up to April 2016, show there are 78.284 workers who leave. The labor force consists of 48.644 or 62% of women and 29.640 or 38% of men. From all these migrant workers, there are 42.979 or 55% of them are included in the formal workers and 35.305 or 45% of informal TKI. The data of the return of TKI for 2015 reached 21.072 with 2,690 migrant workers with problems.

Discussing the Indonesian labor force is very important, considering the MEA has started last December 2015. Management systems and good management of the Indonesian workers who will work abroad properly, will create major economic benefits. The purpose of the author in setting up this the is that there is a real effort is made promptly by the government to prepare for this great economic power. Arrangements that contained in Law No. 39 of 2004 concerning about the Placement and Protection of Indonesian Workers Abroad, must be socialized modernly. The author also put forward the importance of briefing and training of prospective workers in Indonesia in terms of language skills, work skills, cultural knowledge and ability to manage the current income when they return home. Debriefing is not only limited given before departure, but also when returning to the country, before they return to the region.

The purpose of the discussion is done is to give advice to the government to see the huge economic potential of the workforce that abundant. Indonesia will be stronger in the flow of MEA where goods and services are traded freely in the Asian region. The existence of a professional and independent workers who will further strengthen the country's economy to the foreign exchange continues to increase and stabilize.

II. DISCUSSION

2.1. PROBLEMS FACED BY MIGRANT WORKERS ABROAD

Lack of ability and work skills as well as knowledge of Indonesian workers who work abroad raises several issues as follows:

a. Not receiving a salary
b. Verbal abuse
c. physical abuse
d. mental violence
e. Physical abuse

Many cases of women migrant workers are not exposed through complaints, especially those who suffered both verbal and physical harassment. According to Reuters, Thursday, September 19, 2013, a survey of Mission Migrants Hong Kong in 2012, involving more than 3,000 women migrants working in Hong Kong found that approximately 58 percent of workers have experienced verbal abuse, 18 percent experienced physical violence, and 6 percent experienced sexual harassment.

There are 18 420 complaints that have occurred since the establishment of the Crisis Center BNP2TKI on June 27, 2011 until December 31, 2014. There are six categories of complaints from the public-especially prospective migrants / migrant workers and family-incoming and addressed, namely direct complaint (complainant came himself) as much as 6,621 complainants, 6017 by mail, telephone 5135, 181 SMS, email 149, and 317 others.

In addition to the data recorded in complaints of abuse faced by migrant workers abroad, there are many cases that did not get the complaint and only revealed when the victim was already in a state of severe and even killed. For example Meriance's case who brutally tortured by her employer in an apartment block M10, Pandan Jaya, Ampang, Malaysia. His teeth were removed using a screwdriver when she fainted due to the beating. He was also forced to drink their own urine. More sadistic, vital organs damaged by the employer female victim was stabbed with a blunt object.

2.2. GOVERNMENT EFFORTS TO HANDLE THE PROBLEMS OF TKI

The government, in dealing with troubled migrant workers, doing the protection and prevention efforts through positive law and the establishment of the National Agency for Protection of Indonesian Workers Placement. Article 1 paragraph 4 of Law No. 39 of 2004 concerning the Placement and Protection of Overseas Labor Overseas Protection is every effort to protect the interests of prospective migrants / migrant workers in realizing the assurance of fulfillment of their rights in accordance with the legislation, both before, during, and after work.

Meanwhile, BNP2TKI is an attempt by the placement and protection of migrant workers through debriefing before departure and homecoming services of TKI. However, the author's attention is problematic during TKI treatment efforts have focused on efforts to deportations

of TKI. If we are looking for information handling the TKI with problems through the official website BNP2TKI, we will only return data obtained the problematic of TKI. According to the authors, the handling of migrant workers with problems is not enough to return it. It's very important to provide shelter for them to stay some time with mentoring and equipping of certain skills. From the information that the authors obtained there are several measures of psychosocial and psychological recovery migrant workers with problems, but in the ability of the economy has not given a solution.

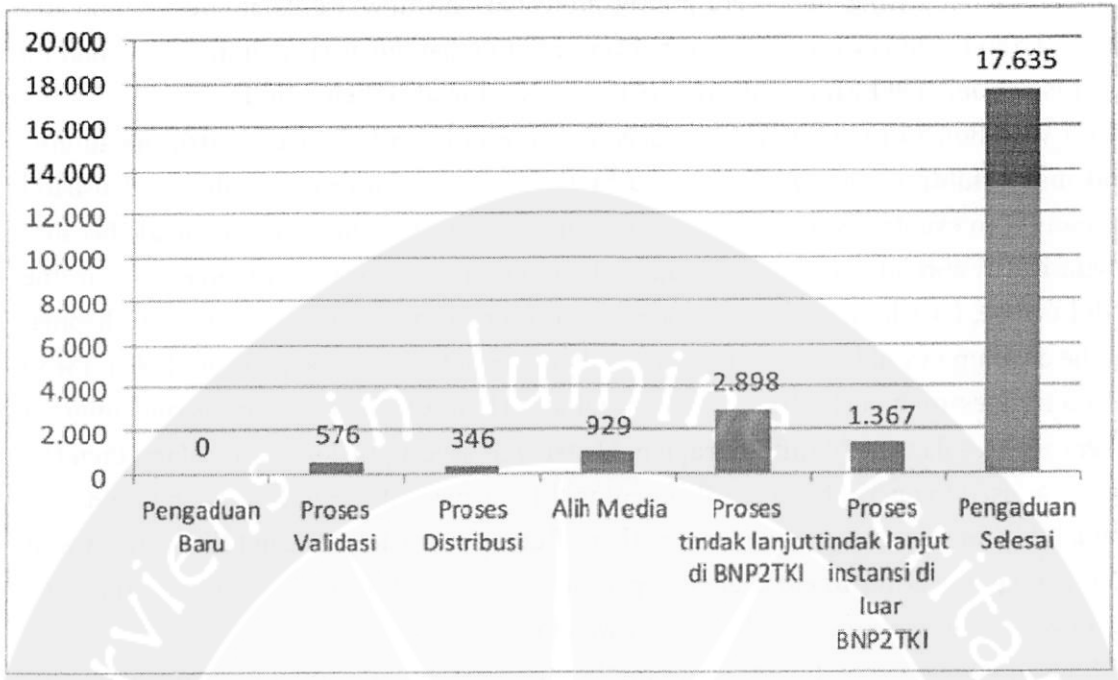
Table 2.1. The Arrival Data of TKI 2016

No	Debarkasi	2016 (Jan)	
		Total Kepulangan	TKI Bermasalah
1	Bandara Adi Soetjipto Yogyakarta	1,005	67
2	Tanjung Pinang (deportasi)	778	778
3	Entikong	207	156
4	Bandara Internasional Lombok Mataram	427	0
5	Bandara Adi Soemarmo Solo	311	11
6	Ahmad Yani Semarang	297	9
7	Sultan Mahmud Badaruddin II Palembang	12	0
8	Husein Sastranegara Bandung	13	5
9	Kualanamu Medan	14	3
10	Common Use Lounge T2 Bandara Soetta	521	521
Total		3,585	1,550

Table 2.2 The Data of Complaint Statistics 2016

STATISTIK PENGADUAN	JUMLAH	%
Pengaduan Baru	0	0
Proses Validasi	576	2,43
Proses Distribusi	346	1,46
Alih Media	929	3,91
Proses tindak lanjut di BNP2TKI	2.898	12,20
Proses tindak lanjut instansi di luar BNP2TKI	1.367	5,76
Pengaduan Selesai	17.635	74,25
Total pengaduan	**23.751**	100,00

Table 2.3 The Data of Complaining and Handling



2.3. SOLUTION OFFERED

See the ineffectiveness of safeguards and handling as well as the precautions taken by the government, for the sake of encouraging economic progress of the state in the era of the MEA, the author offers some solutions as follows.

1. The regulation of laws and their implementing regulations for the law firm in realizing protection for workers
2. Optimization the work of BNP2TKI with the handling and prevention of length scales. The intention is to provide a special shelter for the preparation of debriefing at least 3 months. Debriefing form of job skills, knowledge of the language and culture of the destination country work
3. Conduct regular training in the form of simulated escape from life-threatening conditions even to prevent violence
4. Optimizing the function of community labor migrants in the country for the last regular meeting to take control of fellow migrant workers
5. Requiring workers to stay in the shelter after returning from the country of employment for a maximum of one week to obtain economic independence debriefing. Also to ensure migrant workers in good condition.

he writer suggested some solutions after the authors conducted interviews with several sources who have experienced or lived assisting migrant workers. Information provided almost uniformly from three sources that the authors interviewed. They lamented the lack of government efforts to prevent violence on migrant workers abroad. He said they were heroes

of foreign exchange, but they were poorly protected and their rights are very vulnerable violated. From the interviewees, the authors even found that the negative impact of a migrant worker is not only felt by migrant workers themselves but also their families.

In a visitation to the Glondong village, Yogyakarta in early January 2016, the authors found many children who are abandoned by their mother who worked abroad. Husband also many who eventually decided to divorce his wife, even to the point of suicide because his wife works abroad. Almost the same as Glodong, the majority of divorce cases in the Cendol village, East Java, because of the wife working abroad. If this is allowed to happen then the economy would weaken the country. In contrast to the speakers from Thailand who is now a businessman of children's toys in Surabaya. He was formerly a professional migrant workers with a salary of 20 million rupiah. He tried to save a portion of his salary, then the money was used to open a business. By opening this business, it means he creating economic sustainability for themselves and jobs for others. But unfortunately he is not the workers who set off through the government agency or private but because kinship networks. So the skills and knowledge he acquired was due to his own efforts.

Children who are abandoned by her mother to work abroad should lose education and affection that they should receive from his mother. The best education is education provided by parents, especially mothers. "We are here begging sought instruction and education of girls, not at all times as we want the girls became male rivals in the fight of his life. But because we believe the enormous influence for women, so that women are more capable to perform its obligations, liabilities submitted his own nature into his hand: be a mother, educator man first. [Letter of Kartini to Prof. Anton and gentlemen, October 4, 1902].

For the sake of the prosperity and welfare of this country, the government must act and do something that is clearer and better. These human resources are plentiful in number, if not treated properly it will still cause problems of welfare and unemployment will continue to rise.

III. CONCLUSION

After several kind of observation to find how effective the eforts of goverment to protect and full fill kinds of migran workers rights. Also to make sure that during work abroad the migran workers are safe. Considering the performance of the migran workers has influence the rise of devisen for country. Altough the constitution has regulate about the protection and settling for the migran workers abroad. Also the establishment of the corporation od settling and protecting migran worker abroad. Bye the observation show that these kind of eforts are not enough yet.

To build a strong economic country we need more than just protection. We have to improve our eforts to manage our potential migran workers into the proffesional migran workers. They must be proffesional in skill and knowledge. It needs more than one week or one month to create the proffesional migran workers. I believe if we really pay attention to create proffesional migran workers than we will safe in ASEAN Economic Community

(AEC). The proffesional migran workers expected to be autonomous in their economic importance. Morover they could be new indrustialist in their country. This efort actually not for the goverment only but for all the academician. This is our responsillity to optimalize the eforts of goverman for a better economic development.

Refference

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GROWTH STRATEGY FOR E-COMMERCE USING DIGITAL MARKETING: A Case Study of Brodo

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ABSTRACT

Brodo is men fashion brand focusing its business in e-commerce. Starting in 2010 and has tremendous growth in first three years, from produced 10 pairs of shoes, now Brodo can produced 4,000 – 5,000 pairs of shoes per month. In the last two years, Brodo has been experiencing stagnant growth in revenue. The digital advertising spent become more inefficient toward revenue. To overcome this problem, Brodo has to improve their digital marketing for their growth strategy.

The study using 3C's (Customers, Competitors, Collaborators) to analyze the external environment of the company, while for the internal analysis, the author used 7C's of customer interface and some e-commerce metrics such as, Cost per Acquisition, Cost per Conversion, Cost Profit Value, etc. From those analysis, the study found the insignificant growth from 2014 due to the lack of measuring channel performance. It caused inefficient cost in non-potential channel which not generated higher conversions. The three solutions were given to find the right channel which is potential to get higher conversion with efficient cost, Using Social Media as community base, and Optimizing the UX in their mobile site.

Keyword: *7C's customer interface, e-commerce, growth strategy, digital marketing*
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Introduction

The internet penetration in Indonesia is very high. In 2015, the internet population is estimated around 95 million users (e-Marketer,2015). The growth rate is very high in Asia. In 2017, e-Marketer estimated Indonesia will be in Top 5 whose contributed internet user in worldwide, overtaking Japan. As we can see in graph below, the growth of internet user in Indonesia is increasing rapidly. Every year, internet user in Indonesia had grown around 12%.

Internet user age-segment of 15 – 30 years old reached 50% from total internet population in Indonesia. Most of them using Social Media such as Facebook, Twitter, Instagram, and etc. Average time that Internet Users spend using internet are 5 hours 27 minutes. They could access Internet from their Desktop, Tablet, and Smartphone. Now, in big cities almost all of them using smartphone in the daily life. The use of internet has started to exceed not only the communication aspect, but also financial transactions. The internet development journey in Indonesia is started from social networking into e-commerce (Frost and Sullivan, 2012:195).

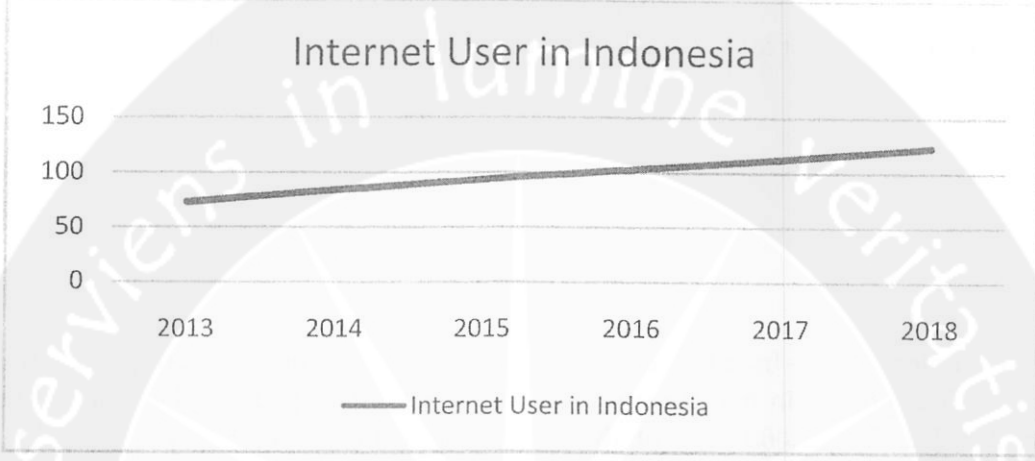


Figure1. Internet User in Indonesia
Source: e-Marketers, 2015

The internet penetration and its usage in Indonesia show that consumer lifestyle has shifted from offline to more online lifestyle. And it is causing effect how Brand do on marketing and promotion. Along the high growth rate in Internet penetration, *e-commerce* become interesting market in Indonesia. The government estimated the revenue from *e-commerce* in this 2015 will become 180 million USD.

E-commerce is the process of allowing web-based technologies to facilitate commerce or trade. An e-business could be the producer of the product or an intermediary that coordinates the distribution process (Brad and Thomson, 2003:86). On top of a budding economy, a variety of push factors such as growing internet penetration, rapid mobile device adoption, increased social media usage and greater spending power by the middle class make Indonesia's e-commerce sector ripe for expansion. However, Indonesia still faces challenges with respect to adoption and implementation of new technology, infrastructure developments, and congestion due to rapid urbanization. They are looking for more convenient order process to make they feel security while they are purchasing.There are eight product categories that e-commerce offer to customers. Clothing has the highest category are purchased by online customers.Those data is one of the reason Brodo enter fashion market through digital. Brodo started business through Facebook Page then have e-commerce website. They are using digital advertising to promote their brand and products. The reason why they are using online platform to run their business is measurable. Beside the high growth from online platform,

they could see the effectiveness of their digital marketing program in real time. It helps them to grow with efficient costs.



Figure 2. Growth in Number of Online Shoppers in Indonesia
Source: e-Marketers

Brodo is a men fashion brand, founded in 2010 by two engineers from ITB, Muhammad YukkaHarlandadanPuteraDwiKarunia. They started the business after they found an interesting facts about fashion industry in Indonesia. Indonesia is exploded with so many talented resources, however they rarely seen fashion brand that have "made in Indonesia" label by Indonesian and sold it to Indonesian. And the retail price is totally way overpriced by 3 times, even 8 times. They feel have a responsibility as the youth Indonesia, they have to create something.

In 2010, the founders and a shoes designer, their friend, started to design their first shoes, named Signore. To differentiate among other local brands, they implement Batik Parang and Indonesia Map in their outsole. They started to sell their products to their friends, family, and relatives. And it worked well, they start to gain profit. To increase more sales, they build Facebook Page to promote their brand and products to wider audiences. They started to use Facebook Ads and it really helped them to gain more followers and sales. The sales growth at that time after using Facebook Page and Ads reach is five times. Thought that Digital Platform really help their business growth, in 2013 they build website with fully e-commerce platform. From selling just seven shoes in a day, now Brodo could sell their products over 150 products in a day or almost 5000 products per month. Now, Brodo is vertically integrated e-commerce with 4 offline stores in Jakarta, Bekasi, Bandung, and Surabaya. Their main products are shoes and in 2014 they entered Apparel and Accessories category. After five years run their business, Brodo still need to increase their growth to sustain in this industry. Acquiring new customers and maintain their loyal customers are very important, also the need of cost efficiency on marketing budget is a key point in startup business. The growth of internet users in Indonesia is rapidly growing, they are become more familiar with

e-commerce. To get more new customer, they need to spend extra money because it said that for acquiring new customers, you will need seven times extra effort in budget than maintain your loyal customers. Therefore, to increase business growth, Brodo have to optimize their digital marketing strategy become more efficient and effective. The purpose of this study is to evaluate Brodo digital marketing program from their growth strategy in order to optimize their digital marketing.

Conceptual Framework

The important thing for Startup is growing fast. One of the growth strategy is in Digital Marketing strategy, especially for online startup company. To analyze how Digital Marketing support growth strategy in BRODO, this study will conduct through several stages. The stages taken in this research as follows: Analyze the external factor3 C's, analyze 7C's of customer interface and analyze current Brodo's Digital Marketing Strategy. It will describe how Brodo use Digital Marketing as growth strategy. This analyze consist of Marketing Mix and it will be focus on Digital area. And adding measurement process to evaluate how far Brodo do in Digital Marketing field. After analyzing those factors, this Conceptual Framework could find the root of causes and solve the problem of startup company have; business growth strategy. Then this study will give some improvement for their Digital Marketing strategy to catch faster growth. For better understanding in analyzing company situation, the author will conduct interviews with the CEO, Head of Marketing, and Digital Marketing Manager. And also use reference literature to gain knowledge in this field.

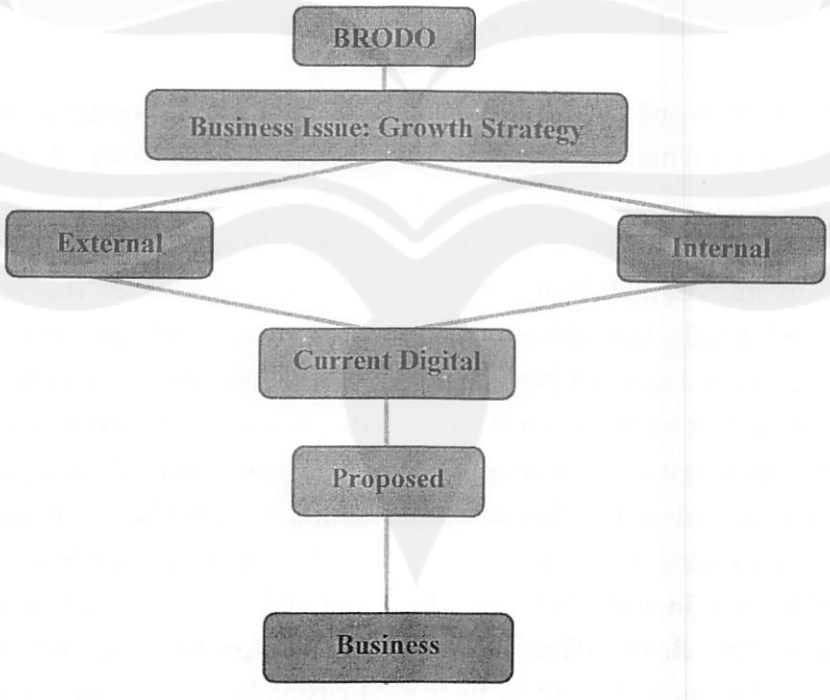


Figure 3. Conceptual Framework

In this study, Brodo business growth strategy is in market penetration. They will focus on how to increase market shares and profit in the short term. This strategy is leveraging many of the firm's existing resources and capabilities. In growing market, simply maintaining market share will result in growth, and there may exist opportunities to increase. And also by increasing usage of existing customers, on how Brodo will monetize their existing customers. By seeing the sales data month to month or year to year, we can simply know the company's growth, in term of revenue growth. Below data is Brodo sales performance in January – June 2014 and January – June 2015. Based on the data below, their sales are increasing in 2015 by 25% from 2014 in total.

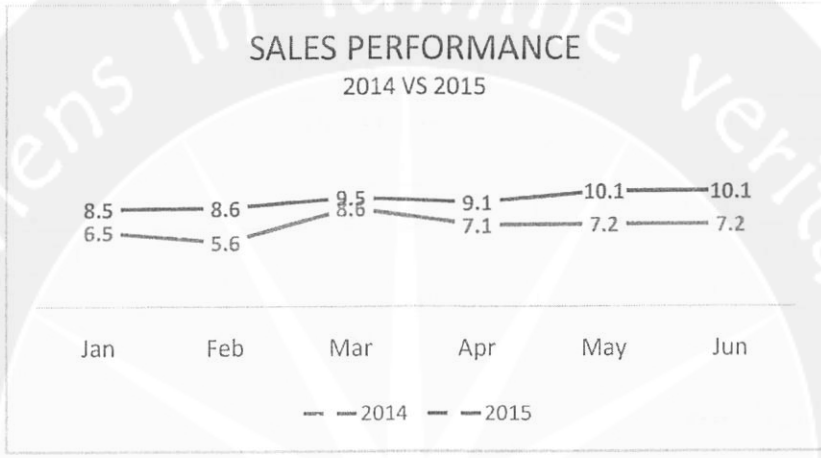


Figure 4. Brodo Sales Performance
Source: Brodo Company Data, 2015

While the sales increase 25% in 2015, the ad spend increase way higher in 2015 by 50% from last year (2014). The incremental in sales performance and ad spend did not match. By seeing these two data, there are something wrong with the investment in advertising.

The metrics in the next page will be used to analyze company growth more in depth. This study will compare the company growth data in six months in period range, between January – June 2014 and January – June 2015. Below the data.From data below, there are increasing number of visitors and transactions. For number of visitors grow two times, however transactions only grow 1.4 times. And the CPA also increase. It indicates that there are some cost inefficiencies in their digital marketing program. CPA Model is consider to be a preferred model by advertisers, because it's easily manage brand campaigns' return of investment. Cost per Acquisition will define whether the paid channel will give cost effective result. The goal is to get the lowest cost in acquiring new customers than revenue that customers will generate when buying the products. So, if the CPA is increasing from the period of time, it means there are some inefficient cost that happened.

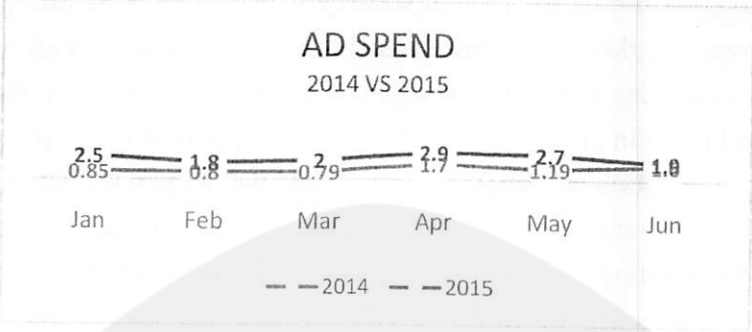


Figure 5. Brodo Digital Ads Spent
Source: Brodo Company Data, 2015

Table1 E-commerce Metrics for Brodo

Metrics	Jan – June (2014)	Jan – June (2015)
Number of Visitors	447,777	980,953
Size of Purchase (transactions)	11,382	15,963
Conversion Rate	2%	1.63%
Cost per Acquisition	Rp 70,815	Rp 120,304

Source: Brodo Company Data, 2015

Research Methods

This study will evaluate their Digital Marketing strategy by measuring some metrics for *e-commerce* business. The metrics will be measured by doing analysis and calculating from their sales performance and marketing budget performance. Also, this study will conduct online customer experience survey. For online customer experience survey, it will target 100 Brodo online consumers from Bandung who already purchased within August – September 2015.

Results and Discussions

3C Analysis

Customer

Since 2010, internet connection in Indonesia remain strong. The number of Internet population is increasing and it effects to the number of online customers. E-Marketer (2013) said in their articles that Indonesia's active internet population is developing extremely fast, currently 83.6 million users and it is projected to be 93.4 million by 2015. And Vela Asia said that Indonesia's *e-commerce* potential is ranked number one in South East Asia. The 2015 projection is 7.4 million online customers, around 10 percent of the total internet population. Based on APJII in 2012, there were 48.4% male internet users. And half of total internet users in Indonesia are young generation. It said that almost 50% are in age 15 – 34 y.o. It becomes more interesting for the online business. For Brodo who target male users, it becomes huge opportunity to penetrate the market. Brodo is a men's fashion brand, they start from selling

men's footwear and now broaden their category to men's apparel and accessories. There are some research said that men usually buy shoes twice a year. To reach their market they are using *e-commerce* platform and digital marketing to sell their products. Online customers nowadays become more comfortable to shop online. They are become more familiar with the process of how to purchase online. Most of *e-commerce* educate internet user to become online shopper, they provide how-to information to shop online by image or video and customer service that will help online shopper proceed their online order.

Nielsen Global Survey conduct research of *e-commerce* in South Asia in Q-1 2014. The data said that there are top three drivers of online shopping in South Asia, look at products online before purchasing in-store, read online reviews prior to purchasing products, and research products online prior to purchasing. In each drivers have different channels to approach. Usually, online shoppers use search engine such as Google, Yahoo, Bing for searching the products they want and sometimes they read products review in social forum such as, Kaskus. This situation drives *e-commerce* business to have present in each channel. To be "there" in front of the customers, *e-commerce*have to use Paid Ads or Non-Paid Ads such as, Search Engine Marketing, Search Engine Optimization, Display Ads, Facebook, Instagram, and etc. If e-commerce have present in Google Search Engine for example, it help them to be recognized by their potential customers and it also can attracts customer's competitors.

Table 2. Top Three Drivers of Online Shopping in South East Asia

INDONESIA	MALAYSIA	PHILIPPINES	SINGAPORE	THAILAND	VIETNAM
Look at products online before purchasing in-store	Convenience	Read online reviews prior to purchasing products	Convenience	Read online reviews prior to purchasing products	Read online reviews prior to purchasing products
Read online reviews prior to purchasing products	Read online reviews prior to purchasing products	Look at products online before purchasing in-store	Read online reviews prior to purchasing products	Look at products in-store before purchasing online	Look at products online before purchasing in-store
Research products online prior to purchasing	Look at produtcs online before purchasing in-store	Research products online prior to purchasing	Look at products online before purchasing in-store	Research products online prior to purchasing	Research products online prior to purchasing

Source: Nielsen Global Survey of E-commerce, Q1 2014

Table above shows that most of Indonesia's online shopper look at products online before purchasing online, read online reviews prior to purchasing products, and research products online prior to purchasing. To save their time from go to window shopping, which is will take their time from their busiest schedule, they find that look at products online before purchase in-store are more efficient and effective. They usually read online review about the products

they want to buy and the *e-commerce* they want to do shop online. By reading the online review they will feel more convince and secure to shop online. As we know, most of internet users are still really cautious when it comes to providing private information and credit card information online.

There four stage of a relationship between brand or *e-commerce* and customers, Awareness, Exploration/Expansion, Commitment, and Dissolution. The framework is useful because it encourages firms to think about what customers do in each stage, what firms have to do to make customers stay committed to brand or *e-commerce*.

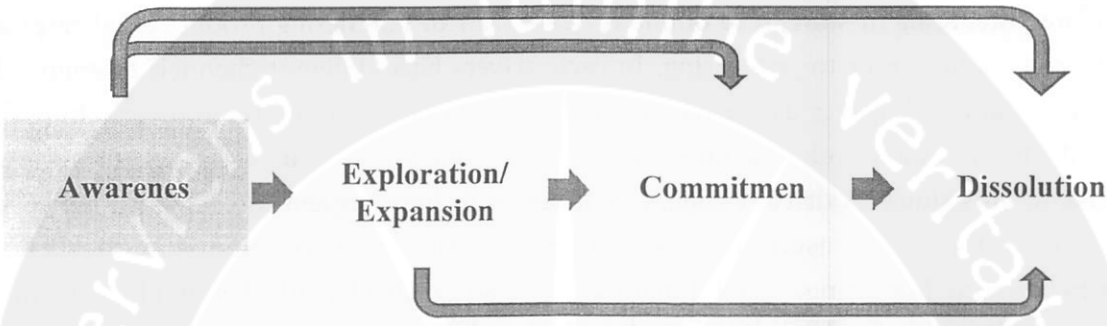


Figure6. Moving through the Relationship Stage
Source: Mohammed, Raffi A. Internet Marketing: building Advantage in a Networked Economy. 2003.

Customer do not necessarily pass through all stages. They could be move to the Dissolution stage right after they enter the first stage, awareness. The factors could be anything and could be from the customer side or the firm side. Customer could jump to the Commitment stage after they pass the Awareness stage. In Digital era, people not just buy the products, they will easily spread the positive and negative experiences toward their purchasing process in some *e-commerce*. Even they could build community who will talk about the products and purchase experiences in specific products and *e-commerce*.

Competitor

The purpose of competitor analyzing is to strengthen Brodo business strategy. By analyzing it, company could see the opportunity and threat for their business. This study will generate some of the companies that compete with Brodo based on the same industry, *e-commerce*that focus on fashion.

Table3. Brodo Competitors

No	Competitor	Business	Segment	Marketing Mix
1	Bro.do	Men Fashion brand – e-commerce	Men, SES AB & B	**Product:** Footwear, Apparel, Accessories **Price:**Rp 99,000 – Rp 1,500,000 **Place:** Internet (e-commerce) **Promotion:** Digital advertising

1.	Zalora.com	Fashion *e-commerce*	Men and Women, SES AB & B	**Product**: Apparel, Footwear, Accessories **Price:**Rp 79,000 – Rp 1,000,000 **Place:** Internet (e-commerce & marketplace) **Promotion:** Digital advertising
2	Metroxonline.com	Fashion *e-commerce*	Men and Women, SES B	**Product**: Apparel, footwear, accessories for men, women, & kids **Price:**Rp 449,000 – Rp 2,499,000 **Place:** Internet (e-commerce) **Promotion:** Digital advertising
3	Maskool.in	Men's Lifestyle *e-commerce*	Men, SES B	**Product**: Apparel, Footwear, Accessories, Electronic, Home&Living, Hobbies **Price:**Rp 99,000 – Rp 3,000,000 **Place:** Internet (e-commerce) **Promotion:** Digital advertising
5	Thegoodsdept.com	Fashion *e-commerce*	Men and Women, SES AB	**Product**: Apparel, Footwear, Accessories for men, Women, and Kids **Price:**Rp 289,000 – Rp 5,000,000 **Place:** Internet (e-commerce) **Promotion:** Magazine Editorial, Digital Advertising
6	Bobobobo.com	Lifestyle *e-commerce*	Men and Women, SES AB	**Product**: Apparel, Footwear, Accessories, Living, Food, Travel for men&women **Price:**Rp 439,000 – Rp 3,500,000 **Place:** Internet (e-commerce) **Promotion:** Digital Advertising

Source: Brodo Marketing Department, 2015

Collaborator

Since Brodo are both a brand and also a vertically integrated *e-commerce*, they are partnering with several vendors. Their Supply Chain Management Department have more than 5 vendors they are collaboration with. Those vendors are working on all Brodo's shoes products and supply their leather material. All those vendors are located in Bandung and Cisarua.For their promotion activity, Brodo's Marketing Department are also doing collaboration with several Advertising Agency to run mostly their digital campaign. For regular campaign or they called "Always on campaign" they collaborate with Google Adwords SEA (South East Asia). And sometimes they go to publishers directly to place their Ads. Brodo have mission to deliver awesome products and service to their customers, so they are partnering with Logistic Service to deliver their product to their end customers.

Table 4 Brodo Partners

No	Department	Vendor
1	Supply Chain Management	- Material : Genuine Leather - Material : Rubber (Outsole) - Packaging - Production : Shoes and apparel
2	Marketing Department	- Advertising Platform - Analytic Platform - Video Content
3	Information and Technology (IT)	- Server - Telecommunication System - *E-commerce* Platform

Source: Brodo Company Data, 2015

The Seven Design Elements of Customer Interface (7C's)

The interface is the virtual representation of firm's chosen value proposition (Mohammed et.al, 2003:225). The design of website have to answer the user's questions when they arrive in the website. A well-designed sites should simultaneously attract target segments customers and deter non-targeted customers. When targeted customers visit the website, they could easily engage with the company. To present a well-designed website, the managers have challenges to match their strategic goals of the business with interface that could bring targeted customers into a profitable one. The goal of Brodo, as a men fashion brand that focus on *e-commerce*, is primarily to encourage buying. At first glance when users visit Brodo website is that users can shop there. Brodo presents shopping options boldly.

Context

The context of the site captures its aesthetics and functional look-and-feel. Based on their goal that encourage users to buy, Brodo is a hybrid site that combines both aesthetics and functional dimensions in their website. So users can not get lost in their site. While Brodo develop a very simple step for user to shop, they give an aesthetics feel to users. On the aesthetics side, Brodo is highly visual, with appealing images of products photographed in their theme setting. The image of their banner in the site are displayed in a style that match with their theme at that moment, for example adventure feel. Functionally, the site present a detailed description of the products with great photos from every angle of products. Brodo are very concern about the ease of navigation in their site so users can easily do the order process.

Content

Content is defined as all digital subject matter on a website. While Brodo focused both aesthetics and functional, they present content that support their context. In Brodo website they focus to bring detailed information about their product with text and image and also there are a video that explain how to order in Brodo Website. Usually the team create content based on customers needed when they shop online in Brodo website. They are using pull content.

Community

Community is defined as a set of interwoven relationship built upon shared interests. Brodo already knows about the importance of community for their brand. In Brodo website there are a section that featured on their homepage about Brodo Gentlemen Community. In that section, users can see photos of Brodo Consumers who wear Brodo products. Brodo consumers who featured on Brodo website will engage with the brand. And it effects almost all Brodo consumers who see the section will do the same thing, capture their moment when they use Brodo products.

Customization

Customization is defined as a site's ability to modify itself to-or be modified by-each user. There are two kinds of customization, tailoring by site and personalization. In Brodo now, they are still using tailoring by site because all the customization is initiated and manage by the firm. But in the future, they have plan to use personalization in their website to build more high engagement with their users.

Communication

It refers to dialogue that unfolds between the website and its users. There are three dimension of communication: broadcast, interactive, and hybrid. Brodo are using hybrid communication. Brodo have newsletter sign up box in their site, so users can put their email and get special treatment from Brodo such as special offers only for subscribers. Brodo collect all the email data and send email marketing every twice a week to their subscribers, and it called broadcast. Brodo provide a live chat with customers in their site, so users can easily chat with Brodo customer service, and it called interactive. Because of using both of broadcast and interactive, it called hybrid communication. Brodo knows that it's very important to always stay connect with their customers, so using hybrid communication is the best choice.

Connection

Connection is defined as the network of links between the site and other sites-in other words, clickable links that either take the visitors off a company's site or that exist on other sites to bring visitors to the company's sites. In Brodo's website there are no connections to other websites, because they do not offer an affiliate program and vice versa. But they do social

media plug in their website. They put social media icon, so when users click the icon, they will directly go to Brodo's social media page such as,Brodo Facebook page, Brodo'sInstagram account, etc.

Commerce

Commerce is defined as transactional capacity of a site-the sale of goods, products, or service on the site-along with shopping carts, shipping, and payment options, checkout, and order-confirmation functionality. In order for a site to have *e-commerce* capabilities, a number of features must be present. Brodo already have all the features that important for *e-commerce*, such as registration, shopping cart, security, credit card approval, delivery options, payment method options, order tracking. But it would be great if Brodo can optimize order tracking feature to become more real time for user.

Customer Profile

Based on survey, 50% Brodo's consumers are at age 24 – 34 years and 75% are employee. It describes that Brodo's consumers at age 24 – 34 years are the most potential buyer.

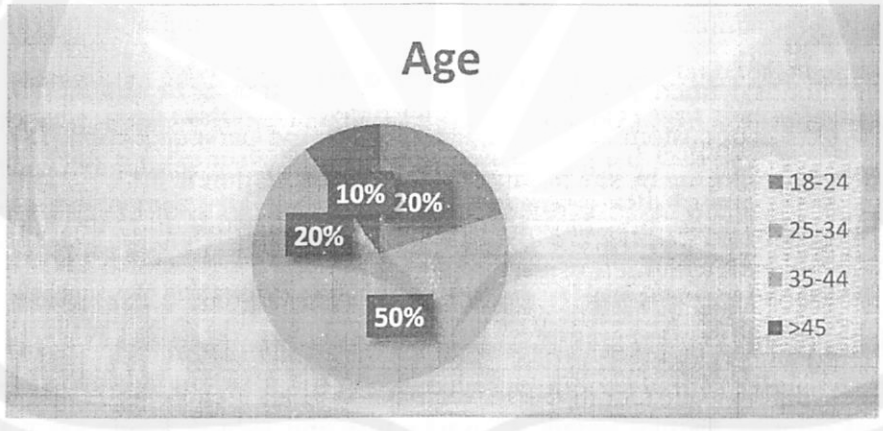


Figure 7 Respondents Age (Survey, 2015)

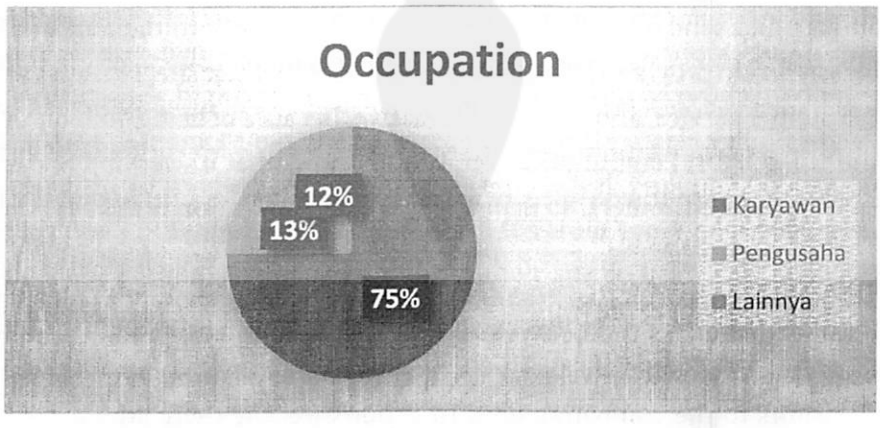


Figure8 Respondent Occupation (Survey, 2015)

For better understanding about Brodo's consumers, this survey also asked about how they know Brodo, from which channel, and which device they use to access Brodo's website. The result shows that 46% respondents knew Brodo from their friends and relatives, 28% from Social Media, and 25% from advertisement in others website. This answer will help management to decide which channel should be optimized. And it will save their advertising cost by choosing the right channel to promote.

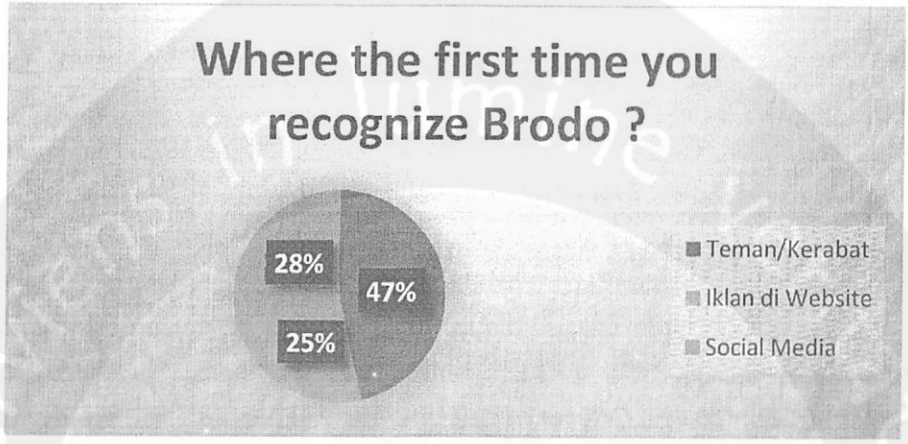


Figure 9 Respondent first digital channel when recognize Brodo (Survey, 2015)

Nowadays in digital field, having mobile site for *e-commerce* are very important. People are more in their smartphone than desktop or laptop. Many articles said that internet users now are their time more in smartphone doing browsing and even purchasing in *e-commerce* website. So this survey also asked about how Brodo's consumer access the website and which activity they did from their device.The 50% respondents said that they use their smartphone to browse products in Brodo's website, not include purchase activity, however only 30% did purchase activity through their smartphone. Brodo's consumers are finding more comfortable to do purchasing in desktop, proved that 70% Brodo's consumers chose Desktop for purchase activity.

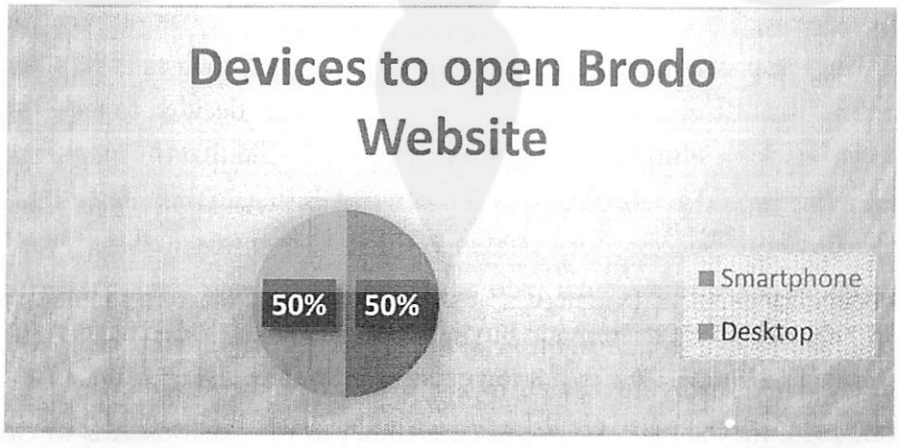


Figure 10 Devices used to open Brodo Website (Survey, 2015)

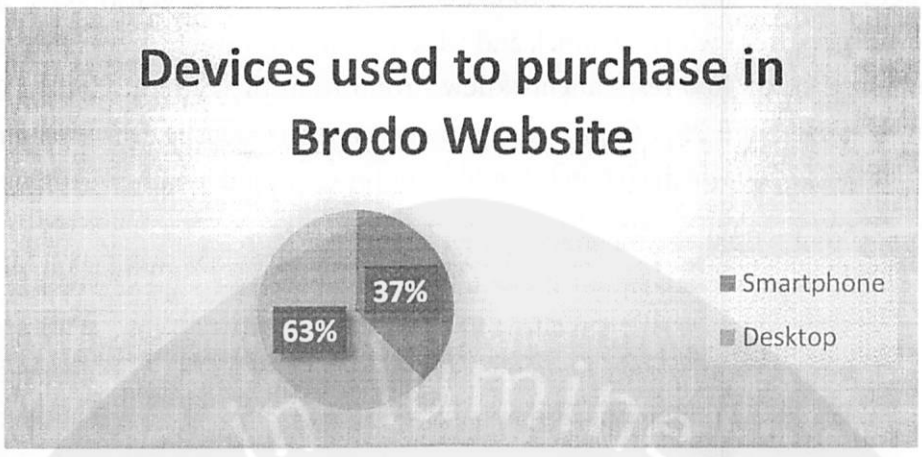


Figure11 Devices used to purchase in Brodo Website (Survey, 2015)

Current Digital Advertising

As *e-commerce* business, Brodo use digital advertising platform to promote their brand and products. Growth hacking in startup business is needed to stay ahead of the saturation risk and find unique innovative ways to leverage the same platform. Through the years, Brodo use Paid Ads Channel and Non-Paid and Channel to gain high growth.

Table5 Brodo Digital Ads

No	Type	Channel	List (or Followers)
1	Paid Ads	Google Ad-words	*N.A*
2		Facebook Ads	*N.A*
3		e-newsletter	80,000
4	Non-Paid Ads	Facebook Page	1,027,655
5		Instagram	69,200
6		Line@	13,000

Source: Company Data, 2015

The first channel that Brodo used is Facebook Page, long before they build Brodo website. They use Facebook Page as their catalogue, promotion platform, and communication platform. It becomes a huge impact to their business growth. Every month their sales number increased by 12%. Realized that Facebook Page had a huge impact, they decided to focus in Facebook Page for growth hacking within 2010 – 2012. Their analysis said that the more fans they have the more sales they would get. So they used Facebook Ads to gain more fans. In 2013, Brodo is featured in Facebook Success Story as Men Fashion startup who had tremendous growth using Facebook Page.Outside regular paid ads that Brodo always used, they ever try many kind of Paid Ads such as, Programmatic Buying, Rich Media (In-Video page, PTO), direct to publishers, and etc. However, the cost it too expensive, so they just used once.

Start from 2013, they shifted their focused channel from Facebook Ads to Google Ad-words (Display and Search Ads). At that time, they already have website, www.bro.do, and

they needed traffic to their website. As a growth hacker, they have to adjust quickly, changing methods or channel that would give huge impact in specific period of time.Because of for ever-shifting digital platform, now they use six main channels to stay ahead in high competition. Brodo's CEO, M YukkaHarlanda, said that with digital platform they could measure the performance in real time and it cheaper than traditional advertising. The flexibility of digital advertising in using ads really help their business process (M. YukkaHarlanda, private interview, 2015). However until now, Brodo have not checked the sales contribution from each channel. They just checked overall performances.

Channel Targeting

To evaluate all channel performance toward sales contribution, this study will evaluate each channel based on cost per channel and credit to sales contribution. This study will divide channel based on paid advertisement (Google Ad-words, Facebook Ads, and e-Newsletter) and non-paid advertisement (Facebook, Instagram, and Line@). Data below are taken from Google Analytics, Advertising and Social Media platform, and Sales Dashboard of Brodo.

Table6 Brodo Paid Ads Channels

Metrics	Channel		
	Google Adwords	Facebook Ads	e-Newsletter
Budget Allocation	70.70%	9.60%	4.32%
Cost	*N.A.*	*N.A.*	*N.A.*
Visitors (%)	33.78%	3.83%	6.57%
Contribution to Sales Total (%)	18.29%	1.73%	7.89%
CVR	0.88%	0.64%	2.00%
CPA	209,695	346,199	30,555

Source: Brodo Company Data, 2015

Table7Brodo Non-Paid Ads Channels

Metrics	Channel		
	Facebook Organic	Instagram	Line@
Cost	*N.A.*	*N.A.*	*N.A.*
Visitors (%)	5.81%	2.39%	1.99%
Contribution to Sales Total (%)	10.59%	1.87%	1.93%
CVR	3.36%	1.17%	1.67%

Source: Brodo Company Data, 2015

Based on those data, Facebook Ads is the most inefficient ad type, Facebook Ads's CPA is the highest among others and CVR is the lowest among others. In term of CVR, Facebook Organic, Line@, and e-Newsletter are in the top three. According to statista.com, average

Conversion Rate (CVR) in global is 1.2%, so Brodo position is in a good level. And the biggest contribution to sales is from Google Ad-words.

After Author evaluate Brodo Digital marketing activity with *e-commerce* metrics, it indicates that there are something wrong in channel targeting. It because of high CPA and low CVR. They did so many experiments, however they could not measure the result well. They did not analyze the profit margin from each channel. The thing that they are missing is Cost Volume Profit analysis.

Website Interface

Based on Survey result that is conducted by the Author, customers still have not good experience when searching products in website, they often did not find the products they want, and they hardly to find Customer Service Contact. In Brodo's Website there are too many layer in every section and the Call to Action (CTA) button do not appealing, so customer hardly find the Size button for example. When customers feel the order process is too complicated, the probability they will leave the website before they purchase is high. It impacts to Conversion Rate and Bounce rate.

Optimize the right channel

Brodo should make improvement related in Digital marketing to keep on track in the business competition. Measurement in every digital activities is a must. In this research, Author will explain the solution for their business problem. The first solution is **tomeasure the Cost Volume Profit in every channel**, so Brodo could find the right channel to capture the right audience. The second solution is **optimizing mobile website experience**, it will help customers have good experience in Brodo mobile site. The last is **increasing the number of followers of Line@ and Instagram** by doing online event.

Brodo already did experiments with some paid ads type, Google Ad-words, Facebook Ads, and e-Newsletter. To optimize the right channel, Author also calculate the Cost Volume Profit in every channel.

Table8 Brodo Contribution Margin Ratio per Channels

No	Channel	Contribution Margin Ratio
1	Google Ad-words	64%
2	Facebook Ads	46%
3	e-Newsletter	85%

Source: Brodo Company Data, 2015

Conclusions

Based on table above, e-Newsletter has the highest contribution margin ratio. With other data says that e-Newsletter have the lowest Cost per Acquisition, Rp. 30,555 and the highest

Conversion Rate in Brodo Paid channel, 2%, Brodo have to optimize their digital marketing strategy in Email marketing.

Email marketing is a marketing tool to stay connected with existing customers while also encourage them to come back and do next purchase. With email database that Brodo already have, the solution is to use Email marketing for increasing customer repeat purchase. Repeat purchase is the next important step after they did the first purchase. And is always easier and cheaper to keep existing customer than acquire new customers. A business have to ensure that existing customer have positive experience with the brand or products.Successful business in *e-commerce* industry like Amazon have a steady base of returning customers to grown the revenue and Amazon do this by implementing techniques like free shipping on orders. Amazon deliver the promotion through email marketing and keep them coming back with it.By using email marketing, Brodo team could easily connected with the existing customer and it will bring them to memory of Brodo products. Deliver the best content and do segment targeting in delivering email marketing is important. In email marketing we could easily create segmentation of each character of the existing customer.

Set the goal is very important, it would be the key in finding tactics. For email marketing, the main goal is to ***increase first transaction and repeat transaction.*** By knowing the goals, it help the team find the tactics to achieve business growth.At this moment, Brodo already have 80,000 email subscribers with 37.5% are customers who already purchased. It brought 224 transaction per month with average open rate 14% and Conversion rate 2%. To increase repeat purchase, Brodo need to also increase number of subscribers. The more subscriber they have, the more repeat purchase will occur. To compete with other big *e-commerce* that spams customers inbox with daily even twice a day updates hard selling fully discounted promotion, Brodo need to investing in smart way. They way is by providing engaging thoughtful high quality content, while also doing promotion activities. To achieve that goal, below are **the tactics** as follows: increase number of subscribersby offering benefits or rewards and create high quality content with personalized thoughtful promotion

Understanding the audience will helped the content creator in making the right content. Brodo team have to know their behavior toward Brodo email marketing, what they want to know when they saw email from Brodo. By understanding the audience, it effects in the result of Open Rate and Conversion Rate from email marketing. The more the content matching with their need, the better the result, converting into transaction in the last. Personalization is one the key to winning the competition in this digital year. By doing personalization in email marketing, the message will be more engage with audience and it will lead to the main goal, transaction. Brodo already knows that twice a week is the best frequency for their business. Now, it's time to optimize the content that Brodo will deliver. Delivering content based on their post activity in the website is the best way. There are three kinds of email in *e-commerce*'s customer lifecycle from Ometria Academy that have to be adapted in Brodo's Email Marketing strategy:Welcoming email, Behavior-Triggered email, Post-purchased experienced. To deliver the right content, Brodo have to make tactic based on goals that have to be achieved.

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MEANING OF CORPORATE SOCIAL RESPONSIBILITY FOR PUBLIC RELATIONS PRACTITIONERS IN BANDUNG

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ABSTRACT

Research entitled Meaning of Corporate Social Responsibility for Public Relations Practitioners in Bandung. The purpose of this research is to examine the motives of Public Relations practitioners in the corporate social responsibilities activities and to explore the meaning of corporate social responsibilities for Public Relations practitioners.

The method used in this research is qualitative with natural descriptive explanatory orientation of research objects in natural and holistic way. The result of this research concludes that there are two motives to initiate corporate social responsibility for public relations practitioners: because motive and in order to motive. Because motive is a motive, which have an orientation to the past of its actors through their experiences. Based on the interviews conducted, moral drive is one of the motives as they feel the empathy towards the surroundings that need assistance. In order to motive is a motive, which associated to the objective of every human action. The purpose of every individual action is a subjective action referred to the objective motive that every individual done, which gone through inter-subjectivity process by using face to face interaction between individuals. Some of the public relations practitioners have motives of initiating CSR activity in order to get a positive image and complying to the government rules.

The meaning of corporate social responsibility according to PR practitioners are as follows: CSR is a philanthropy activity; CSR is one of the strategies to improve company's image, which will affecting financial performance of the company. The suggestion can be given from this research is that PR practitioners, who has no experience in CSR should be given a workshop on CSR. Other suggestion is that government should work with companies in a sustainable CSR activities.

Key words: Corporate Social Responsibility, Public Relations, Bandung

INTRODUCTION

Research Background

Recently there has been an increasing trend of public demand on transparency and accountability as one of the implementation of good corporate governance (GCG) along with corporate social responsibility (CSR). In this globalization era, the awareness of CSR implementation becomes crucial as public understanding on environmental friendly products is rapidly increasing.

Currently, CSR is considered to be a future investment for the company. The interests from investors in contributing their fund are higher towards the company, which has already implemented their CSR program. Through this program, usually done by Public Relations, an effective communication and harmonic relationship with public can be attained.

The role of Public Relations in the global competition becomes increasingly more strategic in country, organizational, and institutional scale. Global dynamic bring about the competition spirit for countries and also professions in all sector of life. Current globalization cannot be refrained and it will continue its growth, as economical cooperation bilaterally or regionally has eliminates geographical borders and creates an impression of limitless working environment, which in the end affected all available professions including public relations.

Public Relations profession in Indonesia has already establish Draft on National Standard of Working Competency (or RancanganStandarKompetensiKerja Nasional – RSKKNI) on Public Relations. All the high-ranking government officials, from the President, Vice-President, Minister of Communication and Information, have fully understood and foreseen this matter.

In the organizational and institutional scale, Public Relations strategic role is increasing significantly, not only in building image and reputation but also contributes towards a proficient organizational and institutional management. The fact that Public Relations is an emerging profession, especially in Indonesia, enablesevery body to enter the profession regardless their educational background, causing a new problem of not having a standardized practice and ethical code in the profession.

Public Relations profession, especially in a rapidly growing Indonesian economy, urgently needs a standardized competency. A detailed standard of how a public relations practitioner would be able to reach a professional knowledge, skill, and attitude, should be made and implemented.

Public Relations as a profession is still in a debate stage compared to Public Relations as a public knowledge. Public Relations practitioners are required to be more professional in implementing good governance value in organizational and institutional management. While it is a necessity to implement good governance for Public Relations practitioners, it is important to recognize that Public Relations practitioners do not yet obtain the dominant position in decision-making, especially in public relations strategic position.

Every form of institution and organization has always been establishing Public Relations activities; the PR department of an organization or institution becomes the pivotal point

for information and communication media in interacting towards its public. The occurring problem is how public relations' practitioners construct of meaning towards Professional Public Relations, in line with the job description given by the organization or institution. The result of the observation in Indonesia shows that there is a discrepancy in interpreting the meaning of Professional Public Relations in organization and institution, i.e. comparing function and responsibility of professional public relations in banking, hotel, and hospital will resulted in a diverse kind of perspective.

Based on that, Public Relations practitioners in Indonesia should exhibit self-actualization to become a professional without neglecting their work and responsibilities. The existence of Professional Public Relations practitioners, who can respond to a highly competitive contemporary world,can be considered to be a connecting thread towards corporate social responsibility activities of a particular company, institution, and organization.

Problem Formulation

Based on the background of the problem mentioned above,
the problem of this research can be formulated as " What is the meaning Of Corporate Social Responsibility For Public Relations Practitioners In Bandung?"
The problem identification can elaborate as follow:

1. What is the purpose of Department of Public Relations in a company to establish corporate social responsibility activity?
2. How do public relations practitioners perceive corporate social responsibility?

Literature Review

Corporate social responsibility according to World Business Council on Sustainable Development (WBCSD) is a commitment from the company to have behavioral ethics and to have contribution towards sustainable economic development. Other commitment including: increasing life quality of employees and their families, local communities, and public as a whole. The harmony between company and surrounding public can be achieved with full commitment from the top management on CSR implementation acting as public accountability.

One of the main Good Corporate Governance (GCG) principal is responsibility, which can be elaborated as how the company able to manage current government regulation along with healthy corporation principles. Recently there are three public interests that tend to be ignored by some companies.

Firstly, company tends to have legal responsibility towards its stockholders while public surrounding the location of the company tends to be ignored. Secondly, negative effects produced by the company are increasing, in which surrounding publics would have to feel the impact, while the positive outcomes can only be enjoyed by some of the company's stockholders. Thirdly, publics surrounding the location of the company, as victims, are having difficulties to demand compensation for the damage that the company had done. This

is caused by less transparent regulations on accountability and the obligation of the company towards the public.

Other than responsibility towards stockholders, company also has some other responsibilities such as corporate social responsibility and sustainable environment responsibility. The reformation era, which the increased of openness is one of the elements can be seen; companies ought to have increased their concern on their environment and surroundings. Company, which has not involved themselves towards their social surrounding and environment, will face a great deal of issues, such as: public rallies against them or even worse being closed down by authority.

Nowadays, one of the transparency tools that already implemented is financial audit, while environmental audit is already developed in some companies, and someday there is nothing would able to prevent social audit to be implemented. New company to be considered as growth and sustainable company would not be measured solely on its profit, but it is also measured by its concern and awareness towards its environment and surrounding, whether it is a local community or natural environment.

Based on that notion, triple bottom line model, which consists of profit, people, and planet (3P), are being implemented, as company reports should have those three aspects including social and environmental aspects (Carroll in Rusdianto,2013;8)

There are two elements that drive a company to initiate CSR program; external and internal drivers. External drivers include regulations, laws, and environmental impact analysis. Government through Ministry of environment has regulates a PROPER audit (PROPER stands for *Program PenilaianPeningkatanKinerja Perusahaan* or Company's Increasing Performance Assessment). Internal drivers are especially originated from the behavior of owner and management of the company, including community development responsibility.

There are four benefits in implementing CSR for the company. First, the existence of a growing and sustainable company through CSR by receiving a positive image from the whole public.Second, gaining easier access to investment capital. Third, maintaining a number of quality human resources. Fourth, increasing critical decision making and easier in managing risk (risk management).

Objective and Benefit of Research

Research objective

The objective of this research is to examine problems within corporate social responsibility area especially in Public Relations subject, as follows:

1. The background of a company implementing corporate social responsibility.
2. The understanding of corporate social responsibility according to Public Relations practitioners.

Benefit of Research

Theoretical use:

1. Comparing the theory of corporate social responsibility with the reality of its implementation.
2. Collecting empirical data in developing corporate social responsibility

Practical use:

1. To bring up some advises for the company in implementing corporate social responsibility.
2. To explain the basic picture of corporate social responsibility in Bandung, to become the base of further research.

Research Method

This research uses qualitative method, accommodating a natural descriptive data explanation on research object in a natural and holistic approach, as developed from the paradigm of Edmund Husserl (1859-1938).

The use of qualitative method is based on the purpose of this research to understand the corporate social responsibility phenomenon through Public Relations perspective. It can be said that research in social world orientation, cored itself on the interpretation of subject, which is more suitable for qualitative method. It is crucial to use it, as qualitative method, according to Denzin and Lincoln (in Creswell, 1998:15),study things in their natural settings, attempting to make sense of or interpret phenomena in terms of the meanings people bring to them.

Qualitative research has a flexible and open characteristic, with inductive analysis approach (*empirico inductive*), which is applied to this research. The reality context on this research has the same attributes with phenomenology research paradigm, i.e.: a relative reality (a reality is particularly constructed and has a local elements), subjective (composing knowledge based on findings in the field including the interaction process between researcher and key informant). The methodology applied has a dialectic feature, which purpose is to retain experience and perspective.

Garna(1999;34) added that some terms in qualitative approach may include naturalistic qualitative research or scientific research, ethnography, ethnomethodology, case study, and phenomenology. As for this research, it is a phenomenological approaches that being used.

Result and discussion

The followings are the result of this research on corporate social responsibility construction of meaning. The discussion based on the interviews conducted to five key informants from public relations practitioners coming from PT. KeretaApi Indonesia (Government owned Indonesian Train Company), Horizon Hotel, Hasan Sadikin State Hospital, West Java Provincial Government, and PT. Telekomunikasi Indonesia (Government owned Indonesian

Telecommunication Company). The results reveal different motives and meanings on corporate social responsibility activity.

The relations between public relations practitioners and their publics are social acts that can be explained as a relation in which meanings are being exchanged and distributed among them in an inter-subjectivity way. Social activity, among public relations practitioners and their publics, has an orientation towards matters that caused the act being chosen. Based on that concept, the motives generated, would have a past and future orientation.

Motive is the configuration of meanings as a platform to act, which makes it important in every informant's action. Schutz (1967:86) divides motives into two: in order to and because motive.

Because motive is a past oriented motive, which refers to the past experience of an actor (a subject, for this matter). Through interpreting other people act, an individual would be able to change the next act in correspond to other individual's act, by recognizing meaning, motive, and purpose of the others. According to Weber to understand motive and meaning of human being's act it is essential to know the purpose of it, which is a subjective act referring to in order to motive going through inter-subjectivity process through face to face interaction between individuals. According to Kuswarno (2009:192) motive is the urge to set up a decision to act, which is consistently conducted by individual, while because motive is the reason transpired in taking a particular action.

After going through bracketing and typified process, five key informants revealing their motives, which are in order to motive and because motive. Public relations practitioners who have because motive are the one who has the reason coming from their moral conscious and empathy towards financial/material problems affecting public around them. While the practitioners who have in order to motive are the one who implementing CSR for the sake of government regulation and positive company image.

Corporate social responsibility is being regulated by Indonesian government through UU no.40 2007 (Law no 40 year 2007) stated that limited liability company has an obligation to implement social and environment responsibility act. Furthermore it requires that company have an annual compulsory report on the implementation of the CSR implementation.

Pro and contra on the Law is still occurring until today, some contra parties stated that the law is a burden, particularly the sanction on the company, and also the image of Indonesian government neglecting some of its responsibility towards public by imposing it into companies all across Indonesia. Despite the pro and contra fact, the CSR implementation in Indonesia is increasing, both in quality and quantity, with varied implementation and bigger financial contribution.

Public relations practitioners interpret the meaning of corporate social responsibility as a philanthropic act and a strategy in improving company's image. After the New Order taken down and the reformation era taking over, CSR are rapidly increasing as big companies are "competing" in giving away charity such as when natural disaster occurred. Those facts above are about some companies in Indonesia implementing CSR, which are suspected using a

philanthropy-capitalism, a capitalism practice on CSR disguised as a charity. The indicators of philanthropy-capitalism, according to research, are as follows: (1) The CSR management is a foundation, which is founded by the company, where the capital are being thrown back to the company, (2) the receiver of CSR cannot decide on program being implemented, (3) the CSR implementation agenda is being decided by company. (4) Government regulation on CSR based on CSR implementation of a company.

Other than philanthropy, a CSR implementation is seen, by public relations practitioners, as one of the strategy in building a positive image for the company, which in line with what Canton (in Soemirat and Ardianto, 2008:111-112) suggests that image is the impression, the feeling, the conception which the public has of a company; a consciously created impression of an object, person, or organization.

Conclusion and Suggestion

Conclusion

1. There are two motives in why public practitioners implementing CSR, which are because motive and in order to motive.
   a. Because motive is a past oriented motive, which refers to the past experience of an actor (a subject, for this matter). Based on the interviews conducted, the motives are moral conscious and empathy towards financial/material problems affecting public around them.
   b. In order to motive is a subjective act referring to in order to motive going through inter-subjectivity process through face-to-face interaction between individuals. Some informants show the motive in creating positive image and following the government rules.
2. Some public relations practitioners have a perspective in seeing CSR as a philanthropy activity, while others interpret the meaning as a strategy to increase company's image, which affected the financial performance of the company.

Suggestion

1. Public relations practitioners who have no experiences in CSR should be made available for training on CSR.
2. Government should cooperate with companies in implementing a sustainable CSR.

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THE INFLUENCE OF OIL PRICE, GOLD PRICE, US BOND INTEREST, AND JSX INDEX TO RUPIAH – US DOLLAR RATE MOVEMENT

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ABSTRACT

As a part of global economic community, Indonesia is influenced by the movement of several economic factors. It is believed that economic condition of the country can also be measured through its exchange rate movement. The volatility of exchange rate movement in several countries, and especially in Indonesia, could give a huge impact to purchasing power of the society and also to political tensions. For those reasons the purpose of this research is to measure the influence of several variables' movement such as oil price, gold price, US bond interest, and also Jakarta stock exchange (JSX) index to Rupiah – US dollar rate movement. Some researchers found some variables have significant influence, while other researchers found some variables do not have significant influence. Using purposive sampling this research found that oil price, gold price and US bond interest have a significant influence to Rupiah – US dollar rate movement, while JSX index has an insignificant influence.

Keywords: *Exchange rate, oil price, gold price, US bond, JSX index .*

1. Introduction

As a part of the agreement with ASEAN Economic Community (AEC), Indonesia's trade with other ASEAN countries will become quota free and duty free. Generally, each country wants to improve the competitiveness of its industry in order to increase exports while in the same time decreasing the import. One of the critical successes of a country's competitiveness is the stability of exchange rate. Volatile exchange rate will confuse investors and lead them to postpone their investments. Furthermore, determining the selling price of goods will become more difficult that lead buyer and seller to suspend their transactions. Because there are some differences of opinion in concluding the variables that significantly influence the exchange

rate then this paper reexamine quantitatively the influence of variables such as the oil price, gold price, US bond interest, and JSX index against the IDR (Rupiah) -USD exchange rate.

2. Theoretical Framework and Hypothesis

Some research findings that discuss the relationship between oil prices to the exchange rate are:

Research by Lizardo and Mollick (2010) which concluded increases in real oil prices lead to a significant depreciation of the USD against net oil exporter currencies, such as Canada, Mexico, and Russia. On the other hand, the currencies of oil importers, such as Japan, depreciate relative to the USD when the real oil price goes up. The same conclusions obtained by Ghosh (2011), which study reveals that an increase in the oil price return leads to the depreciation of Indian currency vis-à-vis US dollar. His study also establishes that positive and negative oil price shocks have similar effects, in terms of magnitude, on exchange rate volatility and oil price shocks have permanent effect on exchange rate volatility. The same result suggest by Narayan et al (2008) who argued between the period 2000–2006 oil prices leads to an appreciation of the Fijian dollar vis-à-vis the US dollar. On the contrary another researches study suggest that real oil price shocks would lead to a minor appreciation of the long-term real exchange rate due to China's lesser dependence on imported oil (Huang and Guo ,2007). Roberedo (2012) also suggests that there is no extreme market dependence between oil prices and exchange rates, his findings have important implications for risk management, monetary policies to control oil inflationary pressures or exchange rates, the dollar-pegging policies of some oil-exporting countries and fiscal policy in oil-exporting countries in general.

Some research findings that discuss the relationship between gold prices to the exchange rate are:

Research by Ciner et al (2013) which study show that gold price increases significant when there is an extreme decline in the value of the dollar index. A similar argument made by Capie et al (2005) who also suggest A negative, typically inelastic, relationship is indeed found between gold and these exchange rates, but the strength of this relationship has shifted over time. A slightly different opinion says by Sujit and Kumar (2011), their research conclude most of the variables taken in their study affects exchange rate in some way or the other, out of which gold plays an important role with largest variation of 10%. However, gold price in euro turned out to be less affected by the index taken.

Some research findings that discuss the relationship between stock price index to the exchange rate are:

Research by Tsai (2012) indicates that the negative relation between stock and foreign exchange markets is more obvious when exchange rates are extremely high or low. The same conclusion reveal by Granger et al (2000) that suggest data of Philippines' stock price

index lead exchange rates with negative correlation, while data from Hong Kong, Malaysia, Singapore, Thailand, and Taiwan stock price index indicate strong feedback relations. Data from Indonesia and Japan stock price index fail to reveal any recognizable pattern. Kim (2003) also found that the S&P 500 stock price is positively related to the industrial production but negatively to the real exchange rate, interest rate, and inflation. However, different conclusion found by Phylaktis and Ravazzolo (2005) which their evidence suggests that stock and foreign exchange markets are positively related and that the US stock market acts as a conduit for these links. Another finding reveal by Oskooee and Sohrabian (1992) that conclude the empirical results show that there is bidirectional causality between stock prices measured by S&P 500 index and the effective exchange rate of the dollar, at least in the short-run.

Some research findings that discuss the relationship between US bond interests to the exchange rate are:

Research by MacDonald and Nagayasu (2000) found evidence of statistically significant long-run relationships and plausible point estimates relationship between real exchange rates and real interest rate (RERI). The conclusion in line with Andersen et al (2007) results who confirm previous unconditional rankings suggesting that bond markets almost uniformly react most strongly to macroeconomic news, followed by foreign exchange and then equity markets, importantly when conditioning on the state of the economy the foreign exchange and equity markets appear equally responsive. But Ehrmann et al (2005) found euro area short rates and equity markets are relatively more affected by bond yields and exchange rates as compared to US markets.

The hypotheses are:

H0: There is no significant effect of oil price, gold price, the JSX index, or US bond interest, either partially or simultaneously to IDR-USD exchange rate.

Ha: There is a significant effect of oil price, gold price, the JSX index, or US bond interest, either partially or simultaneously to IDR-USD exchange rate.

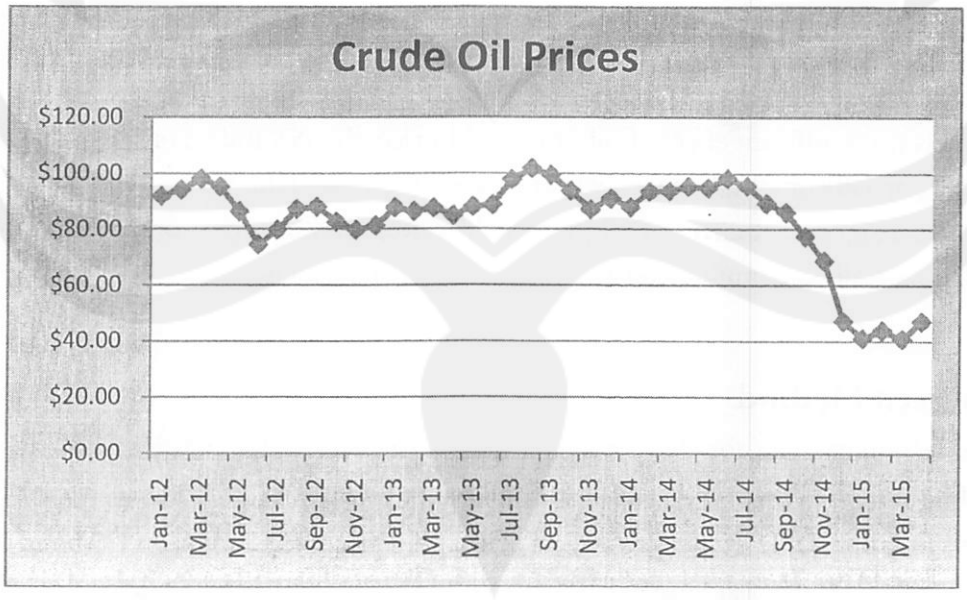
3. Research Method

I use secondary data for this research which provides by The World Bank.org. Using systematic sampling several variables are retrieved from January 2012 to April 2015. Those variables are: IDR-USD exchange rate, oil price, gold price, JSX index, an US bond interest. The first variable used as dependent variables while the others used as independent variables to form a multivariate regression. This research use explanatory study and descriptive method with 5% significance level for the t-test.

4. Data Analysis and Discussion

From Graph Of The Monthly Movement of Crude Oil Prices we can see that oil prices fluctuate from January 2012 to December 2015. The nosedive declining in oil prices began in September 2014 in which the lowest level occurred in the month of January 2015. When finishing this paper oil prices remained below the level of USD 30 per barrel. The decline in oil prices increases the exchange rate of USD to make countries which have debt in the form of USD experience deficit payments. In this respect Indonesia's foreign debt is mostly denominated in USD also experienced the same thing. Indonesia government need more IDR to pay debts denominated in USD if the USD strengthens, the impact of this situation in Indonesia is the government trying to attract increasing taxes and reducing subsidies for the community. On the other side the declining in oil prices benefit the people of Indonesia as gasoline prices are getting cheaper so as to reduce expenses and improve mobility. For the Indonesian government declining oil prices is also useful to suppress the inflation rate and maintain political stability, but on the other hand USD currency strengthened as a result of the decline in oil prices will also push the exchange rate of IDR against USD. The solution of this problem is the Indonesian government must capitalize on the momentum of the declining of oil prices to increase labor productivity, curb inflation, and increase exports so that the exchange rate of S will be able to strengthen against other currencies, especially the USD.

Graph below is the price movements of crude oil from January 2012 until March 2015:

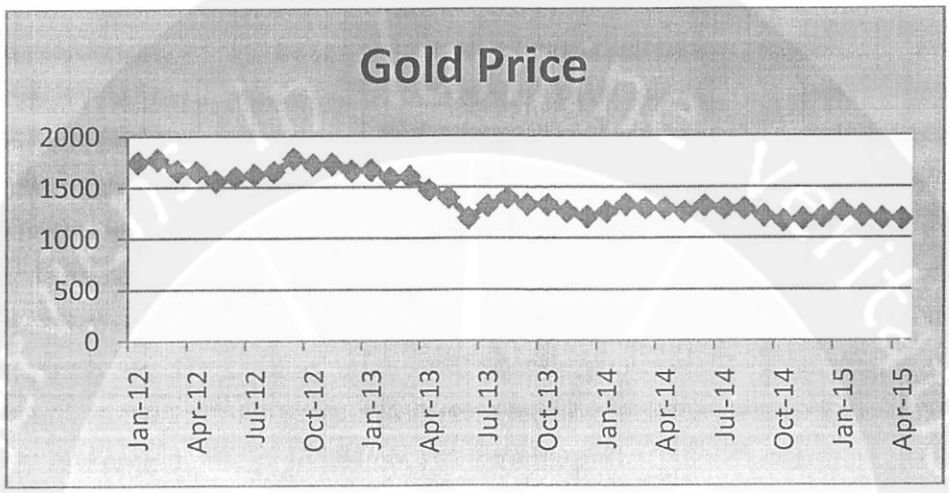


Picture 1. Graph Of The Monthly Movement of Crude Oil Prices

From Graph of Picture Of The Monthly Movement of Gold Prices, we can see that gold prices tend to decrease from the month of January 2012 until the end of 2015. The declining in the gold price is in line with the existing theory that investors will purchase USD when

the price of gold declined and sell gold when the USD has strengthened in value. When the economic crisis occurred in the US in 2008 the price of gold shot up as investors confused where to invest. When the stock prices of the major stock market collapse in the United States, gold have been the choice of investor to secure the value of their assets. This is because gold has long been considered a safe haven when the value of the currency or the value of the share is uncertain.

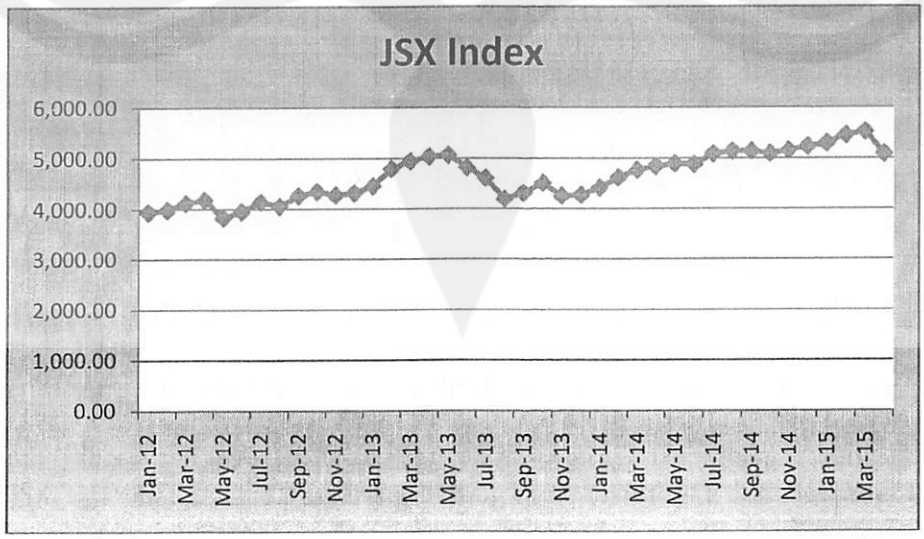
Graph below is the price movements of gold from January 2012 until March 2015:



Picture 2. Graph Of The Monthly Movement of Gold Prices

From the graph of JSX index we can see that the stock index has a tendency to increase, but in certain months there was a decrease in the index as contradictory with the rise in gold prices. This is due to lower USD exchange rate and the rising price of gold resulted in investors will sell shares on the JSX and then they will buy gold. So allegedly IDR-USD exchange rate has an influence on the JSX index JSX index and not vice versa.

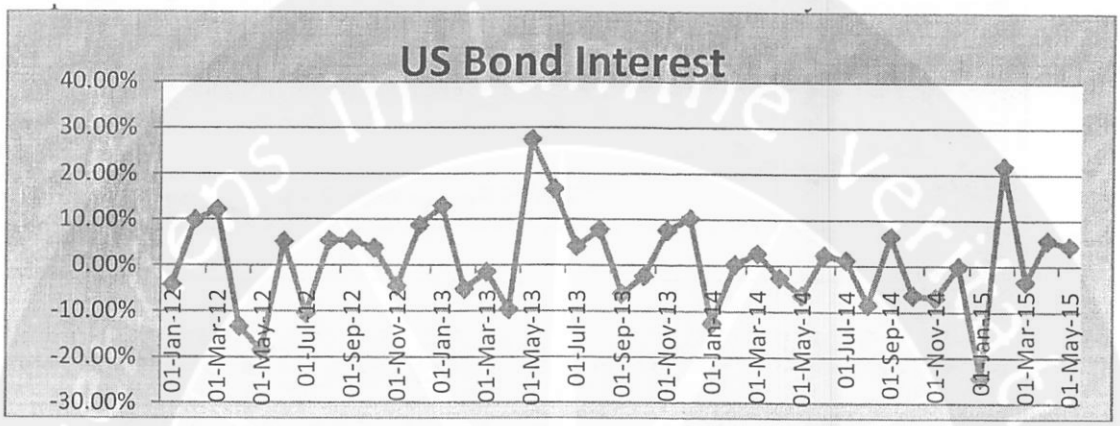
Graph below is the movements of JSX index from January 2012 until March 2015:



Picture 3. Graph Of The Monthly Movement of JSX Index

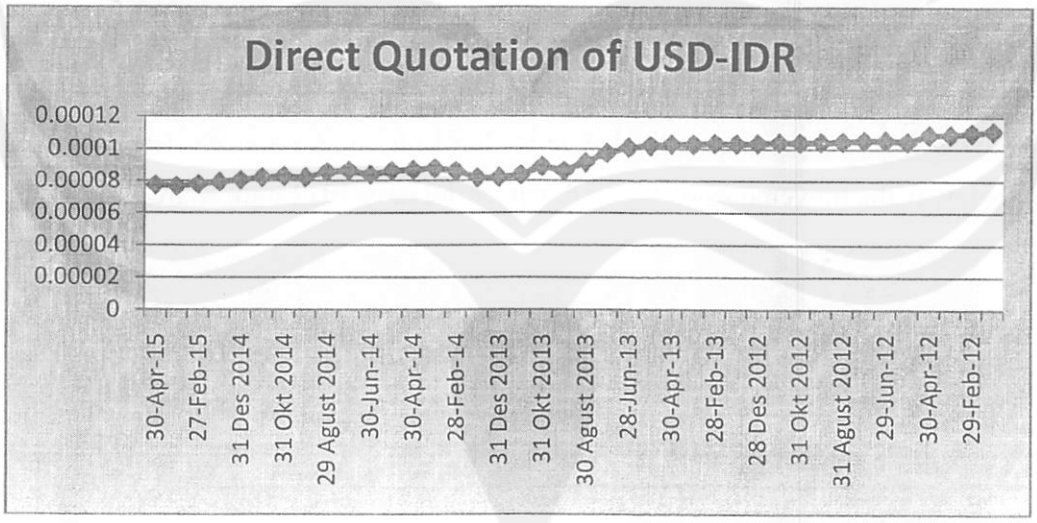
From the graph US Bond Interest we can see the movement of volatile interest rates, but empirically analysts and businessmen expressed US Bond Interest has a significant influence on the exchange rate of USD against other currencies. This is due to rising interest rates will make investors to redeem the bonds to other currencies to the USD and buy bonds in the United States. Bonds in the United States is still considered to be safer than bonds in other countries and developing countries.

Graph below is the movements of US bond interest from January 2012 until March 2015:



Picture 4. Graph Of The Monthly Movement of US Bond Interest

Graph below is the movements of direct quotation USD-IDR exchange rate from Jan 2012-March 2015:



Picture 5. Graph Of The Monthly Movement of Direct Quotation USD-IDR

This study uses a direct quotation of USD-IDR by reason of the uniformity of the use of currency, as gold prices, and the price of crude oil also in US currency.

From the table below we can have several conclusions:

- ✓ The equation which suitable is: IDR-USD EXCHANGE RATE = 14222.16 -2.192888 GOLD PRICE + 0.052379 JSX INDEX - 44.353 OIL PRICE + 1521.147 US BOND INTEREST + μ
- ✓ Adjusted R-squared 0.868703 means the independent variables can explain 86.87% variation in the dependent variable, and 13.13% variation in the dependent variable must be explained by others.
- ✓ F-statistic with significant value 0 (zero) means all independent variables affect simultaneously against IDR-USD exchange rate.
- ✓ Gold price, oil price, and US Bond interest have p-value less than 1%, which means partially those variables significantly affect IDR-USD exchange rate.
- ✓ JSX index partially has no significant effect to IDR-USD exchange rate.

Variable	Coefficient	Std. Error	t-Stat	Prob.	
C	14222.16	2774.845	5.125391	0	
GOLD_PRICE	-2.192888	1.040125	-2.108293	0.0422	***
JSX_INDEX	0.052379	0.269851	0.194102	0.8472	
OIL_PRICE	-44.353	8.948397	-4.95653	0	***
US_BOND_INTEREST	1521.147	441.8443	3.442721	0.0015	***
R-squared	0.882169	Mean dependent var		10901.65	
Adjusted R-squared	0.868703	S.D. dependent var		1319.438	
S.E. of regression	478.0981	Akaike info criterion		15.29398	
Sum squared resid	8000224	Schwarz criterion		15.50509	
Log likelihood	-300.8796	Hannan-Quinn criter.		15.37031	
F-statistic	65.50892	Durbin-Watson stat		0.927159	
Prob(F-statistic)	0				

Table 1. Statistic Result for the Dependent and Independent Variables

Note:

***p-value less than 1%
** p-value less than 5%
* p-value less than 10%

5. Conclusion

Gold price has a negative influence on the IDR-USD exchange rate, when the USD weakened investors will buy gold to secure the value of their assets and vice versa.

The influence of JSX index on the IDR-USD exchange rate is not significant because allegedly capital market in Indonesia is affected by IDR-USD exchange rate not vice versa, and it is controlled by foreign investors. So when the USD is weakening foreign investors will invest in JSX, but when the USD is strengthening these investors will make profit taking and invest their money in the USA.

Oil price has a negative influence on the IDR-USD exchange rate because as the oil consuming nation, payment in USD will be used more to pay the price of oil is rising, otherwise when world oil prices were declining, oil consuming nation would be uses less of currencies USD to buy oil. This will affect the strengthening or weakening of the country's currency against the USD. And as we know the USA is the country's largest oil consumer in the world.

US bond interest has a positive influence on the IDR-USD exchange rate because when US' interest rates increases the investors will invest in US, it will strengthen the value of USD against other currencies and vice versa.

From all of those variables, US bond interest has the biggest influence against the IDR-USD exchange rate, being followed by the oil price and gold price. It means that both the policy makers and the investors should pay a special attention to the movements of the US bond interest.

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ACHIEVING SERVICE EXCELLENCE THROUGH DYNAMIC MARKETING CAPABILITY MODERATED BY MARKETING COMMUNICATION IN HOSPITALITY INDUSTRIES-A CONCEPTUAL MODEL

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ABSTRACT

Hospitality industry in Indonesia has shown significant growth and gain greater attention in today's business environment. During the year 2001-2014, the hospitality industry has an average growth rate of 6.98%. The average contribution of the hospitality sector to total Gross Domestic Product based on year 2000 constant price and current price during 2004-2009 amounted to 0.69% and 0.5%. Though growing, the hotel industry faces new challenges due to external and internal factors in a business environment that affect service excellence and performance. The main issue of hospitality industry in Indonesia is intense competition among star hotels and non-star hotels. This intense competition occurs because of excess supply of hotel, regulations in terms of hotel development and service standards, and global competition where the hotels with an international network to invest in several potential areas. The research aims to study the phenomenon of synergy between dynamic marketing capability and service excellence, to determine and confirm the factors in marketing communication that influence service excellence in the context of Indonesia hotels ranging from 3-star to 5-star. The results of this study can be used to further boost the hospitality industry. The objectives of the study are: to examine the relationship between dynamic marketing capability and service excellence moderated by marketing communication.

Keywords: Dynamic marketing capability, marketing communication, service excellence, hospitality industry

Introduction

Hospitality industry in Indonesia has indicated critical development and increase more noteworthy consideration in today's business surroundings. From the year 2004-2008, the hotel industry has a normal development rate of 5.76% (BPS, 2010). The normal commitment of the hospitality segments to aggregate Gross Domestic Product taking into account year 2000 consistent cost and current cost amid 2004-2009 added up to 0.69% and 0.5%. Hospitality industry is firmly identified with tourism. The tourism industry contributes the quantity of sightseers who possess the hotels. In 2006 Indonesia's tourism industry positioned 6th regarding foreign exchange profit capability of the 11 send out products. In 2009, this position rose to number three. Statistics by the Ministry of Culture and Tourism of Indonesia demonstrated that there were 6,452,259 foreign voyagers went by Indonesia in 2009 contrasted and just 5,321,165 in 2004 (BPS, 2009). The quantity of foreign visitors going to in 2010 added up to 7,000,571 or around 8.5% development contrasted with that of in 2009. Indonesian tourism receipts have expanded from U.S. $ 4797.90 million in 2004 to U.S. $ 6297.99 million in 2009 and U.S. $ 7,600.00 million or Rp.63 trillion for 2010. For 2011, the Ministry of Culture and Tourism will focus on the quantity of foreign vacationer added up to 7.7 million people groups. A comparative inclination can be found in various hotels and hotel rooms. In 2003 there were 263,469 spaces for star-hotel and non-star hotel, while in 2009 there were 334,817 rooms accessible in Indonesia. As far as the quantity of hotels accessible, there were 1,240 star hotels and 12,692 non-star hotels in 2009 contrasted and 1,014 star-hotels and 9,847 non-star hotels in 2004 (BPS, 2009). These statistics demonstrate that the hotel industry in Indonesia is developing.

Despite the fact that developing, the hotel industry confronts new difficulties because of outside and inner elements in a business situation that influence performance. Outside variables incorporate extreme competition from contenders alike. The fundamental issue identified with the neighborliness industry in Indonesia is the extreme competition among star hotels and non - star hotels. This serious competition happens in light of abundance supply of hotel, controls as far as hotel improvement and service benchmarks, and worldwide competition where the hotels with a global system to put resources into a few potential regions. To make due in the business competition and qualify the operational, the hotel occupancy rate ought to be at any rate of 40% (Interview session with administrator PHRI West Java, 2015). The occupancy rate of hotel staff to gauge achievement in drawing in guests to a specific hotel and is measured by the quantity of rooms sold isolated by number of rooms accessible. Insights distributed by the Central Bureau of Statistics demonstrate that from year 2004-2009, the normal occupancy rate was just moderate going from 44.98% to 48.31% (BPS, 2009). At present, so as to survive, hotels in Indonesia performed a restricted promotion; local people don't have a system or universal participation and indicated constrained service development. In competition, the hotel industry ought to have the capacity to offer innovative services to guests and do the best possible promotion strategy as per its business sector fragment.

Dynamic Marketing Capability

Dynamic marketing capability (DMC) idea emerges from the strategic management theory and gives another translation on how companies in the environment that change quickly get their competitive advantage (Winter, 2003; Teece et al., 1997). The stress in the resource-based strategy literature is presently on the creation and exploitation of dynamic capabilities. While dynamic capability by and large is the capacity to create new resources in changing markets, dynamic marketing capabilities are the ability to create new marketing resources to identify, respond to and exploit change. For example, in using the technology for customer's database to facilitate the hotel to serve their market target or combining the artists and designers to design the hotel's amenities. Guaranteeing evolutionary fit between market needs in a dynamic competitive environment and market offers is the quintessence of effective strategic marketing. As indicated by the typology recommended by Wang and Ahmed (2007), Hooley et al. (2008) grouping dynamic capabilities into three principle sorts: absorptive, adaptive, and innovative capability.

"Absorptive capabilities are the processes that enable firms to recognize the value of new information from the market and to assimilate it. These processes focus on knowledge acquisition and assimilation" (Hooley et al., 2008:166). The absorptive capabilities comprise of two capabilities, for example, market sensing and learning. Market sensing is a firm's ability to take in their customers, collaborators, and rivals to sense, process, and use data and in addition to act persistently on trends and events in prospective and present markets (Day, 1994; Kok et al., 2003). Particular capabilities incorporate the ability to embrace (or viably commission) marketing research and competitor analysis, and the ability to guarantee dissemination of the ensuing information all through the organization as a premise for decision making. Market sensing infers being near the customer, encountering products and services in the same way that the customer encounters them. Firms working in B2B markets may have specific customers that they are particularly close to whom they will discuss new product development opportunities with.

Learning capability empowers firms to keep up long-term competitive advantages over opponents, to make due in dynamic and competitive environments, and to be responsive to acquiring and assimilating external knowledge (Hooley et al., 2008). Learning empowers to recognize new opportunities, take into account redundancy to incorporate information from the external environment in quest for improved effectiveness (Zollo & Winter, 2002).

Hooley et al. (2008:168) said that *"adaptive capabilities center on the firm's ability to identify and capitalize on emerging market opportunities. Adaptation implies doing things differently in response to external stimuli"*. Market targeting and positioning capabilities incorporate the ability to identify alternative opportunities and afterward select appropriate market target, where the firm's resources and capabilities are adjusted for the best impact. Positioning is not only a marketing decision, notwithstanding. In adjusting resources and capabilities to changing markets, the competences of all parts of the business (including operations, finance

and R&D) and marketing need to be considered. As market change, so might the positioning adopted need to change. Grant (1996) stated that capabilities coordinate tasks and also present a functional dimension. In this respect, marketing represents an important area of functional knowledge in a firm's value chain (Grant, 1991). Zollo and Winter (2002) stated that dynamic capabilities are different from operational capabilities. Marketing capabilities help firms acquire a living in harmony by satisfying current customers, exploiting existing products and distribution channels, and promoting existing brands. Day (1994), for example, keeps up that channel bonding is a marketing capability that fortifies the association with wholesalers. Danneels (2002) found that a particular sort of marketing capability that he calls customer competence permits firms to serve certain customers. Dynamic marketing capabilities, rather, help firms at present transforming from their stationary process. Actually, dynamic marketing capabilities are particularly centered around discharging and incorporating market knowledge that helps firms evolve. Under dynamic marketing capabilities, this study intends to incorporate what others have marked market sensing (Day, 1994), learning (Zollo and Winter, 2002) and market targeting and positioning (Hooley et al., 2008).

Innovative marketing capability consist of new product and service development capability. The innovative marketing capability is the ability to innovate and develop the up and coming era of goods and services is the backbone of any organization. Hooley et al. (2008:168) said that *"effective new product development requires both an outside-in (customer sensing) capability and appropriate R&D skills. It relies on multidisciplinary inputs from marketing, R&D, finance, operations and other functional disciplines"*. This study just embraces the absorptive and adaptive capability.

Service Excellence

Organizations are increasingly providing service excellence as an integral part of their superior service to win the customers' hearts and stay competitive in the market (Berry & Parasuraman, 1992). Service excellence, which is viewed as being "easy to do business with" (Johnston, 2004), delivers promises and is as an expression of very high satisfaction (Oliver, 1997). This suggests that the service organization does not only need to satisfy the customers but has to delight them as well (Aziz & Wahiddin, 2010).

Service excellence in this study is based on service process and delivery, service-scape, customer participation, and customer responsiveness. Flexibility and customization in service process and delivery are highly appreciated by customers (Bettencourt & Gwinner, 1996). Well planned and designed service delivery may directly contribute to the whole service excellence. Servicescape is related to the style and appearance of the physical atmosphere and environment in a service organization that has some impacts on customers' experience (Lovelock et al., 2005). Dube & Renaghan (2000) also confirmed the importance of architecture and design as key value drivers that influence the customers' perceptions of service excellence.

Customers' participation increasingly plays active and even leading roles in service production and delivery processes (Xue & Harker, 2002) in most of the service organizations. The nature of service characteristics that is highly simultaneous requires customers to be part of the service transaction or as a co-producer. The customer's engagement in service as a co-producer is important in the cost reduction and service quality improvement (Heskett et al., 1997). Thus, the degree of service success may depend very much on the customer's participation to make the service happens. In other words, in some services, the customer is acting as a partial employee of the organization.

Marketing Communication

Marketing communications is a means to express itself and show the actual positioning to customers. Reid (2005), in serviceand consumer goods companies, shows the relationship between integrated marketing communication (IMC) performance(in terms of cross-functional strategic planning, inter activity, and mission marketing) and market performance(brand advantage, customer satisfaction, and sales performance). Cizmar and Weber who focused in the Croatianhotel industry mention that marketing effectiveness is positively associated with the performance level, the scope ofmarketing activities, the way marketing information is used in strategic and operational management and also with thestatus of the marketing department within the hotel company. The marketing activities consist of advertising, promotionalmaterials and PR that correlated with hotel performance in terms of occupancy rate and revenue per availablebed.

The study of marketing-finance interface could be a way to improve the relationship marketing communicationand performance. Denizci and Li (2009) mention that in tourism and hospitality industries which include airlines, hotelsand restaurants there are positive marketing efforts contributed to the firms' financial performance. Marketing effortsare measured by advertising expense and consumer satisfaction score while the firm's performance is measured by ROE,ROA, PM, stock return, and Tobin's q. The analyses reveal that IMC practices (integration of marketing communicationfunction between company and advertising agencies) vary across firm size, industry type, product/service orientation,and customer orientation. Potluri in Ethiopia and Kola and Akinyele (2010) in Nigeria conducted research of the effectivenessof advertising and personal selling practices of service companies in order to improve the existing communicationand customer satisfaction. They concluded that advertising and personal selling indicated moderately effectivein providing information, creating awareness, and changing attitude and ineffective in building company image andenforcing brand loyalty. The research also identified the lack of integration between advertising and personal selling.Nykiel (2001) stated that the hospitality industry has developed many different marketing communication concepts.

Marketing communication has become a major contributor to driving occupancy or providing market advantage. Pjero andShyle (2008) conducted a study in Albania hotel industry concluded that the marketing communication was used in thehotel industry to

improve how to act and to survive in a tight competitive market. Their study is enhanced by Pjero,Agaraj, and Shyle (2008) in Albanian reality business to measure the effectiveness of marketing communication with performance,but their study was not specifically conducted in the hospitality industry. The hotel industry determines promotionbased on their clients and their area of operation and tends to attract more customers from regional markets,national, and international. Mateljic (2010) in his research on Croatia hotels, said that promotion can help differentiate theproduct from other similar products that already exist in the tourist market. Each hotel has to find its way of promotionand figure out its unique and recognizable design. Sangkaworn and Mujtaba (2010)based on their study in thehotels and resorts in Chiang Mai, Thailand, mentioned that the tools of promotion that commonly used are printed media,local radio, brochures distribution and bill-boards nearby.

Peattie and Peattie (1996) conducted a study of price-based promotional techniques at tourism and travel markets, but there is growing awareness that non-price based promotion scan add value for the consumer while meeting a range of marketing communications objectives. One of the non-price promotional tools is the use of consumer competitions. From the above studies conducted by researchers that ranging from marketing communication concepts, tools and techniques, this study will take the marketing communication mixin developing model. Sikdar and Vel (2010) reveal that promotion strategies play a crucial role in the launch of new productsto the market that help attract the customer's attention to wards the new product in a market cluttered with similar products. Total advertising expenditures have been found to have a positive impact on the market entry studies. In the 21st century market place, the ability to measure a combination of marketing communication activities may be moreimportant than trying to choose the impact or influence of any single element. In the marketing arena in which the allocationof limited resources is critical, it is more important to find the best and most effective set of brand communicationtools and activities, not just those who can most widely distributed at the lowest cost.

Tung, Lin, and Wang (re-applied the SCP (Structure-Conduct-Performance) paradigm to international tourist hotels industry in Taiwan through three simultaneous equations, market share, advertising and profitability. Kang, Lee, andHuh (2010) stated the relationship between CSR activities (public relations) and financial performance in the hospitality context. This study examines different impacts of positive and negative CSR activities on financial performance of hotel, casino, restaurant and airline companies, theoretically based on positive and negative effects. Findings suggestmixed results across different industries and will contribute to companies' appropriate strategic decision-making for CSR activities by providing more precise information regarding the impacts of each directional CSR activity on financial performance. From the above reviews, the researcher came to the conclusion that there is a relationship between marketing communication and service excellence.

Dynamic Marketing Capability and Service Excellence

Hotels are competing for the market share and develop new strategies to leave their competitors behind. In order to improve their image and increase their profit, hotels should put more effort into investigating the needs and expectations of their target groups. Only with a deep understanding of their customer's desires can the hotels keep their customer's loyalty (Smolyaninova, 2007). The study conducted by de Farias (2010) reveals that market sensing and learning play their roles as determining factors in service excellence. The evolutionary fit between market needs and market offers is the essence of effective service excellence. Sensing captures the effectiveness in order to generate, disseminate, and respond to customers' needs. Firms with higher absorptive capability demonstrate greater ability to learn, integrate external information, and transform it into their embedded knowledge (Hou, 2008).

Proposed Model of Dynamic Marketing Capability and Service Excellence

Based on the above discussion, we propose the following model to be further investigated as shown in Figure 1. We argue that service excellence is influenced by the dynamic marketing capability at the hospitality industries. Therelationship is moderated by the marketing communication.

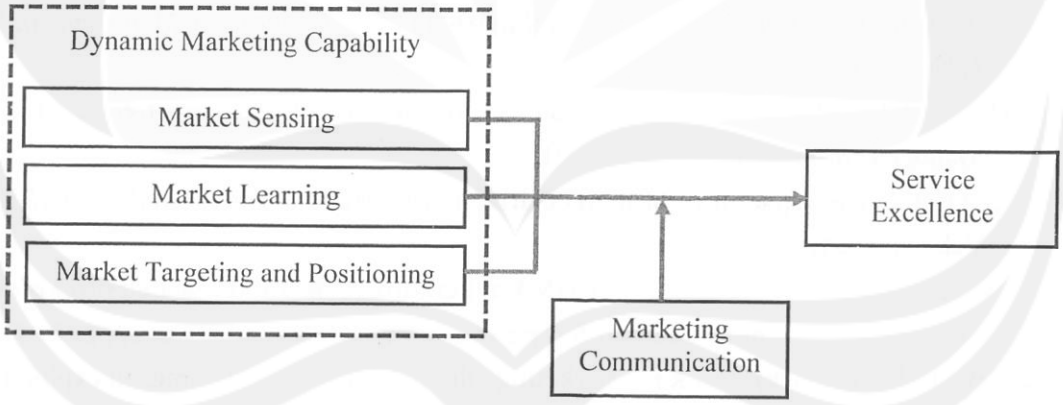


Figure 1. The model of dynamic marketing capability and service excellence

Conclusion

This study has proposed a model of dynamic marketing capability in relation to the service excellence in the hotel industry. The marketing communication is expected to moderate the relationship. Thefindings of the model are significant to the research and the hotel industry for their business performance and improvement especially in becoming more responsive to their customers. It is expected that this study will contribute to the development of conceptual model that relate dynamic marketing capability and service excellence by involving marketing communication in the hotel industry. For the practice,

this studyaims at helping hospitality industries to better plan and move towards effective and intense marketing communicationand greater dynamic marketing capability implementation and practices which would assist hospitality industry to create the appropriate environment to encourage and promote customer satisfaction. For the government as a policy maker to increasethe tourism sector specially to improve the regulations related to hotel business. This study will be the empiricalresearch of the involvement marketing communication mix in dynamic marketing capability, specifically studying the hospitality industry and that focuses on integration of IMC (integrated marketing communication) component.

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LAW-SOCIAL JUSTICE: 1

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ELECTION NOKENS SYSTEM BASED ON LOCAL DEMOCRACY IN THE CENTRAL MOUNTAINS OF PAPUAPROVINCE

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ABSTRACT

Election noken system is elections held using ballot boxes noken as a substitute in the selection of candidates as well as candidates for Regional Head and Deputy Head of the Central Mountains region of Papua Province. Election noken system is not in accordance with the legislation in force in Indonesia, in addition to the many people who object to the use catapult noken system in the elections, as well as raises the pros and cons related to the use in the selection. Noken system does not comply with the laws and regulations in force in Indonesia, but the indigenous people continue to use camshaft in the general election which is led by a chief. Elections are conducted to select candidates and candidates for regional head and deputy regional head is done by consensus or consensus and the principle of transparency through the ceremony of the Feast Grill stone. Consultation or consensus and the principle of transparency is the value of local democracy which is based on the values of local wisdom exist and thrive on indigenous peoples. In this study, the principal study in the formulation of the problem is why the electoral system in accordance noken local democracy in the central mountains of Papua and how the electoral system based on local democracy noken central mountainous region of Papua Province. Intended use camshaft in the elections is due to the significance of philosophy camshaft and camshaft which is the original work of indigenous peoples are respected and appreciated for generations in the lives of Indigenous. Moreover, because the election logistics that go into the interior of Papua difficult and slow because of the terrain and geographic location far from the city. And also avoid conflict or friction between residents due to differences in perception. The approach used in the study is the approach of Sociology of Law. Type of research is a kind of normative research. The result of research that use camshaft system in elections to go ahead in accordance with the values of local wisdom mountainous region of Papua although many people who oppose the election noken system. The constitutional court has already admitted that the camshaft can be used elections, the Constitutional Court also appreciate the values of local wisdom and thrive in indigenous communities.

Keywords: Election, Nokens, Democracy

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ASEAN's CHALLANGES IN ADDRESING REFUGEE AND HUMAN TRAFFICKING ISSUES OF ROHINGYA

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ABSTRACT

In May and June 2015, displacement of over 25,000 Rohingya etnic became an international issue. Problems arose concerning the government's attitude in three State , namely Thailand, Malaysia and Indonesia in handling the boat people . In addition, many refugees become victims of human trafficking. Refugee issues could affect security and stability in ASEAN. In the blueprint of political and security community ASEAN include the respect and protection human rights. This article aims to address how should ASEAN efforts in handlling asylum seekers and human trafficking of etnic Rohingya in the framework ASEAN community. Based on this research, the ASEAN have failed in handling the crisis, so it needs effort of ASEAN to make a importance policy preparedness. Several steps can be taken to address the issues . First, making ASEAN Intergovernmental Commission on Human Rights (AICHR) works in dealing with Rohingya problems. AICHR should be given further authorities to facilitate state in dealing with Human Rights issues as well as preventing the Human Rights violation. Second, This institution may coordinate with UNHCR to manage Rohingya refugee in many Southeast and South Asia States to resettlement in another member State. Third, establishing ASEAN Refugee institution. ASEAN is still lack of a regional refugee framework, so it needs to create a framework which provide standard of the management of refugees. Handdling of human trafficking, ASEAN member States have agreed the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP) approved at the 27th ASEAN Summit last November.

Keywords : ASEAN, asylum seekers , human trafficking, Rohingya

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A. Introduction

One year ago , the issue of Rohingya have become a serious problem for ASEAN . This organization has been critized by international community because they had let the tragedy of Rohingya in Myanmar . The number of refugees had arrived into neighboring State , as evidence that ASEAN can not resolve the issue of Rohingya refugees . [2] Myanmar as one of the member State of ASEAN (*Association of South East Asian Nations*) was in the attention of the international community for committing human rights violations against the Rohingya . The Rohingya are one of the ethnic inhabiting the State of Burma (Myanmar) . In Myanmar, there are still some ethnic muslims but Rohingya ethnic was never included in the list of 137 ethnic groups recognized by the government of Myanmar . The absence of this recognition cause they do not have citizenship . The right of freedom of the Rohingya is very limited , the majority of them are not recognized citizenship. They are just a little bit and was not even given the right to ownership of land and houses and forced labour impose a number of infrastructure construction work in Myanmar . The discriminatory treatment has forced them chose to become man boat and leave Myanmar to seek safety and a better life in other State . State that become a transit and destination they include Bangladesh, Malaysia , Pakistan , Saudi Arabia , Thailand , Indonesia and Australia .[3]

Based on UNHCR data, there were 400,000 displaced Rohingya residing in refugee camps Bangladesh , 200,000 in Pakistan , 20,000 in Thailand , 15,000 in Malaysia and about 2000 stranded in Aceh .[4] In mid-May 2015 , there were four waves arrival of Rohingya refugees and Bangladesh entering by boat to the waters of Indonesia , Malaysia and Thailand . The issue of the Rohingya refugees became international attention because the attitude of the three States rejected the arrival of the refugee to entry into their territorial sea . At first , the government of the three States reject refugees who will go into the States, but in June 2015, ministers of the three States held a meeting which resulted an agreement to provide humanitarian assistance.

Rohingya refugee situation followed by the problem of human trafficking . The refugees trapped smugglers syndication of Thailand , paid a high enough up to 1,500 US dollars per person . They could cross over to Malaysia and find a job there , but in the worst of these refugees died by criminal smugglers . Malaysian police have found 139 graves and 28 refugees camp near the Thailand border. [5] Based on reports of international amnesty , the Rohingya have also become victims of human trafficking .[6] The issue of refugees and human

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2 ASEAN dan krisis Rohingya, available in Tempo,co.id accessed on 15th February 2016

3 Risma D. Damayanti, "Manusia Perahu Rohingya : Tantangan Penegakan HAM di ASEAN", *Jurnal Opinio Juris*, Ditjen HPI Kemenlu, Volume 01 Oktober 2009, hlm. 18

4 Alifan, Rohingya sebuah krisis kemanusiaan yang Rumit, 23 juni 2015 tersedia di blogact.id rohingya,diakses pada tanggal 15 Maret 2016

5 Anonim' *Report: Southeast Asia's refugee and trafficking crisis* 21 October 2015, 02:56PM available in http://www.amnesty.org.au/refugees/comments/38269/ acessed on 13 April 2016

6 Deadly Journeys, *The Refugee and Trafficking Crisis in Southeast Asia*, Amnesty International, October, 2015 hlm. 19

trafficking are one of form of non-traditional security threats for ASEAN to disrupt the security and stability of the ASEAN region . It is related with the vision of ASEAN which will embody the political and security community . In the blueprint for the ASEAN Political and Security Community (APSC) stated their respect for and protection of human rights . Based on Article 14 of the ASEAN Charter established human rights body . In 2009 , the member State of ASEAN established AICHR which serves the promotion and protection of Human Rights . In humanitarian crisis of the Rohingya questionable role of ASEAN to resolve this problem . This article examines how ASEAN's efforts in providing protection to handle the Rohingya refugees and refugees who are victims of human trafficking .

B. Discussion

1. ASEAN Efforts In Dealing of Rohingya Refugees

The state is the primary subject of international law is reviewed historically and factually.[7] The major different between State and other subject of international law is that the state has sovereign .[8] According J.H.A. Logemann , the notion of sovereignty is supreme absolute power or powers on the people and regions of the world and its contents are owned by a sovereign national state system . Sovereignty means " supreme authority " , was originally defined as a sovereignty and integrity that can not be divided and can not be placed under the authority of another. Starke said sovereignty is often analogous to the independence which is also a function of a country. Souvereingty in the relations between States signifies independence . Independence in the regard to a portion of the globe is the right to exercise there in, to the exclusion of any state , the function of a state .[9] Now the sense and meaning of sovereignty is no longer regarded as a round and intact but in certain limits are already subject to restrictions .

The restrictions of sovereignnty were derived from the international law and the sovereignty of other State. A sovereign state , remain subject to international law and should not violate the sovereignty of other State. The violation againts the sovereignty of other State resulted in the emergence of the state's responsibility . One of change in the meaning of absolute sovereignty is the emergence of *the concept of responsibility to protect.* The government of a State which adopts the concept of full sovereignty should have restrictions in relation to the concept of humanity and the capacity to act effectively to protect its citizens from threats to their security from foreign or domestically of the State .[10]

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7 Subject of law is defined as any holder , owner , or supporting the rights and obligations based on international the law . The subject of internatinal law, namely : State, international Organization, Vatican, International Committe of the Red Cross, Individu, and Belligerent.

8 Robert Mc Corquodale dan Martin Dixon, *Cases and Materials on International Law,* Oxford, Oxford University Press, @003, p. 140

9 J.G. Starke, *Introduction of International Law*, London : Butterworths, 9th ed, 1984, hlm. 152.

10 David Chandler, 2009, *Unrevaling the Paradoks of the Responsibility of Protect*, Irish Studies in International Affairs Vol. 20 p.27

The relation between State was more complex , so the States in Southeast Asia formed international organization, called *The Association of Southeast in Asian Nations* (ASEAN). ASEAN was established on 8th August 1967 in Bangkok, Thailand, with the signing of the ASEAN Declaration (Bangkok Declaration) by the Founding Fathers of ASEAN, namely Indonesia, Malaysia, Philippines, Singapore and Thailand. In their relations with one another, the ASEAN Member States have adopted the following fundamental principles, as regulated in the *Treaty of Amity and Cooperation in Southeast Asia* (TAC) of 1976, namely : *Mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations; The right of every State to lead its national existence free from external interference, subversion or coercion; Non-interference in the internal affairs of one another; Settlement of differences or disputes by peaceful manner; Renunciation of the threat or use of force; and Effective cooperation among themselves.* In 2007, the member States of ASEAN agreed the ASEAN Charter at the ASEAN 13th Summit in Singapore . The ASEAN Charter serves as a firm foundation in achieving the ASEAN Community by providing legal status and institutional framework for ASEAN. It also codifies ASEAN norms, rules and values; sets clear targets for ASEAN; and presents accountability and compliance.

There are three ASEAN's plan had written in the ASEAN Charter that desire for the forming of the ASEAN Economic Community, ASEAN Security Community and the ASEAN Socio-Cultural Community . Entry into force of the ASEAN Charter is expected to give a new atmosphere for ASEAN, which has more than 40 years of cooperation on a voluntary basis .[11] ASEAN Charter basically promote economic integration, strengthening the principles of democracy, the protection of Human Rights and the environment. Drafting of the ASEAN Charter aims to transform the ASEAN from a non formal political association became international organization with legal personality , based on the rules of professional (rule - based organization) , as well as have an organizational structure that is effective and efficient . The legal consequences of legal personality it will have the ability to act .[12] There is a relationship between legal personality and judicial capacity as stated by the Weissberg : "*An entity which exercise international rights and is bound by international obligations, in shorts which has international legal capacity, is one which is endowed with international legal personality*".[13]

In the ASEAN Charter Chapter I, Article 1 (paragraph 7) that is said that the ASEAN Community is a community aimed at strengthening democracy and protecting human rights. Based on Article 14 of the ASEAN Charter has been established *Asean Intergovermental Commission of Human Rights* (AICHR). AICHR is an agency of Human Rights adopted by

11 Igor Dirgantara, *ASEAN Charter, Asean Political Security Community dan Isu Kemanan non Tradisional* tersedia di https://oseafas.wordpress.com/2010/06/25/asean-charter-asean-political-security-community-isu-keamanan-non-tradisional/ diakses pada 9 April 2016

12 A. Leroy Bennet, *International Organization* , Prentice, New Jersey ,1979, , p. 3

13 Guenter wiesberg, 1961, *The International status of the United Nations*, Oceana Publication. Inc. New York, p.23

the ASEAN foreign ministers of member State of ASEAN meetings on 23th October 2009.[14] The AICHR's mandate and functions set out in Article 4 of the Terms of Reference which in essence is for the promotion and protection of human rights , The principles in the ASEAN often called ASEAN way[15] which consists of six principles: *sovereign equality, avoid the use of force as well as efforts to resolve the dispute peacefully, non-interference in domestic problems of other State, non involment ASEAN bilateral issues of member State, diplomacy guided , mutual respect , tolerance member states, and effective cooperation between members.*[16] The principle of non-intervention is a principle that guarantees the recognition of the sovereignty of member states, also guarantees the protection of the intervention of a member state of the domestic politics of other member states.

ASEAN consists of 10 States, namely Indonesia, Singapore, Malaysia, Thailand, Phipina, Brunei, Cambodia, Vietnam, Laos and Myanmar. Myanmar as a member of ASEAN is in the international atention for committing human rights abuses against the Rohingya. Rohingya people are one of the most persecuted ethnic and religious minorities in the world, subjected to forced labor, holding no land rights, experiencing severe limitations on their freedom of movement, and they are excluded from basic registration requirements giving them rights as citizens and access to education. They are a population fleeing systematic human rights violations by the Myanmar government which has stripped them of their citizenship under the discriminatory 1982 Citizenship Law.[17] Total population according to United Nations estimates about 1.3 million people, and most live in Rakhine state. Currently there are about 300,000 Rohingya in Bangladesh, especially in the border region to Myanmar, and 600,000 people living in Myanmar Rohignya. Over the years they got bad and discriminatory treatment from the Government of Myanmar. According to UNHCR, there are currently about 28 thousand Rohingya living in Bangladesh refugee camps. Ironically ethnic Rohingya Muslims are not recognized by both the Myanmar and Bangladesh as citizens so that it can be said that the Rohingya are people without citizenship or stateless.[18]

International law has laid the basis for the obligation of the state in carrying out its international protection . The matters concerning the protection of human rights including the rights of refugees . Asylum seekers and refugees are the two things are related . Asylum is the protection is given by a State to individual or more individuals who request them and the reason why these individuals were given protection is based on the humanitarian ,

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14 Igor Dirgantara, *Op. Cit*, p. 5

15 *ASEAN Way is the way in responding to and addressing issues in the region. ASEAN way emphasizing their norms such as consensus (consensus) and the principle of non - intervention in the relations in the region and to encourage member states to cooperate by way of dialogue and consultation.*
Baca I. Halina, " Menyoroti Prinsip Non-Intervensi ASEAN, *Multiversa: Journal of International Studies,* Vol. 1, No.1, 2011, p8.

16 Wictor Beyer, *Assesing an ASEAN Human Rihts Regime : A New Dawn for Human Rights in Southest Asia* ? Thesis Laud Univercity Swedia, 2011, p. 43

17 Rohingya People : *The Most Refugees Persecuted in The World*, available in http://www.amnesty.org.au/refugees/comments/35290/ accesed on 11 April 2016

18 Risma D Damayanti, *Op. Cit*, hlm. 12

religious , racial , political, and so forth . [19] Asylum is conferring protection in the territory of a State to people from other State who come to the State concerned due to avoid detection or great danger .[20] Asylum cover various aspects including *the principle of non -refoulement* , permission to remain in the State of asylum and appropriate treatment of common standards of humanity .[21] Many people commonly use the word *refugee* rather than use the word asylum seekers . Refugee status is recognized by international law or national level. A person who has been recognized refugee status will accept the obligations and rights assigned . First step a refugee is as an asylum seeker . Before someone recognized status as refugees , first of all he is an asylum seeker, refugee status is the next stage of the process of its being someone overseas, but asylum seeker is not necessarily a refugee . He was only recognized after a status recognized by international legal instruments or national level.

Definition of a refugee contained in the Convention on Refugee Status of Refugees in 1951 are :

> *As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out- side the State of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that State; or who, not having a nationality and being outside the State of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*

This convention regulated about time restriction that only the events occured before 1951 . This Convention be amended by the 1967 Protocol, which gives a broader definition of the notion of refugees . According the 1967 Protocol, definition of refugees is not limited to events that occurred before 195.

In the framework of the United Nations, refugees become an international problem. The regulation of refugees protection is a general principle of human rights.[22] According to article 14 (1) 1948 *Universal Declaration of Human Rights*, everyone has the right to seek and enjoy asylum from other State for fear of torture. The right to seek asylum implies that people fleeing from persecution and into the territory of another State without bringing a complete document should be given permission to enter a State, the minimum for a temporary period . Each asylum-seekers have the right to not or returned forcibly expelled if they have arrived in a State . This principle became known as non-refoulement. The principle of non refoulment should be distinguished from expulsion or deportation or expulsion. Deportation done if a foreign citizen action to take against the law the reciving State, or it is criminals who escaped from the court process, while the principle of non refoulment only be used against the

19 Sulaiman Hamid, *Lembaga Suaka Dalam Hukum Internasional*, PT Raja Grafindo persada, Jakarta, 2002, hlm.47

20 Alice Edwards , *Human Righs, Refugeess, and The Right To Enjoy Asylum*, 2005, hlm. 301 di http://ijrl.oxfordjournals.org/diakses tanggal 23 Maret 2016

21 Ajat Sudrajat Havid, "Pengungsi dalam Kerangka Kebijakan Keimigrasian Indonesia Kini dan yang akan Datang", *Jurnal hukum Internasional*, LPHI UI, Volume 2 No 1, 2004, hlm.. 88.

22 Alice Edwards, *Op. Cit.*, hlm. 297 .

refugees or asylum seekers.[23] This principle is one of *jus cogens*[24] norms or a peremptory norm of general international law. The legal consequences of jus cogens norm, noun refoulment principle is a part of customary international law so it binding on all states both members and non-members of the 1951 Convention.[25] There are only three State in Southeast Asia that have ratified the 1951 Convention , namely the Philippines , Combodia and Timor Leste .

At the beginning of the arrival of asylum seekers Rohingya who will enter the waters of Indonesia and Thailand, ships carrying hundreds of Rohingya refugees had rejected the security forces of Indonesia, Malaysia, and Thailand's. The policy known as "push back" policies means to reject refugees to return to sea . The rejection of asylum-seekers had violated *the principle of non refoulment* mentioned in Article 33 of the Convention in 1951.[26] Even this principle has been recognized as part of customary international law means that the State is not a party to the 1951 Refugee Convention remains should respect *the principle of non-refoulement* . Thailand and Indonesia are responsible for not immediately expel and repatriate them forcibly (*non-refoulement*) when stranded Rohingya asylum seekers arriving in its territory . States can do the best action to accommodate them temporarily while determining the next process, whether to grant asylum immediately, forward to another State, or return to the State of origin when conditions is possible.

In May of 2015, as a response to the crisis, Indonesia and Malaysia agreed to provide humanitarian assistance to those 7,000 irregular migrants still at sea and offered them temporary shelter on the condition that the international community resettle them within one year. Indonesia and Malaysia agreed to continue The meeting welcomed the efforts of Bangladesh, Indonesia, Malaysia, Myanmar, and Thailand which have intensified search and rescue operations as well as deployment of the United States aircraft in close collaboration with Malaysia and Thailand; In response to the alarming rise in the irregular movement of persons in the Indian Ocean, the Royal Thai Government organized the *Special Meeting on Irregular Migration in the Indian Ocean* on 29 May 2015 in Bangkok.The following proposals and recommendations were put forward: [27]

a. **Intensifying search and rescue operations** to ensure safety of the irregular migrants at sea;

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23 Sigit Riyanto, "The Refoulement Principle and Its Relevance in the International Law System", *Jurnal Hukum Internasional*, LPHI, FH UI, Volume 7 Nomor 4, 2010, hlm. 697

24 Article 53 Vienna Convention : Jus cogens is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

25 Jean Allain, "The Jus Cogens Nature of Non Refoulment", *International Journal of Refugee Law* Vol. 13 No. 4 Oxford University press., 2002, hlm. 538

26 **Article 33 - Prohibition of expulsion or return ("refoulement")** paragraph 1. No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

27 Press Releases : Summary Special Meeting on Irregular Migration in the Indian Ocean 29 May 2015, Bangkok, Thailand available in http://www.mfa.go.th/main/en/media-center/14/56880-Summary-Special-Meeting-on-Irregular-Migration-in.html, aceesed on 25 April 2016.

b. **Exploring further means for identifying predictable disembarkation options and proper and harmonized reception arrangements for those rescued;**
c. **Ensuring that UNHCR and IOM have access to the migrants;**
d. **Identifying those with protection needs through effective screening processes, paying particular attention to the protection of the vulnerable groups**, including women, children, and unaccompanied minors, who are often most affected;
e. **Strengthening information and intelligence sharing mechanism** to provide accurate data on whereabouts of migrants and vessels stranded at sea, and ensure timely response in terms of search and rescue operations;
f. **Establishing a mechanism or joint task force to administer and ensure necessary support,** including resources as well as resettlement and repatriation options from the international community to countries that provide humanitarian assistance to the irregular migrants;
g. **Mobilizing resources of the international community to the appeals of international organizations to support emergency responses** in the spirit of international burden-sharing, and in this regards, welcomed the United States of America's 3 million USD pledge to IOM's appeal and Australia's pledge for an additional 5 million AUD in humanitarian assistance to Rakhine State and Cox's Bazaar.

The Special Meeting was attended by officials from 17 countries – 10 ASEAN countries plus the United States, Japan and Switzerland, who sent observers, along with officials from the UNHCR, the *UN Office on Drugs and Crime* and *the International Organization for Migration*. [28] The meeting was to formulate some recommendations to save as many as 4,800 Rohingyas and Bangladeshis who became a trafficking victim and should be stranded at sea for tens of days. Two solution was formed a task force Rohingya and submit proposals to the UNHCR trust fund.[29] The three State seek comprehensive solutions involving State of origin, transit and destination State through the principle of *burden sharing,* and *shared responsibility.* This action has been bridged between the inability to interfere in the internal affairs of Myanmar with concern the humanitarian emergency in the region. Ethnic Rohingya can be called citizens of ASEAN because geographically stay in Myanmar as a member of ASEAN. Notably, Myanmar, which threatened to boycott the meeting, took part in the talks but forbade the use of the term "Rohingya." The Special Meeting was a great first step in solving the crisis, the ultimate solution must involve granting citizenship to stateless Rohingya. The Rohingya refugee crisis requires a regional and international response. ASEAN should work with the UN to support a UN investigation into the government policies and human rights violations against Rohingya. Certain norms and conventions should be signed by regional governments and ASEA should come up with a regional legal framework to deal with its refugee and statelessness problems.

28 Silvia di Gaetano, *How to Solve Southeast Asia's Refugee Crisis*, available in, http://thediplomat.com/2015/09/how-to-solve-southeast-asias-refugee-crisis/ accesed, 20 April 2016

29 Ini Dia Tiga Solusi Malaysia Untuk Rohingya, 9 Juli 2015, tersedia di http://theglobejournal.com/Politik/ini-dia-tiga-solusi-malaysia-untuk-rohingya/index.php, 29 Maret 2016

Rohingya crisis management by the member State of ASEAN shows that ASEAN does not have a regional legal framework and standard operating procedures to handdle of refugees. The handling of refugees by ASEAN still an incidentally . Rohingya crisis is a challenge for the AICHR, is it can serve to the protection of human rights . In fact, ASEAN has not been able to provide the protection of human rights due to constraints of the principle of non-intervention . ASEAN implemented the principles of non-intervention in the relations among the members, but Rohingya crisis is not an internal affair of Myanmar because it has become a regional issue . Even though ASEAN has included the establishment of ASEAN Intergovernmental Commission on Human Rights in 2009, The Commission was not able to engage with any Human Rights cases in the region. This limitation was occurred due to lack of authority that the Commission owns in dealing with Human Rights cases. Thus, they are only able to make cooperation with other state in Human Rights issues. Another problem that is faced by the Commission is the low degree of democratization in several ASEAN Member States, including Myanmar. Many member states do not believe with democracy as well as Human Rights and even see them as threat for national sovereignty. The nature of authoritarian regime in ASEAN Member States prevents ASEAN to discuss prominent issues in Human Rights, even weaken the Human Rights Body itself.[30] Compared to other regions, Southeast Asia also does not have any regional mechanisms in place to manage refugee flows effectively or to provide protection for those in need of it. At the ASEAN level, regional cooperation is compromised by the principle of "non-interference" in the internal affairs of other states – refugee outflows, however, can never be an "internal" issue only, as it impacts an entire region. Although the ASEAN Declaration of Human Rights was adopted in 2012, the protection language is very weak and coupled with a lack of political will and political sensitivity around refugee issues. [31]

As a first step , Indonesia could propose that ASEAN State ratify the 1951 UN Convention and 1967 Protocol UN refugee status . With this, the ASEAN State would have a basis that is clear for the refugees. Besides ASEAN will continue to encourage its members to treat all citizens fairly in order to fulfill the vision of ASEAN : political cohesive , economically integrated , socially responsible and a truly people oriented , people centered and rules -based *ASEAN Ministerial Meeting on Transnational Crime* (AMMTC) in Philippines 1997 .

2. ASEAN Cooperation in Tackling Human Trafficking of Rohingya

The one of the priorities of ASEAN cooperation is combating transnational crime has established the ASEAN *Ministers Meeting on Transnational Crime* (AMMTC) in 1997 with the mechanism of Senior Official Meeting on Transnational Crime (SOMTC) as sub – ordination to support the eradication of Transnational Crime . ASEAN member State agreed

30 Rohingya, Antara Solidaritas ASEAN dan Kemanusiaan, www.kemlu.go.id/Majalah/**ASEAN**%20Edisi8-All *acceesed on 26 April 2016*

31 Fan Lilianne, Mayerhofer Julia, *Refugees and Maritime Movement in Southeast Asia 2015* – Rohingya, Bangladeshi. Available in https://www.boell.de/en/2015/11/23/refugees-and-maritime-movement-south-east-asia-2015, acessed on 27th April 2016

on eight (8) forms of transnational crime that must be dealt together , namely : terrorism , *Human Trafficking / Trafficking in Persons , Smuggling of illegal drugs , Piracy at Sea, Money Laundering , Economic Crimes International , smuggling of weapons , Cyber Crime / Cyber Crime* .[32] Rohingya refugee issue followed by the issue of human trafficking . They are entangled syndicate smugglers from Thailand . They pay up to 1,500 US dollars per person , and then accommodated in temporary camps near the border to Malaysia . Some of them can be crossed into Malaysia and find a job there , but some are not lucky because the refugees were killed by criminals or smugglers. In May 2015 , after the Thai government announced it would crack down on the perpetrators of human trafficking , thousands of refugees left in boats on the high seas . They consist of ethnic Rohingya who suffered persecution in Myanmar .[33]

Human trafficking is a transnational crime that must be eradicated. Trafficking of women and children as yet have a standard definition. In the Convention on the Elimination Discrimination Against Women in 1976, provides a definition of trafficking as follows:

> *All effor ts or actions relating to the recruitment, transportation within or across borders, purchase, sale, transfer, delivery or receipt of a person by using deceit or pressure, including the use or threat of use of force or abuse of violence or debt bondage for the purpose of placing or holding the the well paid or not to work idak desired in forced labor or bondage in slavery-like conditions in an environment of a place where people are living at a time of deception, pressure, debt bondage first time.*

In 2000, the UN General Assembly has set a *Protocol Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*. In this protocol contains the definition of trafficking as:

> *The recruitment, transportation, transfer, harboring or receipt of persons by threat or use of force or other forms and pemaksaa, abduction, fraud, deception or abuse of power or dependence by administering or or receiving of payments or other compensation in obtaining the consent of a person having control over another person for the purpose of exploitation, which minimally includes the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.*

Based on Trafficking Protocol , States parties shall penalize perpetrators of human trafficking and making comprehensive measures to prevent and combat it. Currently, all ASEAN member State have become party to the *UN Convention on Organized Crime Transnational* .

Some indication that the Rohingya people become victims of human trafficking , among others :

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32 Abdullah Tulip dkk., *Kerjasama Indonesia Dengan Negara –Negara Tetangga Dalam Pemberantasan Kejahatan Transnasional,* Laporan Penelitian, Unisri, 2009, hlm. 43

33 Perdagangan manusia ke Malaysia 'masih terjadi'Rohmatin Bonasir http://www.bbc.com/indonesia/dunia/2016/02/160218_dunia_malaysia_perdagangan_manusia, diakses pada tanggal 21 Maret 2016

First, the network of human trafficking in Southeast Asia . Proximity and human trafficking networks in the region , raising concerns that those who took the Rohingya people from the boat , will be traded and exploited laborers on land or at sea . For several years , the Thai fishing industry has been engaged in exploitation, including forced labor and human trafficking .[34] Workers who become victims of trafficking in the industry dominated by men from Myanmar and Cambodia .

The secondly indicator is the purpose of human trafficking for exploitation. Trafficking Protocol does not provide a complete list of all exploitative purposes, but the list is open, detailing what the state should, at a minimum, treat it as exploitation. A third indicator that the Rohingya people are being trafficked is the low cost of the trip. Although some people have told Amnesty International that they pay anywhere from 150,000 Myanmar Kyat (116 USD) 113 for mother and child up to 7,000 Malaysian ringgit ($ 1,650)[35] 114 for one passenger, traveling several others free of charge. Some men would not pay upfront, with the understanding that they would pay in Malaysia, while the other Rohingya people do not pay anything, and was told that the journey is free. Trips low cost or free shows that the boat crew will cover the cost of transportation (including boats, equipment, fuel and rations), and make a profit in another way, the possibility trafficking people for forced labor or by hitting the passengers until their families pay for freeing them. Abductions is the fourth indicator trafficking. Human rights organizations have documented several cases of abduction among the Rohingya people stranded at sea in May 2015. [36] The fifth indicator which indicates that the Rohingya people fall victim to human trafficking networks, is the crew of the boat were well organized. Testimonies collected by Amnesty International shows that boats containing Rohingya people run by a crew of well-organized, funded and equipped with communication devices and navigation equipment was good.[37]

Human trafficking is a crime that violates human rights, dignity and integrity of the victims. ASEAN immediately made efforts to combat trafficking by making legal framework and practical measures when know the refugee issues that accompanied the ethnic Rohingya human trafficking. In July 2015, ASEAN Ministers hold emergency session of ASEAN in Kuala Lumpur to take more serious measures to combat the phenomenon of human trafficking. During the meeting, the ASEAN ministers unanimously agreed to establish a trust fund for refugees and victims of human trafficking. Malaysian Home Minister Ahmad Zahid Hamidi said after an emergency session, all ASEAN member State will contribute to the funding it. The ASEAN ministers also stressed the establishment of a joint task force to combat

34 International Labour Organization, *Employment Practices and Working Conditions in Thailand's Fishing Sector*, 2013 [Praktik kerja dan kondisi kerja di sektor perikanan Thailand], tersedia di http://www.ilo.org/wcmsp5/groups/public/---asia/---ro bangkok/documents/publication/wcms_220596.pdf, hal. ix

35 Aceh Interview, 14 August 2015, Amnesty International The Deadly Journey, October 2015

36 Human Rights Watch, Southeast Asia: Accounts from Rohingya Boat People, 27 May 2015, available at http://www.refworld.org/ docid/556868b94.html

37 Deadly Journey, Op.cit., Peter Benenson House, 1 Easton Street, London WC1X 0DW, UK hlm. 56

transnational crime.[38] The member State of ASEAN should cooperate to formulate effective measures to combat human trafficking and protect people from violations human right by traffickers and smugglers. This requires, among other things, that the government continues to monitor and look for the boat and the camps where the man likely to trade, being held to ransom and suffered serious human rights violations. The member of ASEAN States should also help the physical and psychosocial recovery of people Rohingya and Bangladeshi victims of human trafficking , investigate and prosecute everyone involved in human trafficking in a fair trial. All State in Southeast Asia are legally required to ensure the action against human trafficking is not intentionally or unintentionally violate human rights that have been set. Thailand is targeting the trial of cases of trafficking from the territory of Thailand to Malaysia with 92 defendants completed within one year to perform law enforcement against trafficking. The defendant among others, include a military general and a number of police officers. They were arrested after the discovery of the graves in the camp of human trafficking on the border with Malaysia in May.

Trafficking in persons is a serious crime that affects the human rights, dignity and integrity of all its victims including women, men, and children in the ASEAN region. ASEAN has made efforts to fight human trafficking through *inter alia* the establishment of regional counter-human trafficking laws and human rights bodies to establish best norms and practices for its member countries. The results of **Special Meeting on Irregular Migration in the Indian Ocean in 29 may 2015** , the member States have agreed to take *comprehensive prevention of irregular migration, smuggling of migrants, and trafficking in persons. The measures are :*

a. **Strengthening national law enforcement to combat people smuggling and human trafficking and cooperate in eradicating the transnational organized criminal syndicates** through sharing investigation information, strengthening cooperation on mutual legal assistance and cooperation in extradition, where applicable, and build on available tools and frameworks, in particular, the United Nations Convention Against Transnational Organized Crime (UNTOC) and its protocols;
b.. **Identifying national contact points** among key law enforcement officers to coordinate and exchange real time information / intelligence to enable early detection and alert as well as to facilitate prompt response and effective action against transnational smuggling and trafficking syndicates;
c. **Strengthening operations**, where applicable, in accordance with existing mechanisms, among law enforcement authorities to curb transnational criminal networks and their activities, bilaterally and regionally,
d. establishing a special investigation taskforce among the key affected countries in accordance with existing mechanisms to suppress the transnational organized criminal syndicates that have committed crimes of people smuggling and human trafficking in accordance with the UNTOC in order to bring the perpetrators to justice;

38 Strategi ASEAN Memerangi Perdagangan Manusia, 3 Juli 2015 tersedia di http://indonesian.irib.ir/editorial/fokus/item/97394-strategi-asean-memerangi-perdagangan-manusia accesed on 25 March 2016

ASEAN States have launched a fund to help victims of human trafficking. In addition, ASEAN member State have agreed to address the problem of human trafficking and the fight against transnational crime with the signing of the ASEAN *Convention Against Trafficking in Persons* (ACTIP) at the meeting of the 27th ASEAN Summit in November 2015. Signing the ACTIP will become an effective legal framework in the region to address human trafficking issue. The purpose of ACTIP to prevent and combat trafficking in human beings, especially women and children and it has aims to protect and assist victims of human trafficking to earn a decent living and to cooperate with relevant parties to realize the goal of ACTIP.[39]

The refugees and human trafficking are form of non traditional security threat . ASEAN challanges to fight of non-traditional security threats need interpretation more wiser than the principle of non-intervention, consensus, and national sovereignty to be applied more flexibly as an ASEAN Way, although the principles were still embraced in the ASEAN Charter (Article 2, paragraph 2e and article 20, paragraph 1). The new world order , needs new ideas, so ASEAN must dare to abandon the conservative attitude had been attached , as do the redefinition of the principles and improve decision-making mechanism in the body ASEAN. The principle of non-intervention will remain a key in the ASEAN Community, but the governments of ASEAN State are expected to be more flexible and prudent in applying these principles, especially as related to transnational crime issues that have regional impact. The same may also apply to the ASEAN decision-making mechanism that is always based on the principle of consensus can be converted into voting.

C. Closing

1. Conclusions

a. Rohingya refugee issue and human trafficking is a challenge for ASEAN to realize the political and security community . In dealing with refugees , at the beginning of the arrival of Rohingya refugees , the State Indonesia and Thailand had breached of *noun refoulment principle* because the refugees returned to the sea before entering the State. Then the change of attitude of the concerned State . Indonesia , Malaysia and Thailand held a special meeting that resulted in an agreement to hold at least for one year while waiting for UNHCR to find a third State , establish a task force to address the Rohingya refugees , providing the trust funds . ASEAN considered not able to address the issue of Rohingya refugees for several reasons , namely : the agency had no authority to AICHR, ASEAN has not have a body that specifically address the issue of refugees . ASEAN has not been able to provide the protection of human rights due to constraints of the principle of non-intervention.

b. ASEAN's efforts in addressing and combating human trafficking Rohingya by giving assistance to the victims, both material and immaterial. ASEAN member State should

39 Prashanth Parameswaran, January 28, 2016 Singapore Ratifies ASEAN Anti-Trafficking Pact tersedia http://thediplomat.com/2016/01/singapore-ratifies-asean-anti-trafficking-pact/ diakses pada tanggal 20 Maret 2016

investigate and prosecute everyone involved in human trafficking in a fair trial. ASEAN State have agreed on the *Convention on Anti-Trafficking* in 2015 as the legal basis for the eradication and prevention of crime and the recovery of victims of trafficking.

2. Recommendations

a. The importance of preparing a policy to deal with refugees in the ASEAN region. ASEAN can immediately establish a special agency dealing with refugees who can coordinate with UNHCR.
b. ASEAN member States that have not ratified the 1951 Convention and the 1967 Protocol were encouraged to ratify the treaty so that it is easier to determine refugee status and give the legal protection.
c. The ASEAN States should made an agreement to respect the principle of non refoulment as customary international law. According to this principle refugees should not be returned to the place where they will suffer persecution.
d. AICHR given more authority to enforcement the law againts human right violation.
e. Southeast Asian leaders must question the principle of non-interference in domestic matters of neighboring State in order to maintain peace and stability in the region, espesially in Myanmar.

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OWNERSHIP OF THE APARTMENT UNIT AS COLLATERAL IN THE BANK LOAN AGREEMENT

Henny Saida Flora

ABSTRACT

Holders of property rights to the apartment units authorized to perform legal acts make it as his right certificate as collateral to obtain credit in the bank. The types of loans that can be obtained include mortgages. This credit is intended to provide assistance to communities in low and middle income to buy a house, including the apartment units with payment in installments. Granting of loans granted by the bank as a financial institution, it should have to be able to provide legal protection for providers and recipients as well as the related credit protection through a body of legal guarantees for all parties concerned. Each holder of a certificate of ownership of the apartment units can apply for credit at the bank by making the right certificates title on apartment units are held as collateral for loans include mortgage loans provided by banks in applying for a loan with property rights to the apartment units as collateral must meet the requirements agreed upon by both parties (debitor and creditor) after the requirements are met then submitted a written request to the bank credit by including the necessary papers. Furthermore, the bank will determine whether the loan application is accepted or rejected.

Keywords: Properties, Flats, Assurance, Bank Credit Agreement.

Introduction

One of the products provided by the Bank in helping to smooth the business debtor, is giving credit where it is one of the functions of banks are very supportive of economic growth. Understanding credit according to Article 1 paragraph 2 of Law No. 10 of 1998 on the amendment of Law No. 7 of 1992 concerning Banking is as follows: "Credit is the provision of money or bills can be equated with it, based on agreements between bank lending with the baleen which requires the borrower to pay off debts after a certain period with the amount of interest "

Based on the national development goals for the welfare of all people in Indonesia, the housing is one of the main elements of people's welfare in addition to food and clothing.

Housing has an important meaning for one's life, not only in its function as a residence but also as a means of family life, society and the state. According to Komar Andasasmita, housing development must be based on a comprehensive settlement pattern, in the unity of the whole system between home physical, environmental infrastructure and social facilities, in order to achieve a functional level of settlement in order to support human life. To the direction of housing construction among others by taking into account population size and distribution, spatial and land use, social and cultural systems as well as environmental compatibility and integration with the development of the area and region.

The main problems encountered in the construction of housing, especially in urban areas is the number of very dense population and the population growth rate is very high, while in others the provision of land for housing is limited. Various policies and measures have been taken by the government include circuitry launched the development of this pattern. Residential buildings habitable together in a high-rise building constructed on land in common ownership. The concept of construction of flats born to address the limitations of available land, with consideration of the efficiency and effectiveness of the use of land, given the already less likely to build housing horizontally or a single story.

Along with the increase in the pace of development in Indonesia, so did the need for funding in order to meet the wishes of development. Dana is an essential requirement in a business / business. without funds, one is not able to start a business or expand an existing business. Source of funding a business made up of capital and debt. Capital is revenue either goods or funds owned by the employer or income by investors who deposit / refund for an enterprise. While debt is a source of funding that can be obtained by employers from financial institutions both banking institutions, non-bank financial institutions, financial institutions and financial markets. The buyer source of funds in the form of debt is referred to as the lender and the borrower is referred to as the debtor.

Giving or loaning of funds made available to economic actors through financial institutions. One is a banking institution. Banking institution or bank is also called, is a business entity that raise funds and channel them back into the community in the form of credit and / or other forms. So in banking practices prevalent receivable or a debt agreement also called credit agreement.

According to lure M. Thessalonians, that the process of debts between creditors and debtors need an agreement in order to ensure the rights and obligations of the parties. In addition to requiring an agreement. Creditors also requires a collateral from the borrower to ensure repayment of debt sufficient and guaranteed. This is because credit granted by the bank to risk so that the necessary guarantees in terms of confidence and ability and willingness to repay its debt. To obtain this conviction, before providing credit, the bank should undergo a careful assessment of the character, capacity, capital collateral, and prospects of the debtors. In general, banking practice how to obtain this belief known as The Five's of Credit or 5C Character (character), Capital (capital), Capacity (ability), Collateral (collateral), and the Condition of Economy (economic conditions).

One element of 5C is the Collateral or guarantees. The provisions concerning the guarantee of the provision of this debt is governed by the Code of Civil Code. Article 1131 of the Civil Code confirms that all the material things owe, whether movable or immovable both existing and new will exist in the future, be dependent on any individual engagement.

This provision is clearly the provision that provides protection to creditors in the credit agreement. Article 1132 of the Civil Code provides more detailed explanation affirming that the material becomes collateral together for all those who provide loans him, income sale of objects was divided according to the balance that is according to the size of the individual receivable, unless among indebted that there are legitimate reasons for precedence.

The provisions mentioned are general collateral arising from the laws common to all creditors, here the creditors have the same status (parity creditorium). Thus if the debtor defaults, the proceeds of the assets of the debtor distributed in a balanced manner according to the amount of debt owed to each creditor, except among creditors have legitimate reasons for precedence.

General guarantee is often perceived to be unsafe, because the guarantee generally applies to all creditors, so if creditors more than one could be discharged and the debtor wealth insufficient its debts. According to Sri Soedewi Masjchoen Sofwan, that it takes a special guarantee that the guarantee arising from specific agreements held between creditors and debtors to be a guarantee that is immaterial or that is individual. According Delima Manalu, that the guarantee is immaterial is the existence of a particular object that is used as collateral, while the guarantee is individual is the presence of certain people who could pay or meet achievement when the debtor defaults. In the system of flats known ownership of the apartment units. Thus, each holder of title to the apartment unit has the right to take legal actions it among others by making ownership of the apartment units as collateral for obtaining loans from banks.

According to Law No. 20 of 2011 on the Flats, Article 1 paragraph 1 is a bunk house is the story buildings built in an environment, which is divided into parts that are functionally structured in horizontal or vertical direction and is units each of which can be owned and used separately, especially for shelter equipped with parts together, objects together, and the land together.

Apartment units in the Act Flats in Article 1 paragraph 3 is apartment units are of interest primarily designation used separately as a shelter that has a means of connecting to a public road. Guarantees are dependent on the proceeds received.

Law No. 10 of 1998 Article 1 point 12 confirms, that the credit is the provision or bills can be equated with it, based on agreements between bank lending and other parties who require the borrower to repay their debts after a certain period of time with the amount of interest, reward, or profit sharing.

Of course purchases of flats is done in installments through a credit facility that is rife apartment ownership provided by a variety of both private and foreign banks. The process of purchase such as buying a regular house, but the payment is partly financed by the bank

to Develover. Thus, the newly purchased flats that are pledged as collateral for repayment of consumer debt buyers of flats financed by the bank. Thus circuitry property rights to the apartment units can be used as collateral in credit agreements.

Housing Development System

Flat development aims to meet the needs of adequate housing for the people, by improving the effectiveness and efficiency of limited land. In a development considered include mastery in legal certainty and security in their utilization.

Construction of flats held by State-Owned Enterprises, Regional Owned Enterprises, Cooperatives, Private Owned Enterprises engaged in construction of residential and non-governmental. Organizers construction of flats must qualify as a subject of rights over land, where the flats in question was built.

Flats just built on land right, Broking, and the Right to Use granted by the state and the right management. The land where the construction is appointed by the Head Office of Municipal / Regency, based on the General / Detailed Spatial level II Regional concerned.

Organizers construction of flats in setting up flats required to have a building permit (IMB) from government level II is concerned, to have the IMB must submit:

1. A certificate of land rights of the land upon which the building will be built on behalf building Housing Tenant Association.
2. Plan tread, ie plan layout of the buildings to be constructed
3. Pictures of the architectural plan that includes charts and pieces and separation clearly indicating the vertical and horizontal boundaries of each apartment unit and its location.
4. Draw a plan structure and calculation
5. Draw a plan clearly indicating the parts together, common ground and a common good
6. Figure 6. The network plans to clean water, electricity, gas network, sewerage and others.
7. The proportional ratio of each apartment unit.

Properties in Unit Flats

Implementation of flats built on the basis of the condo that stem from theories about the ownership of an object. According to the laws of an object or building can be owned by one, two or more persons are known as shared ownership.

Sri Soedewi Masjcohoen Sofwan on setting up common property confirms the common property that there is no general rule that there are only special here and there. Civil Code was that there were only about two kinds of common property, common property that is free, and the commons are bound.

In common property which is free between the owners are not legally binding in advance in addition to the common rights to be the owner of an object. So the common property that

is free to exist when an object or without their agreement or approval two or more persons jointly owned between two or more people.

Here is found the will to jointly become the owner of an object to be used together. Free form of common ownership under Roman law called condo.

Common property that is bound to be based on the legal bond between the owner of the object beforehand with him. The existence of this common property for their birth or have preceded their legal bond so that the owners have collectively over an object or more.

Property rights in the flats as stipulated in the Law on Housing is a private property on the units of flats that includes the collective rights of the parts and building flats, collective rights on the objects and collective rights to land. This Act created the legal basis of property rights on apartment unit that includes:

a. Individual ownership units of flats that are used separately
b. Joint rights over the parts and building flats
c. Joint rights on the objects contained in flats
d. Joint rights to land

Thus in the flats known individual rights and collective rights are in use all of which are an inseparable unity.

Separation Properties In Unit Flats

In order to provide position or as a base to give the position as immovable that can be the object of ownership as well as to provide the foundation for a system of ownership of the apartment units are required for regulating upper part of the building, each of which can be owned separately containing the right pieces together, a common good and common land, known separation. Separation is the duty of the organizers of the development, as mentioned in Article 7 (8) of the Housing Project as follows: Implementation of development required to separate flats on units and parts in the form of pictures and descriptions are approved by the competent authority in accordance with the laws and current legislation that gives clarity on:

a. Limit units that can be used separately for individual
b. Limits and descriptions on parts together and the common good are the rights of each unit
c. Limits and description of common land and the amount they are entitled to part of each unit

The parts are made together with clear descriptions in the form of pictures and descriptions demarcated in horizontal and vertical directions that contain proportional value comparison. Separation is set forth in a deed of separation that is a proof of the separation of flats on the units of flats, sections together, objects together, and the land along with descriptions that clearly in the form of images, descriptions, and boundaries in the vertical and horizontal containing the proportional value. What is meant by proportional ratio is a number that indicates the ratio between the apartment units for the right pieces together, shared objects,

and common land, calculated based on the area or apartment units in question on the number of building area.

Once the deed of separation was approved by the local government, the organizer of the construction are also obliged to register the deed of separation is at the land office district / municipal by attaching a certificate of land rights, permits livable and clause more is needed, such as power of attorney and others ,

With the enactment and registration of the deed of separation is concerned means that the apartment units that already have a position as a stationary object and can be made the object of ownership. Thus the ownership of the apartment units occur / birth certificate since the registration of the deed of separation with the making of books apartment units concerned.

Issuance of receipt (right) as an evidentiary tool is part of a series of land registration activities. It is revealed from the definition of land registration which is a series of activities undertaken by the government continually and regularly in the form of measurement, information / specific data concerning lands of certain existing in certain regions, processing, storage, and presentation for the benefit of the people in order ensuring legal certainty in the area of land, including the issuance of receipts and maintenance.

According Boedi Harsono, the words of the lands of particular suggests the possibility that the requested portion of land that belongs to the rights designated to be registered are property rights, right to build, right to cultivate, but later expanded the use rights granted by the state , rights management, endowments and property rights to the apartment units.

Understanding Security

In Article 1131 of the Civil Code contained provisions on the guarantee of a general nature means that the entry into force of the debtor and the creditor and is valid by law without having agreed beforehand stating that all material si owed either movable or immovable, either existing or to be No later Harri dependents for every individual engagement. Furthermore, Article 1132 of the Civil Code confirms the material becomes collateral together for all those who lend to him, the sales revenue of objects was divided according to the balance that is according to the size of the individual receivable, unless among the creditors that there are reasons legitimate to take precedence. General guarantee as stipulated in Article 1131 and 1132 of the Civil Code has two disadvantages, namely:

a. If the whole property or part of such property transferred to other parties for no longer belong to the debtor, it is no longer a guarantee for settlement of accounts receivable creditor
b. If the sale of assets of the debtor are not sufficient to pay off all the creditors of each creditor accounts only received partial payment balanced by the number of receivable respectively.

In general, credit guarantees defined as the delivery of property or statement one's ability to bear the repayment of a debt. According to Thomas Suyanto, that the purpose of the guarantee is to:

1. Provide the right and power to the bank to get a settlement and the sale of goods that guarantee, if the customer makes a breach, which does not repay the loan on time as stipulated in the agreement
2. Ensuring that customers participate in the transaction to finance its business, so it is likely to leave the business or project with harm to oneself or the company can be prevented or at least likely to be able to do so minimized the occurrence.
3. Encourage borrowers to meet the credit agreement, in particular regarding the repayment in accordance with the terms that have been agreed so he would not lose the wealth that has been pledged to the bank.

The guarantee agreement is that is accesoir, since the onset due to an agreement in principal, the credit agreement. According to R. Soebekti, that this guarantee agreement has characteristics:

a. Born and remove depending on the principal agreement
b. Participate canceled by the cancellation of the principal agreement
c. Participate switched with the shift of the principal agreement.

Good assurance and ideal are:

a. Collateral can be easily help earn credits by those who need it
b. The guarantee does not weaken the potential debtor to do business
c. Collateral gives certainty on the lender, in the sense that the collateral any time.

Security Assurance function is to ensure compliance with the obligation that can be valued in money arising from a legal bond. In general moneylending agreement underwriting guarantee was requested by the lender (creditor), especially when the amount of money in large quantities. Collateral is indispensable to partially guarantee the certainty of payment receivables in the future. although on this assurance in general is already regulated in Article 1131 of the Civil Code, but these guarantees between lenders perceived lack of certainty to repay their debt payments. In Bank Indonesia Circular Letter March 16, 1972 Date No. 2/248 / BFL / PK said that the engagement collateral for moving stuff used liens and fiduciary institutions and for goods remains is the mortgage. Providing a collateral means to release some power over the goods. In principle, to be released it is the power to move to the goods in any way as well as selling, exchanging or giving it away. Therefore the security agency has the task of carrying out and secured lending, it guarantees a good and ideal are:

a. Which can easily help earn credits by those who need it
b. That does not weaken the potency (strength) of the credit providers to perform (continue) efforts
c. That gave the assurance to the lender that the collateral available to be executed every time that if necessary can easily be cashed to pay off debts.

In a security agency, the distinction on moving objects with immovable has significance in certain things, namely regarding:

a. How loading
b. How handover
c. In terms expired
d. In the case of bezit.

In the case of loading for moving objects carried by security institutions, namely the pledge and fiduciary. As for the object is not moving is done with a mortgage guarantee agencies and creditverband. How to surrender moving objects is done in a manner different from stationary object. Submission of a moving object according to its kind to do with the delivery of real, symbolic handover (handover key warehouse), Cessi, and endorsement. As for the immovable done behind the name, which is juridically who intend to transfer that right, made wtih authentic deed and registered. In terms expired, for a moving object does not recognize expired, while the immovable recognized institute expired. In terms of the position of the ruling (bezit) for moving objects apply the principles as set forth in Article 1977 of the Civil Code, that bezit on board a moving object serves as a perfect right, while for immovable not apply such principles. In the case of loading for moving objects is done by agencies that pledge and fiduciary guarantees. As for the object is not moving is done with a mortgage guarantee agencies and creditverband.

Types of Collateral

Credit guarantees can be divided into individual guarantees and collateral material. The guarantee is immaterial in the form of an absolute right over a particular object can be maintained at everyone and has characteristics include:

a. Defended against anyone
b. Always follow the object wherever it
c. Know the principle prioriteit
d. Recognize the principle of droit de preference
e. Can redirected

At the material guarantees the lender feel secure because they have the right to precedence in the fulfillment of their receivables on the results of execution against the debtor objects. Being on guarantees of individual creditors feel secure because they have more than one person that can be billed to pay off its receivables. The types of credit guarantees include:

a. Collateral material, mortgage, pledge, fiduciary, and creditverband
b. Collateral individuals.

Understanding Credit Agreement

Credit at the present time is not a new thing. Credit has now become a common agreement model for the community, especially in terms of buying and selling. In other words, buying

and selling is done at the present time a lot is done with credit method. The credit is generally defined as a debt or borrowing money. This credit is increasingly growing and ultimately in society then raises one of payment systems are popular in today's society is a credit card.

The term credit comes from the Greek "credere" which means belief (truth or faith) and the word credit means trust as the basis of the existence of a credit is the belief that someone or credit recipients will fulfill everything that has been agreed previously. The emergence of credit model is inseparable from the development of the system in the community, especially with regard to trade issues and other businesses that are run by the community. The concept of a credit is lending money to be used by someone who then returned after a certain period of time with interest. The loans are generally used for working capital, in contrast to a credit card which has the same concept but different destinations administration. Lending can be done with or without collateral, which in the form of a mortgage, pledge, encumbrance and fiduciary.

There are various kinds of credit terms, either as formulated by legislation and put forward by scholars. But in general, the credit is defined as "the ability to borrow on the opinion conceived by the lender that he will be repaid". There are some scholars who put forward the definition of credit include:

1. Savelberg, stating that the credit has meaning, among others:
   a. As the basis of every engagement in which the person is entitled to demand something from others
   b. As a guarantee, where someone handing something to someone else, in order to regain what was left of it.
2. Levy, argues that in the legal sense of the credit is voluntarily handed over a sum of money to be used freely by credit recipients. Credit recipients entitled to utilize the loan to gain with the obligation to return the loan amount was behind the day

While the definition of credit in Law No. 7 of 1992 as amended by Act No. 10 of 1998, in Article 1 point 11 confirms that, credit is the provision of money or bills can be equated with it, based on agreements between bank lending with eligible party that requires the borrower to repay the debt after a certain period of time with interest.

Thus in brief it can be said that the provision of credit is one form of fund distribution. Under the provisions of the Banking Act that legally can be detailed and explained the elements of credit is as follows:

1. Provision of money as debt by the bank
2. Claims which can be equated with the supply of money as financing, such financing home manufacture or purchase vehicles.
3. The obligation of the borrower (debtor) to pay off debts by period accompanied by payment of interest
4. Based on the approval of the lending and borrowing of money between bank and borrower (debtor) with mutually agreed terms.

Agreement is set in the third book of the Civil Code because the agreement is one source of the engagement. According to Article 1313 of the Civil Code an agreement is an act by which one or more persons bind himself to one or more persons. Mariam Darus approval confirms that the formulation of Article 1313 of the Civil Code is the formulation of the agreement. But the definition of the agreement as it has been formulated in Article 1313 of the Civil Code is very broad formulation.

According Subekti, an agreement is an event where one promise to another person or where the two men promised each other to implement something, such as purchase agreements, lease, and exchange.

The credit agreement is one very important aspect is the basis in a provision of credit, no credit agreement signed between the bank and the lender then there is no provision of the credit. Agreement credit is the bond between the bank as debtor and other parties borrowers fund as a creditor whose contents determine and regulate the rights and obligations of both parties relating to the provision of loans or credit based on agreements within a certain period which have been approved or agreed to be paid off the debt with the amount of interest, reward, or profit sharing.

In sum, similar to a credit agreement agreement to borrow money then partly controlled in Civil Code, while others are subject to other regulations ie the Banking Act. So the credit agreement can be said to have its own identity but to understand the formulation credit terms are defined by the Banking Act itself then concluded a basic agreement partial credit can still refer to the provisions of the Civil Code.

Although the credit agreement is not specifically stipulated in the Civil Code, but in making the loan agreement must not be contrary to the principles or teachings that are common in civil law, as contained in Chapter I and Chapter II, all agreements both named and unnamed subject to regulations in civil law.

Types of Credit

Loans granted by banks or other financial institutions initially have the same kind or similar. Along with the development of economic and business world, then each of the financial institutions including banks offer loans with different types. The types of these loans by Munir Fuady classified according to the following criteria:

1. The classification is based on the time period, if the period is used as the criteria for a credit can be divided into:
   a. Short-term credit, the credit period is not exceed one year.
   b. The medium-term credit loans have a term of between 1 to 33 years
   c. Long-term credit, namely credit have period.
2. Classification based documentation. Based on credit documentation can divided into:
   a. Loans with a written agreement
   b. Credit without a letter of agreement, which can be divided into oral credit, but these are very rarely performed, and credit securities instruments, for example credit only

through documents promissory note, bond, credit cards and so on.

c. Overdraft credit, this credit arising from the withdrawal / loading giro exceed its balance, and withdrawal / loading R / C that go beyond the ceiling.

3. Classification is based on economics. In this case a credit can be divided into:
   a. Credit to agriculture, labor, and agricultural inputs
   b. Credit for the mining sector
   c. Credit to the industrial sector
   d. Credit for the sector of electricity, gas and water
   e. Credit to the construction sector
   f. Credit for the trade, restaurants and hotels
   g. Credit transportation, trade, and communication
   h. Credit to the services sector
   i. Credit to other sectors.

Granting Procedure Right of Ownership on Unit Flats to cite this as a guarantee in the Bank Credit Agreement.

Holders of property rights to the apartment units are also authorized to perform legal acts make it as his right certificate as collateral to obtain credit in the bank. The types of loans that can be obtained include mortgages. This credit is intended to provide assistance to people who are low income and middle to give the house including the apartment units with payment in installments.

In the process of crediting the first thing to do is:

a. Has settled the advance payment of the price of the apartment units purchased (minimum 10%)
b. Bank fees amounting to 1% of the loan amount approved (maximum credit)
c. In the first installment
d. Insurance premium the first year
e. Notary fees for loan realization process

The extension of credit made by the Bank as a financial institution, it should have to be able to provide legal protection for providers and recipients as well as the related credit protection through something institute legal guarantees for all parties concerned. Property rights in the flats as stipulated in Article 25 section i UU Housing is a private property on the units of flats that include the right in common of parts and building flats, collective rights on the objects and collective rights to land.

There are a few more requirements that must be met, namely:

a. Indonesian citizens
b. Not to own their own home
c. Having a good income is fixed or not fixed
d. Especially those who are married

e. Minimum age 21 years or married, a maximum of 60 years and is authorized to take legal action
f. Applicant including low income / medium ie each month does not exceed. 300,000 rupiahs
g. Has had a working lives or have been doing business in the field for at least one year
h. For government employees / members of the armed forces already have NIP / NRP
i. Groups who have a fixed income who are civil servants, members of the Armed Forces, private employees. While the group is not fixed are those that (eg kis small entrepreneurs and others) and those who work on the employer, such as shop assistants, workers in the building project, taxi drivers and others
j. The number of installments per month on loans does not exceed 1/3 of the total income of the principal applicant.
k. Income that counts is the total income of the principal applicant plus additional income that could be considered in the judgment.
l. Basic income for fixed income is a fixed monthly salary of the applicant in instance concerned and for which no fixed income is the sum of the income received by the head of the family as the main livelihood to support their families.
m. Additional income is earning more regularly received by the applicant or by a husband / wife of the applicant institution where the principal or income obtained from the agency company.

In addition to the common ownership of the land and buildings of flats, there is individual ownership. Individual rights and collective rights to land known as the ownership of the apartment units. Apartment units are flats that its main purpose designation used separately as a shelter that has a means of connecting to a public road. Understanding of flats, as mentioned, it is clear that the construction of flats intended for shelter.

As the holder of the certificate of ownership of the apartment units can apply for credit at the bank by making the ownership certificate apartment units are held as collateral for loans include mortgage loans provided by banks in applying for a loan with the right of ownership over a unit home stacking as collateral must meet the requirements agreed upon by both parties (debtor and creditor) after the requirements are met, the proposed letter of credit application to the bank to include the necessary papers. Next the banks will determine whether the credit application is accepted or rejected

Conclusion

Procedures for granting property rights to the apartment units as collateral in a loan agreement with the Bank is that property rights holders can apply for credit and make the ownership of apartment units its as collateral. To obtain credit from banks, borrowers are required to repay an advance or installments and the conditions that have been determined by the bank. Once the requirements are met, the petition for credit on the bank to include the letters required by the bank, ie identity card, family card, and others. Furthermore, whether

the bank will process the loan application submitted by the holder of title to the apartment unit is approved or rejected by the bank. In case of default in the credit agreement made by the debtor, then the bank can take a variety of ways to meet loan repayment is to seize and execute the apartment units that serve as collateral.

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LAW: 2

OPTIMIZING CONFISCATION OF ASSETS IN ACCELERATING THE ERADICATION OF CORRUPTION[1]

by
Shinta Agustina[2]

ABSTRACT

Corruption has resulted in huge material and immaterial loss for Indonesia. While the country lost materially billions of rupiahs due to corruption, immaterial loss occurred as the government could not afford providing basic health care and education for the people, leaving a large number of people having no access to it. Various means and efforts have been resorted to fight corruption, but the results are unfruitful. Until recently, Indonesia is still the third most corrupt country in Asia according to the survey of Transparency International Indonesia (TII) in 2015, with the Corruption Perceptions Index of 36 points. The fight in eradicating corruption cannot be separated from the effort to deter the criminals through severe punishment. However ICW's most recent data shows otherwise. During the first half of 2014, there were 261 accused of corruption, with 242 of them were convicted guilty by the Corruption Courts. Among them, 193 were sentenced lenient (between 1-4 years imprisonment), 44 moderate (4-10 years), and only 4 with over 10 years imprisonment. The average length of sentence is therefore 2,9 years. Lenient sentence can also be found in criminal restitution. Only in 87 of the total cases state compensation is imposed, amounting 87.04 billion rupiahs in total. The amount is only 0.022% of the total financial loss of 3.863 trillion rupiahs. The weak penalty triggered then the idea of impoverishing corruptors as a strategic step to accelerate the eradication of corruption while restoring the loss to the state. An effort that will potentially be fruitful is to impose confiscation of assets as stipulated under Article 18 of the Anti-Corruption Law. In contrast to the criminal restitution, which is restricted only to the state loss caused by the perpetrators, criminal confiscation of assets has no limit in amount. Another strength is that it may be imposed against all forms of corruption, not limited to only the acts corruption stipulated under Articles 2 and 3 of the Anti-Corruption Law.

Keywords: confiscation of assets, corruption acts, impoverishing corruptors

1 This article was summarised from a research under titled *"Criminal Confiscation in the Contex of Impoverishing the Corruptors"*, funded by Dikti, 2016.

2 The writer works as senior lecturer and the Director of Master in Law Programme at the Faculty of Law, Andalas University.

A. Background.

In Indonesia, the issue of corruption has long existed within various aspects of the society. For several decades, the phenomenon has become a national issue that is difficult to be dealt with.[3] The chain of corruptive behavior has been connected in all sectors, starting from the Presidential Palace to even small neighborhoods.[4] The act of corruption occurred within the government bureaucracy, state-owned enterprises, private enterprises, as well as within social groups established to aid in channeling the disaster-relief fund aimed for the victims of earthquake.[5] Corruption has immersed in all aspects of life within the nation, such as in politics, economics, governance, education,[6] and even religion.[7]

The crime of corruption has been considered as an extraordinary crime, hence it requires extraordinary measures be taken to deal with it.[8] It has even been considered as a violation of economics and social rights of the society as parts of fundamental human rights,[9] for it hampers the objectives of Indonesian national development and the goals of the country in general.

The measures taken by Indonesian government in eradicating corruption has taken many forms, from imposing progressive regulations[10] to establishing various special anti-

3 Elwi Danil, 2011. *Korupsi: Konsep, Tindak Pidana dan Pemberantasannya.* Jakarta: Raja Grafindo Persada, p. 64.

4 Nurul Irfan, 2011, *Korupsi Dalam Hukum Pidana Islam (Corruption in Islamic Criminal Law).* Jakarta: Amzah, p. 5.

5 District Prosecutor's Office of Padang is currently conducting legal proceeding against the leaders of several Social Groups suspected of embezzling the fund allocated for earthquake-relief scheduled to be channeled in the middle of 2012. Padang Ekspres, *Pemotong Dana Gempa Ditahan (The actor behind the earthquake-relief fund embezzlement arrested)*, 12 January 2013 issue, p. 9-10. Meanwhile, there were 2 cases of corruption concerning the embezzlement of earthquake-relief fund which had been concluded by the court. Those were committed by the leader of Social Groups in Lubuk Begalung and Tunggul Hitam. Padang Ekspress, 10 October 2011 issue. In the present case, the embezzlement of earthquake-relief fund was recommitted by the leader of Social Group by embezzling Rp. 3,4 millions. Padang Ekspress, 12 January 2013 issue, *Dipotong Hingga Rp 3,5 Juta (cut down up to Rp.3,5 millions*).

6 Among them was the Rector of Unsoed, EY, who was involved in the corruption case concerning CSR fund of PT. Antam in 2013. See 'Kasus Korupsi, Rektor Unsoed Ditahan' *(Rector of UNSOED arrested for involvement in corruption)* on <http://m.tempo.co/read/news/2013/08/21/063506193/p-Kasus-Korupsi-Rektor-Unsoed-Ditahan >, Accessed Tuesday, 19 April 2016.

7 An example of a corruption case in this field is the corruption involving members of the House of Representative concerning procurement of the Koran. See *Jangan Pilih Politisi Korup (do not vote for corrupt politicians)*, Harian Kompas, Rabu 17 Oktober 2012, hlm 2-3.

8 The consideration part of the Law No. 20 of 2001 mentioned that "..a crime of corruption shall be classified as a crime of which the eradication shall be conducted in an extraordinary manner..". See the Law No. 20 of 2001 concerning amendment of the Law No. 31 of 1999 concerning the Eradication of the Crime of Corruption.

9 Elwi Danil, *op.cit*, p. 77.

10 Regulations concerning the crime of corruption in special regulations dated back in 1957 with the Warlord Regulation on Eradication of Corruption, in pursuance with Emergency Law. This rule was replaced with the Military Commander Regulation a year later, but revoked when the state of emergency was declared over. The government of Indonesia then set the Law No. 24 (Government Regulation in lieu of Law) of 1960 (UU Nomor 24 Prp Tahun 1960), which entered into force for approximately 11 years, and replaced it with the Law No. 3 of 1971. This Law was in effect throughout the Orde Baru regime, and was only revoked after the end of Reformation regime with the Law No. 31 of 1999 being regulated to replace it. This

corruption agencies and committees.[11] However, the more effort is taken, the more intense it occurred, resulting in an even bigger loss caused to the state.

With such condition, it is no wonder if a survey by Transparency International[12] placed Indonesia as the third most corrupt country in Asia after Myanmar and Vietnam. In 2015, the Corruption Perception Index of Indonesia was 36 points, having 2 points difference from the previous year of 34 points.[13] The score showed that the anti-corruption movement in Indonesia has not brought fruitful outcomes. Throughout the last decade, there was only an increase of one point of the score.[14]

The lenient penalty is presumed as one of the reasons causing the failure of corruption eradication effort in Indonesia. Data from the *Indonesia Corruption Watch* (ICW) for the first half of 2014 revealed that the average length of imprisonment sentenced upon corruptors is 2,9 years, while the fine penalty imposed is only 1-2% of the corrupted amount. Only in 87 cases out of a total of 241 cases handled that state compensation is imposed, in the amount of Rp 84,07 billions (0,022%) out of the total loss of the state as much as Rp 3,863 trillions.[15] Such situation is so much different with one in China, for instance, which imposed capital punishment upon the perpetrator of the crime of corruption.[16] To the present day, there has been no capital punishment imposed upon corruptor in Indonesia, despite the fact that corruptions occurred most often in the country.

Law underwent changes and additions in 2001 by the existence of the Law No. 20 of 2001. See Hamzah, Andi, 2007. *Pemberantasan Korupsi Melalui Hukum Pidana Nasional dan Internasional (eradication of corruption through National and International Criminal Law),* Jakarta: Raja Grafindo Persanda, p. 41 and Adji, Indriyanto Seno,2003. *Korupsi dan Hukum Pidana (Corruption and Criminal Law).* Jakarta: Kantor Hukum Seno Adji dan Rekan, p. 7.

11 Starting from Paran (Committee for the Retooling of State Apparatus) headed by AH. Nasution with Muhammad Hatta and Roeslan Abdulgani as its members in 1957, then Opstib headed by Sudomo, to the Commission for Eradication of Corruption (KPK) which was established through the Law No. 30 of 2002. See Andi Hamzah, *loc.cit.* The latest measure was the establishment of a Special Court for Corruption through the Law No. 46 of 2009.

12 Corruption Perception Index is a result of survey and polling conducted on the ranked countries concerning perceptions on the crime of corruption that occurred in the respective countries. Paku Utama, 2013. *Memahami Asset Recovery dan Gate Keeper.* Jakarta: Indonesia Legal Roundtable, p. 10.

13 In the survey by Transparency International (TI) conducted every year upon 178 countries, the Corruption Perception Index (CPI) was ranked with score ranging from 0 to 10 (it was changed to 0 to 100 in 2013). The higher the number, the better CPI it shows, meaning that the country is considered clean from corruption. Krisna Harahap, 2006. *Pemberantasan Korupsi, Jalan Tiada Ujung.* Bandung: Grafitri, p. 11.

14 From 2004 to 2011, the corruption perception index in Indonesia according to the survey by Tranparency International Indonesia (TII) always shows positive progress. Starting from 2,0 in 2004, then increased to 2,2 in 2005, 2,4 in 2006, and 2,6 in 2008. It stayed at 2,8 from 2009 to 2010, and reached 3 in 2011. Denny Indrayana, 2012. *Strategi Pemberantasan Korupsi,* a lecture on Pekan Konstitusi ke V, Faculty of Law of Andalas University held on Wednesday, 17 October 2012, p. 1.

15 Indonesia Corruption Watch, 2014. Laporan Tahunan 2014. Jakarta: ICW, p .

16 Data from Amnesty International as reported by CBS News revealed that at least 4000 people were executed for a crime in China, be it for corruption or for other offences. It occurred since the President of China, Xi Jinping vowed on 14 March 2013 that he will punish to death corruptors, be it State Authority or small-scale corruptors. See <news.okezone.com/read/2015/10/05/18/1226446/inilah-pelaksanaan-hukuman-mati-koruptor-di-china>, accessed on Monday, 18 April 2016.

Imposition of lenient penalties will not deter the perpetrator, and is instead considered as the cause of the increasing corruption, for the benefit of the corrupted fund still overweighs the imposed penalty. An example of a lenient and non-deterrent penalty is the sentence against former Governor of the Province of North Sumatra, GP, and his second wife, ES. The former governor who bribed a judge of the Administrative Court of Medan was sentenced to 3 years imprisonment and a fine of Rp. 150 millions, while his wife was sentenced to 2 years and 6 months imprisonment and a fine of Rp. 150 millions. Both were convicted guilty of violating Article 6 (1) section a and Article 13 of Anti-Corruption Law for bribing the Secretary General of Nasdem (a political party, hereinafter "Partai Nasdem"), PRC. The imposed penalty was the minimum penalty as stipulated under Article 6 (1) section a of the Anti-Corruption Law, where it is set in the article the penalty of imprisonment for 3 to 15 years and fine of Rp 150 millions to Rp 750 millions.[17] Lenient penalty was also imposed against the judge of Administrative Court in Medan, AF, who received the bribe from the former governor through his attorney. AF was sentenced to 2 years imprisonment and a fine of Rp 200 millions for accepting a bribe of as much as US$ 5000. The judge did not even impose such a sentence which would enable the state to confiscate such bribe money, however ordered KPK (Commission for Eradication of Corruption) to reopen some of the bank accounts of the accused which were previously blocked.[18] The sentence against the-ex Secretary General of Partai Nasdem, PRC, who was also involved in this case, was a mere one and a half years and a fine of Rp. 50 millions, despite being proven guilty of receiving bribe of as much as Rp. 200 millions and thus violated Article 11 of Anti-Corruption Law, which sets the bar for penalty as 1 year to 5 years imprisonment and fine of Rp. 50 million to Rp. 250 millions.[19]

The loss suffered by Indonesia caused by corruption is enormous. ICW claimed that throughout 2015, the amount of financial loss caused by corruption was as much as Rp 3,1 trillions from approximately 550 corruption cases.[20] Meanwhile, the amount which was able

17 Kurnia, Dadang 'Guberur Sumut Non aktif Divonis 3 Tahun Penjara'. (Former Governor of North Sumatera Sentenced to 3 years imprisonment) Tuesday 15 March 2016 on <http://nasional.republika.co.id/berita/nasional/daerah/16/03/15/o41myf284-gubernur-sumut-nonaktif-divonis-tiga-tahun-penjara>, accessed on Monday, 18 April 2016

18 Terima Suap OC. Kaligis, Hakim PTUN Medan Divonis 2 Tahun Bui (Judge of Administrative Court of Medan imprisoned for receiving bribe from OC Kaligis), on <https://m.tempo. co/read /news/2016/01/27/063739770/terima-suap-oc-kaligis-hakim-ptun-medan-divonis-2-tahun-bui>, accessed on Monday, 18 April 2016.

19 See Fauzi, Gilang, 'Patrice Rio Divonis 1,5 Tahun Penjara', (Patrice Rio Convicted to 1,5 years imprisonment), Monday, 21 Desember 2015 on <http:// www.cnnindonesia.com/nasional/20151221170513-12-99670/rio-capella-divonis-15-tahun-penjara/>, accessed on Monday, 18 April 2016.

20 See "Kerugian Negara Akibat Korupsi 2015 sebesar Rp 3,1 Trilyun" (State loss due to corruption in 2015 amounted as much as Rp. 3,1 trillions) on <http://www.antikorupsi.org/id/content/kerugian-negara-akibat-korupsi-2015-sebesar-31-triliun> accessed on Tuesday, 19 April 2016. This number is decreased compared to 2014 of Rp 5,29 trillions. See 'ICW: Kerugian Negara akibat Korupsi Tahun 2014 Rp 5,29 Trilyun' (ICW: State loss due to corruption in 2014 amounted Rp. 5,29 trillions) on <http://www.tribunnews.com/nasional/2015/02/17/icw-kerugian-negara-tahun-2014-akibat-korupsi-rp-529-triliun>, accessed on Tuesday, 19 April 2016.

to be restored to the state was very little compared to the suffered loss. For instance, in 2013 KPK had only succeeded in restoring Rp 1,196 trillions and Rp 2,8 trillions in 2014 to the state.[21]

Such huge loss has resulted in the inability of Indonesian government to manifest its goals as set in the fourth Paragraph of the Preamble of the 1945 Constitution of Indonesia. Therefore, it is reasonable that the effort in eradicating corruption be prompted, taking into account all ideas surfacing in various public discussions concerning the strategic measures toward such prompt. Impoverishing corruptors is a logical effort, but has to be conducted within the applicable legal framework, that is including but not limited to utilizing the additional punishment stipulated in the Anti-Corruption Law, such as punishment taking form of criminal confiscation (pidana perampasan) or compensation of state loss (pidana uang pengganti). Letting the perpetrator of the crime of corruption have possession over the corrupted proceeds will open the opportunity for the said perpetrator or to other person related to him to enjoy such proceeds, reuse and even develop the conducted crime of corruption.[22]

Confiscation of Asset within the Anti-Corruption Law

Confiscation of assets of the perpetrator of corruption in order to impoverish corruptors can be carried out through imposition of additional punishment stipulated in Article 18 of the Anti-Corruption Law. It is stated in the article several forms of punishment which basically confiscate the properties (which can take form of movable goods, tangible or intangible goods, immovable goods, company, including some certain rights or privileges) of the perpetrator of corruption. If this punishment is imposed cumulatively, then this measure will encourage the acceleration of eradication of corruption for its potential deterrence effect.

1. Criminal Confiscation as Punishment

In Indonesia, confiscation is one of additional punishments as stipulated under Article 10 of the Indonesian Penal Code (KUHP). It is stated in the article that punishments consist of:[23]

a. Basic punishment, namely:
   1) Capital punishment;
   2) Imprisonment;
   3) Light imprisonment;
   4) Fine;
   5) Punishment imposed under political considerations upon a person who had committed an offence punishable with imprisonment (pidana tutupan).

21 See 'ICW: KPK Lebih Banyak Selamatkan Uang Negara Ketimbang Polri dan Kejaksaan' (KPK saved the most of State Fund compared to Police and Prosecution Agencies) on <http://news.detik.com/berita/2835667/icw-kpk-lebih-banyak-selamatkan-uang-negara-ketimbang-polri-dan-kejaksaan>, accessed on Tuesday, 19 April 2016.

22 Yunus Husein, 'Perampasan Aset Hasil Tindak Pidana di Indonesia' (Confiscation of Asset as a proceed of the commission of offences), Jurnal Legislasi Indonesia Vol 7 No.4, Desember 2010, p. 478.

23 R. Soesilo, 1981. *KUHP dan Komentar (Indonesian Penal Code and Commentaries).* Bogor: Politeia, p. 7.

b. Additional punishment, namely:
   1) Deprivation of certain rights;
   2) Forfeiture of specific property;
   3) Publication of judicial verdict.

On the other hand, regulation on confiscation as punishment toward the perpetrator of corruption is stipulated under Article 18 of the Anti-Corruption Law. The article set out that:

(1) Other than the additional punishment as set out in Indonesian Penal Code, it is set out under this Law as additional punishments as follows:
   a. Confiscation and forfeiture of tangible or intangible movable property, or immovable property used in or resulted from an act of corruption, including company belonging to the convicted where the act of corruption was conducted, including properties which substitute them;
   b. Payment of compensation of state loss in the amount of as much as the proceeds obtained through the act of corruption;
   c. Closing down, entirely or partially, a company, for the longest period of 1 year;
   d. Deprivation entirely or partially of certain rights or abolition entirely or partially of certain privileges, which has been or may be granted by the Government to the convicted.

(2) If the convicted fails to pay compensation of state loss within the longest period of 1 year after a judgment has obtained a res judicata status, as stipulated in Paragraph (1) section b, his properties may be confiscated and forfeited by prosecutor and be auctioned to cover such compensation of state loss.

(3) In the event that the convicted has no sufficient property to pay the compensation of state loss, the convicted will be imprisoned for a period that does not exceed the maximum penalty of the basic punishment according to the provisions under this Act, and the duration of the punishment has been decided in the judgment.

It can be derived from both provisions that there are some additions on the regulations concerning the goods which may be confiscated in a corruption case. In KUHP, the property which may be confiscated is only tangible, movable and immovable goods as stipulated under Article 39 (1). In contrast, the Anti-Corruption Law enables the confiscation of tangible and intangible movable goods, immovable goods, as well as company or any substitute goods.

With regard to the confiscable goods in the additional punishment, it is set out in Article 39 (1) of the KUHP that goods which may be confiscated are "a) property belonging to the convicted which was used directly in committing the crime or preparing for the commission of the crime, and b) property belonging to the convicted which was obtained through the commission of the crime. Whereas in the crime of corruption, based on Article 18, there are three kinds of confiscable goods, namely[24]

1. *Instrumentum scheleris* (goods which was used to commit the crime as well as to prepare for or to enable the commission of the crime);
2. *Objectum scheleris* (goods which becomes the object of the crime); dan
3. *Fructum scheleris* (goods which was a proceed from the commission of a crime, including its substitute).

24 Eddy OS Hiariej, 2014. *Prinsip-prinsip Hukum Pidana*. Yogyakarta: Cahaya Atma Pustaka, p

Since confiscation is an additional punishment, it is facultative in nature, in the sense that it can only be imposed after guilty verdict and sentence with basic punishment have been awarded. However, unlike confiscation under KUHP, confiscation as punishment in a corruption case has a bigger chance to be imposed. This kind of punishment is not only imposable upon the accused who is convicted guilty of committing corruption, but also upon an accused that died while the legal proceeding upon him is still ongoing, as long as there is strong evidence derived from the hearing and evidence adduced before the court that the accused has committed a crime of corruption. In such case, the judge through its judgment may, upon a charge by prosecutor, forfeit the goods which was confiscated during the proceeding, as stipulated under Article 38 (5) of the Anti-Corruption Law. An appeal cannot be filed upon this kind of decision, based on paragraph 6 of this article.

Forfeiture can also be imposed upon the property presumably obtained by the commission of corruption, in the event that the accused cannot prove otherwise. This forfeiture concerns the property belonging to the accused which has not been charged but is presumed as being the proceed of the commission of corruption. It is set out in Article 38 B (2) of the Anti-Corruption law:

> *(2) In the event that the accused cannot prove that his property is obtained not by the commission of corruption, such property will be considered as being obtained by the commission of a crime of corruption. The judge may decide that such property be forfeited by the state, either partially or entirely.*

A charge to forfeit property is filed by the prosecutor during the indictment reading, while the decision upon such charge is decided along with the verdict upon the crime.

It can be understood, based on the elaboration above, that there is a good chance to impose confiscation of assets or property as punishment in a corruption case. The forfeiture can be proposed in three different mechanisms as follows:

a. Upon the asset and property obtained by or used in the commission of the crime of corruption, regardless of it being confiscated or not during the proceeding;
b. Upon the asset and property belonging to an accused that died during the proceeding, and there exists strong evidence that the accused had committed the crime of corruption; and
c. Upon the asset on property belonging to an accused, which has yet to be charged and presumed to be obtained from the commission of a crime of corruption.

Although the chance is good, the success of this measure depends on the seriousness and professionalism of the investigators and prosecutors to track down the assets of the accused during investigation, and to prove the guilt of the accused with all evidence adduced before the court.[25]

25 Yunus, Muhammad, 2013. *Merampas Aset Koruptor: Solusi Pemberantasan Korupsi di Indonesia. (Forfeiting the Assets of Corruptors; the Solution to eradicate corruption in Indonesia)* Jakarta: Penerbit Buku Kompas, p. 163.

2. Compensation of state loss as a punishment.

This kind of punishment is of additional nature, imposable upon an accused of a crime of corruption as stipulated under Article 18 (1) section b of the Anti-Corruption Law. However, unlike confiscation and forfeiture of assets which is imposable to any kind of corruption committed by the perpetrator, compensation of state loss is only imposable to the kind of corruption causing the loss of state finance or economics. In other word, it is applicable to Article 2 (1) and Article 3 of the Anti-Corruption Law.

Although the elucidation of the particular article did not explain to which act of corruption such punishment is imposable for it only stated "Sufficiently Clear", it is interpreted from the phrase stated in Article 18 (1) section b "...which amounts as much as the proceeds obtained through the commission of a crime of corruption". Through grammatical and systematic interpretation, compensation of state loss should only be addressed towards the perpetrator of the crime of corruption causing the loss of state finance or economics.

Grammatically, the wording "*uang pengganti*" (meaning compensating the loss of state finance) should correlate to a loss, or an outcome resulted from the commission of a crime.[26] This kind of punishment is resorted to get compensation of the loss as a result of the commission of corruption by the perpetrator. Such loss is no other than the financial or economic loss which is explicitly mentioned in Article 2 (1) and Article 3 of the Anti-Corruption Law. Whereas systematically, the interpretation of compensation of state loss should correlate with the punishment of confiscation and forfeiture that is regulated under the same article. What is then the distinguishing factor between confiscation of assets and compensation of state loss, if not the kind of the crime committed by the perpetrator? If the law maker had no intention to distinguish the two kinds of punishment in the first place, why regulates two kinds of additional punishment having an exact same objective?

Hence, there needs expert testimony in examining a corruption case in order to be able to determine accurately the amount of the compensation of state loss imposable upon the perpetrator.[27] Strict limitation on its amount becomes one distinguishing characteristic between compensation of state loss and confiscation of assets. With regard to compensation of state loss, Wiyono explained that it is not only upon properties and assets under the possession of the perpetrator, but also upon those of which possessions have been assigned to other person.

Another distinguishing characteristic is the existence of imprisonment as a substitute in the event that the perpetrator cannot pay the compensation. It is stipulated under Article 18 (3) which restricts the duration of such imprisonment to not exceeding the maximum length of imprisonment set out under the article upon which the charge is based.

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26 See also Chazawi, Adami, 2016. *Hukum Pidana Korupsi di Indonesia.* (Anti-Corruption Law in Indonesia) Revised Edition. Jakarta: Raja Grafindo Persada, p. 326.

27 R. Wiyono, 2008. *Pembahasan UU Pemberantasan Tindak Pidana Korupsi (study on the Law on the Eradication of the Crime of Corruption).* 2nd Edition. Jakarta: Sinar Grafika. p. 142.

3. Close-down of a company, in its entirety or partially.

It is regulated under Article 18 (1) section c, where its elucidation mentioned about revocation of business license or the halt of business activities for a certain period of time as determined by a judicial decision. Although it is not mentioned in the elucidation that the company shall belong to the accused, Wiyono interpreted that the company does not have to belong to the accused. However, the crime of corruption should be committed within the company.[28]

4. Deprivation entirely or partially of certain rights or abolition entirely or partially of certain privileges which has been or may be granted by the Government to the convicted. Wiyono interpreted such deprivation of rights in this article as wider in its scope than what is stipulated under Article 35 (1) of the KUHP, by mentioning as an example the right to export or import particular goods or the right to develop a certain area. While for the term "certain privileges", Wiyono referred to Article 7 of Emergency Law No. 7 of 1955 concerning investigation, prosecution, and adjudication of Economic Crime. In that article, privilege is related to the accused's company, which is considered as including the privileges taking the form of permit or dispensation.[29]

Confiscation and Forfeiture of Asset in Anti-Corruption Law Enforcement Practice

In criminal law enforcement, there is an interesting phenomenon concerning the imposition of additional punishments regulated in the Anti-Corruption Law. Compensation of state loss is the kind of punishment that is being imposed the most. In almost every case concerning financial loss of state, be it under Article 2 (1) or Article 3, the prosecutor always prosecutes the accused with such punishment, and the judge grants it most of the time.

However, it is not the case with confiscation and forfeiture of asset, deprivation of certain rights and privileges, nor the defunct (closing-down by a court-order) of company. These three forms of additional punishments rarely be imposed, whether in the indictment or in the judgment. In some cases mentioned in Background earlier, confiscation of assets should have been imposed upon the object and the proceeds obtained from the commission of corruption. The judge of Administrative Court of Medan who was convicted guilty of receiving bribe, was sentenced with imprisonment and fine but no additional punishment was imposed upon him. The examining judge even ordered KPK to reopen the blocked bank accounts of the accused, meaning that his assets were returned to him instead of punishing him by confiscating and forfeiting it to be acquired by the State. Same goes for *PRC case* where PRC was sentenced with imprisonment and fine, despite receiving bribe as much as Rp. 200 millions.

In other case such as AF bribery case concerning beef import, AF was sentenced to 16 years imprisonment and fine as much as Rp. 1 billion. He was convicted guilty of receiving

28 *Ibid,* p. 143.
29 *Ibid*, p. 144.

bribery as much as Rp. 1,3 billion from the CEO of PT. Indoguna. AF was also convicted guilty of committing money laundering, for spending as much as Rp. 38 billions on houses and cars assigned to several women. Despite being convicted guilty under both Anti-Corruption Law and Anti-Money Laundering Law, it was not decided in the judgment that his assets be forfeited to be acquired by the State. Only in *LHI case* (LHI was a president of a particular political party in Indonesia), which was in correlation with *AF case*, the deprivation of rights be imposed, which was the right for to run for office.[30] In the *Regent of Buol case*, AB (former Regent of Buol) was sentenced to 7,5 years imprisonment and fine of Rp 300 millions, despite being convicted guilty of receiving bribe as much as Rp. 3 billions in the issuance of land use permit for PT HIP (a limited liability company).[31]

In other case, the judge imposed compensation of state loss as punishment instead of confiscation of asset, upon the convicted, AS.[32] In the judicial review judgment, AS was even granted lesser penalty, from 12 years imprisonment to 10 years. AS was also sentenced to a fine of Rp. 500 millions, and compensation to state loss as much as Rp. 2,5 billions and US$ 1,2 millions with 1 year of subsidiary imprisonment. AS was convicted guilty of committing the crime of corruption and receiving bribe, hence the imposition of compensation of state loss as punishment raised debates among legal scholars.[33] According to my opinion the confiscation of assets is more suitable to be imposed, for the committed crime of corruption was not of Article 2 (1) or Article 3 of the Anti-Corruption Law. The received bribe in the amount of 23 billions rupiahs should have been forfeited to be acquired for the State. Moreover, the compensation order in this case is substitutable with 1 year imprisonment, which raised doubt that the convicted will pay, given the condition that she could just opt for the other punishment.

Conclusion

Based on the elaboration above, the current legal framework allows the measure to be taken to impoverish corruptors, which is through confiscation and forfeiture of assets as proceed of corruption. Such measure can be conducted by imposing additional punishments. Law enforcement officers have to thoroughly take this measure into account. The imposition of basic punishments, like what has been going on this whole time, clearly fails to create deterrence. Therefore, the effort toward impoverishment of corruptors should be carried out through various additional punishments. Additional punishments can also be imposed cumulatively so that it can create a greater deterrence on "future corruptors". Law enforcement

30 Judgment No.1195 K/Pid.Sus/2014.

31 See 'Amran Batalipu divonis 7,5 tahun' (Amran Batalipu Convicted to 7,5 years imprisonment) on <http://kpk.go.id/id/berita/berita-sub/821-amran-batalipu-divonis-7-5-tahun> accessed on Saturday, 23 April 2016.

32 Judgment No 107K/Pid.Sus/2015.

33 Indriyanto Seno Adji stated that compensation of state loss as punishment stipulated under Article 18 of the Anti-Corruption Law is for the act of corruption under Article 2 (1) and Article 3, not for Bribery. See on <http://www.beritasatu.com/hukum/152099-pengamat-putusan-ma-pada-angelina-sondakh-bermasalah.html> accessed on Saturday, 23 April 2016.

officers have to have a correct understanding that each additional punishment is different in its substance and implementation. Such difference creates strength and weakness on each punishment in achieving the goal of impoverishing corruptors, which also gives an impact in accelerating the eradication of corruption.

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THE APPLICATION OF THE REGIMES ON LIABILITY AND COMPENSATION FOR OIL POLLUTION DAMAGE BY TANKERS IN INDONESIA

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ABSTRACT

Oil pollution by tankers is a risk of oil business. Claims for compensation of oil pollution by tanker owners become the one governed seriously by the system of international maritime law through an international convention on evolving civil accountability for civil into The International Regime on Liability and Compensation for Oil Pollution Damage. The regime divides three levels of compensation (the three tier system of compensation) for the oil pollution caused by tankers. The compensation of the first level is based on the provisions of CLC 1969 and IOPC Fund 1971, the compensation of the second level is based on the provisions of CLC 1992 and IOPC Fund 1992, and then the compensation of the third level is based on Supplementary Fund Protocol 2003. The aims of this paper were to examine each level of compensation and the position of Indonesia in the levels of compensation for damages.

Keywords : *The Regime of Liability and Compensation for Damages, Oil Pollution, Tanker*

1. BACKGROUND

The legal issues in environmental cases are the debate concerning the issues of the right to sue (ius standi), the evidentiary associated with scientific verification to explain the causal relationships, the principles of compensation, the coverage and breadth of the environmental issues to determine the amount of compensation, the criteria for environmental restoration, the criminal offenses to the environment, expert testimony, the role of laboratories and polluted analysis methods to establish the presence and absence of pollution in terms of legal reasoning based on the development of science and technology due to the formal truth principles espoused in the prosecution system in civil damages.

Oil pollution at sea by tankers would be a serious concern for the pollution caused serious harm to the marine ecology and sociology of the coastal states. An argument is given by John

Maddox[1]; pollution will be solved by calculating the expenses incurred (price), pollution is an economic problem, "we can reduce pollution if we are prepared to pay it". Therefore, it should be understood that pollution problem is an economic problem; it means how much our ability to pay either by creating pollution prevention device of anti-pollution or indirectly to pay for damages caused by pollution. H.C. Combs[2] argues that economic changes can solve many environmental problems. According to him, pollution can be controlled economically through legal arrangements, such as the application of penalties, the tax on processed materials or their wastes.

E.J. Mishan, in *the cost of economic growth*, in the sixties introduced the principle of polluter pays which states that the polluter is merely someone who performs the pollution that he should be able to avoid.[1] In 1972, the polluter pays principle was adopted and developed by the state members of the Organization of Economic and Development (OECD)[2], which states that the polluter should bear the charge or expense of prevention and controlling of pollution caused. As an economic instruments, this principle uses cost internalization in the production process which is intended as a preventive action for the possibility of pollution. In the further development, this principle began to shift into a legal principle, such as in the Indonesian positive law system.

The polluter pays principle in its development regulates the issue of responsibility of a country to another country on the environmental damage made. This principle is born out of the state's obligation not to damage the environment of other countries or territories outside its territory as well as the one's obligation to preserve the environment. The principle of responsibility and the obligation to pay the compensation to the marine environment pollution caused by the oil spill raises the need to set the amount of compensation to be paid by the source of the pollution. Hence, the international law system imposes some international provisions related to the limits of losses that can be claimed by a state/victim of pollution. This paper examined the international provision pluralism governing the compensation of oil pollution by tankers and where the position of Indonesia in the pluralist regime of the legal provisions for the compensation.

Phillipe Sands, 2003, *Principles of International Environmental Law*, Second Edition, Cambridge University Press, United Kingdom. Page 281.

Sundari Rangkuti, 2000, *Hukum Lingkungan dan Kebijakan Lingkungan Nasional (Environmental Law and National Environmental Policy)*, second edition, Airlangga University Press, Surabaya. Page 238.

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1 Phillipe Sands, 2003, *Principles of International Environmental Law*, Second Edition, Cambridge University Press, United Kingdom. Page 281.

2 *Ibid.* Page 281.

2. RESULT AND DISCUSSION

2.1. The Regime of Oil Pollution Compensation in the Sea by Tankers

2.1.1. Old Regime (The 1969 CLC dan 1971 Fund)

Three levels in the compensation regime stems from the old regime; in the early days of the enactment of the 1969 CLC and 1971 IOPC Fund Regime. Both conventions provide first-rate compensation and require the owner of the ship to be responsible for oil pollution damage made. Pollution loss refers to the loss or damage resulted from disposal of vessels that lead to contamination due to decreasing environment and costs of pollution prevention[5].

In general, a claim can be filed for property damage, consequential loss and pure economic loss. Both provisions of this convention have the same essence. The 1969 CLC in terms of applications is more geographically narrower; it only applies to the pollution damage suffered in the territorial waters of its member countries. The pollution damage which is only in the exclusive economic zone (EEZ) or the equivalent area of its member countries are not covered by the 1969 CLC.[6]

CLC applies to the pollution damage caused by "persistent oil" spilled or discharged from the vessels carrying oil in bulk as cargo.[7] The convention is in force only to the damage caused by the spills of oil cargo from tankers and does not include the oil spills which are not cargo or purely preventive efforts undertaken in which there is no oil spill from tankers. The Convention also applies only to the ships carrying oil as cargo, which are the tankers carrying oil. The spills of tankers in a sailing of "Ballast Condition" and the spills of bunker oil or ships other than tankers is not included in this convention. The damage caused by "non-presistent Oil" such as gasoline, kerosene, light diesel oil, and others is not included in the CLC Convention.[8] Strict liability is imposed to ship owners due to pollution, which means that the owners will be liable regardless of fault elements, even in the absence of negligence.

5. Article 1(6), the 1992 CLC. Article 1(2) *1992 Fund Convention*. Article 1 (6) *Supplementary Fund Protocol*. This definition and the various types of admissible claims are further discussed by Oosterveen W, 2004, *Some recent developments regarding liabilityfor damage resulting from oil pollution*, from the perspective of an EU member state, Env. L. Rev. Page 223-239.
6 United Nations Conference on Trade and Development, *Op. Cit*. Page 14.
7 *Ibid.*
8 Http://muliadirusmana.blogspot.com/2012/12/pencemaran-lingkungan-laut.html, Muliadi Rusmana downloaded on 20 August 2015, at11.00.

In general, obligation arises if the plaintiff is able to prove that the polluting oil is from a ship of the owner of the ship concerned. The pollution damage caused by oil spills from one or more vessels is not the reason to separate the damage. Both registered ship owners will be responsible jointly.[9] The limitation of CLC was initially expressed in gold france which is equal to 133 SDRs per tonne subject to a global maximum value of 14 million SDRs. [13] The maximum amount of compensation paid by shipowners under the 1969 CLC is the equivalent of US$19 million. [10] the 1969 CLC uses the value of gold (Poincare france) based on the another country's currency rate. In the 1976 Protocol, it introduces the form of unit of

account based on Special Drawing Rights (SDR) as used by the International Monetary Fund (IMF).[11]

This protocol is intended to address the development and anticipate the broad interpretation of the values of the compensation in the 1969 CLC. Article 2 of the 1976 CLC Protocol states that the compensation limit is 133 units of account for each ton of ship tonnage.[12] The total amount does not exceed 14 million units of account. Furthermore, the 1984 Protocol was adopted on 25 May 1984. The issuance of the provisions of the 1984 Protocol by the IMO is intended to increase the limit of liability. This protocol cannot be enforced because it does not reach the requirement of ratification as required by the protocol. The main factor for not being able to implement this protocol is because of the reluctance of oil-importing countries, including the United States, to ratify. The United States tend to implement a system of unlimited liability.[13] On December 18, 1971 IMCO successfully formulated the International Convention on the Establishment of an International Fund for Oil Pollution Damage, 1971 (Fund Convention 1971), applicable from October 16, 1978.

Fund Convention is a supplement of the 1969 CLC and will pay the compensation for the pollution of the marine environment if the amount of compensation paid by the 1969 CLC is sufficient.[14] The purposes of making this convention are: [15]

9. United Nations Conference on Trade and Development, *Op. Cit.* Page 15.
10. R. Bhanu Krishna Kiran, October-Desember 2010, *Liability and Compensation for Oil Pollution Damage: An Examination of IMO Conventions*. Page 408.
11. *Ibid.* Article V of the 1969 CLC as amended by Article VI of the 1992 Protocol.
12. IMO, *Protocol 1976*, (IMO 1989). Page 17. See also *The Magazine of the International Maritime Organization*, 1994, IMO News, Number 3. Page 1.
13. For the participating countries that are not the members of the IMF and their laws do not permit the application of SDR, then every accident has the compensation limit of 2,000 monetary units per tons of tonnage, but not exceeding 10 million monetary units. Monetary unit is equivalent to 65.5 mg of gold.See Article 2 (2) *Protocol1976.*

(1) to provide compensation for oil pollution damage to the extend that the protection afforded by the 1996 Civil Liability Convention is inadequate;
(2) to give relief to shipowners in respect of the additional financial burden imposed on them by the 1969 Civil Liability Convention, such relief being subject to conditions designed to ensure complience with safety at sea and other conventions;
(3) to give effect to the related purpose set out in the Convention.

The amount of compensation that may be paid pursuant to Article 4 (4) and (6) of the 1971 Fund Convention does not exceed 450 france. This amount may be adjusted based on the "changes in currency rates" but do not exceed 900 million france. The Fund Convention of 1971 specifies the type of oil that can be accounted for which are the types of crude oil and fuel oil.[16] the 1976 Fund Convention Protocol was adopted on 9 November 1976 and effective on 22 November 1994. The changes contained in the Fund Convention Protocol of 1976 are the changes in the compensation into Special Drawing

Right (SDR), and the other changes are:[17]

(a) 450 million france is replaced with 30 million units of account or 450 million monetary units;

(b) 900 million france is replaced with 60 million units of account or 900 million monetary units.

2.1.2. New Regimes (The 1992 CLC dan the 1992 IOPC *Fund Regime*)

Based on the conventions of their predecessors, the two conventions still maintains the system of multilevel compensation liabilities with limited liability of shipowners depending on the tonnage and additional compensation available from the international funds compensation up to a maximum overall amount per incident. The 1992 CLC sets shipowner's liability for oil damage. This convention is based on the principle of strict liability for shipowners and creates a system of compulsory insurance. Shipowners are entitled to limit the amount of compensation related to ship tonnage. The 1992 Fund provides additional compensation to victims when the compensation provided by the 1992

14. For the participating countries that are not the members of the IMF and their laws do not permit the application of SDR, then every accident has the compensation limit of 2,000 monetary units per tons of tonnage, but not exceeding 10 million monetary units. Monetary unit is equivalent to 65.5 mg of goldee Article 2 (2) *Protocol1976.*
15. Http://www.imo.org/imo/convent/summary.htm,*IMOs Web Site Summary of Status of Convention*, downloaded on2 February 2012 At 10.00 WIB.
16. Http://www.amsa .gov.an/me/pn324.htm, *Marine Pollution Legislation*, downloaded on 28 July 2015, at 15.00. WIB.
17. Http://www.imo.org/imo/convent/summary.htm,*Op.Cit*.

CLC is inadequate. The 1992 CLC applies to pollution damage including the territorial sea and exclusive economic zone (EEZ) or the Convention member states. The 1992 CLC applies to the ships carrying oil in bulk, which are generally tankers, oil spills from bunker ships other than tankers.

The limits of compensation under Article 6 of the 1992 CLC Protocol are as follows[18]: 1.The limit of liability of the ships which are not exceeding 5,000 gross tonnage is SDR 3 million (equivalent to US $ 4.1 million). For the type of ships weighing 5,000 to 140,000 gross tonnage, the limits of liability reach SDR 3 million plus the multiplication of SDR 420 (equivalent to US $ 567) for each additional tonnage; 2.The limit of liability of the ships over 140,000 gross tonnage is SDR 59.7 million (equivalent to US $ 80 million).

The claims based on the 1992 CLC can only be made to registered shipowners. This circumstance does not preclude victims to claim compensation out of the convention instead of tanker owners. The 1992 CLC prohibits the claims against the owner's employee or agent, pilot, tenant, manager or operator of the ship, or the person doing the rescue operation or taking preventive measures. The compensation paid by the 1992 Fund is related to the limited incident for the total amount of SDR 203 million SDR (US $ 292 million or € 249.8 million), including the amount actually paid by shipowner (or insurance) under the 1992 CLC. The

1992 Fund can pay compensation to claimant only as long as his claims are justified and meet the determined criteria. For this purpose, prosecutor would need to prove the claim by making notes, invoices, receipts and other documents to support the claim.

The incident of *the Prestige* in 2002 called for a new review to the amount of compensation because it became clear that the claim received from the incident will exceed the maximum amount available under the 1992 CLC and the 1992 Fund. In accordance with the Supplementary Fund Protocol of 2003, it introduces three optional levels of compensation for the participating countries of the 1992 CLC and the 1992 Fund. [19] This Protocol entered into force on March 3, 2005. The International Oil Pollution Compensation Fund (The Supplementary IOPC Fund) provides additional compensation for the claims under the IOPC Fund of 1992 to a maximum amount of SDR 750 million per incident (equivalent to approximately US $ 1,157.2 million).

There has never been an incident that required compensation from the addition of the Supplementary IOPC Fund. The Supplementary IOPC Fund goes into the third stage of compensation by giving protection to the member countries of the 1992 CLC and the 1992 Fund by ratifying or acceding to the Supplementary Fund Protocol of 2003. The Supplementary IOPC Fund will only provide compensation for oil pollution damage suffered by the contract states recognized by the 1992 Fund but exceeding the relevant limits in accordance with the 1992CLC. The total amount of compensation available from the Supplementary IOPC Fund is limited to SDR 750 million with the total amount of SDR 203 million SDR. The significant benefit from the Supplementary IOPC Fund allows all claimants receive 100% compensation.

CLC requires the instrument to be imposed through a compulsory insurance to require shipowners carrying more than 2,000 tons of oil (either in bulk or in cargo) to cover insurance or other coverage with the amount in accordance with the liability limits of the payment of compensation.[20] It does not mean lack of shipowner's liability under the Convention if a shipowner based on the convention transport oil of less than 2,000 ton.[21] In such case, the owner is freed from the obligation to cover the compulsory insurance. In the provision of the compulsory insurance, every tanker is required to carry a certificate in the form in accordance with the provisions to which the ship is registered stating the existence and validity of the compulsory insurance. Without the certificate, the registration state is not allowed to let the ship sail. This certificate will be accepted and appreciated by the convention by each participating country. The Convention determines that the claim for damages can be submitted directly to the insurer or other party who provide guarantees. Insurers use the principle of strict liability although it is possible to have the exceptional fact to the principles.

The insurance formed as the implementation of the CLC is known as voluntary industry schemes called TOVALOP (the Tanker Owner's Voluntary Agreement Concerning Liability for Oil Pollution) and CRISTAL (Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution) that provide compensation for the damage caused by oil pollution. These schemes were established along with the international conventions.

18. *Fund Convention 1971*, Article 1 (3)
19. Http://www.imo.org/imo/convent/summary.htm,*IMOs Web Site Summary of Status of Convention*, downloaded on 2 February 2012 At 10.00 WIB.
20. *CLC 1969*. Article VIII (1).

The purpose of the two industrial schemes are to resolve the compensation comparable to that provided by the CLC and Fund Convention to the countries that have not ratified the two conventions.[22]TOVALOP and CRISTAL are intended for internal settlement and will remain in force until the international conventions apply globally.

Along with the heavy responsibility of tanker owners to pay compensation in the case of oil spill, the 1969 Brussels Convention on Civil liability has determined the highest limit of the tanker owner's liability. As the implementation before the creation of Funds Conventions, TOVALOP was created with the purposes of:[23]

1. *to encourage immediate remedial action by participating tanker owners in the event of discharge of oil;*
2. *to assure financial capability of participating tanker owners to fulfil their obligations under tovalop through insurance coverage;*
3. *to avoid jurisdictional problems under existing maritime law and practice;*
4. *to place on tanker owners the burden of disproving negligence; the provide a national government with machinery for making valid claims not with standing the fact that such government might not, under international or local law, have a legal obligation to remove oil discharge from a tanker or a legal right to recover removal expenses.*

The nature of TOVALOP as a private institution of oil pollution insurance[24] provides compensation on the basis of coverage agreement and the premiums received. This form of insurance will cover losses for its participants because of oil spill as much as US $ 100 per gross registered ton with the highest amount of US $ 10,000,000. After June 1, 1981, this amount will increase to be loss underwriting of $ 147 for each gross tonnage of ship weight with the highest amount of US $ 16.8 million. The things which are the characteristic of the insurance institution of oil pollution compensation of TOVALOP are as follows:

21. *Ibid.* Article V (1).
22. *International Oil Polution Compensation Funds*, 92 Fund/A.ES.10/13, 1 February 2006, Assembly 10th extraordinary session agenda item 13. Under the revised STOPIA, the limited amount applicable to small tankers would, on a voluntary basis, be increased to 20 million SDR for tankers of 29.548 gt or less for pollution damage in all 1992 Fund Member State. TOPIA 2006 would result in the shipowner indemnifying, on a voluntary basis, the Supplementary Fund for 50% of the compensation amounts paid by it under the Supplementary Fund Protocol.
23. Pieter Batti, *Op. Cit*. Page 144.

1. TOVALOP do not concern whether an event occurs in a particular area of the country, both participants and non-participants of the Convention on Civil Liability for Oil Pollution Damage. The considered one is only the state of oil spill and losses because

of the contamination of the coast of a country;

2. That the oil spill is caused by the mistakes or carelessness of the tanker party;
3. That claims will be settled by the insurance agency of Tanker Owners Pollution
4. Federation Ltd., with the possibility of the use of arbitration institutions;
5. That claims can only be submitted by the national state and not by private parties;
6. The compensation was initially confined to private damages which is the direct cost, immediate preventive measures and direct damages by physical contamination, and then added with the damages caused by pollution, including the actions taken to reduce or divert the possibilities of damage. The compensation based on TOVALOP excludes consequential and ecological damages.

CRISTAL[25] is a form of voluntary insurance following TOVALOP. This kind of coverage is an insurance closed by the oil owners transported by the tankers that have followed TOVALOP coverage. This coverage will be effective in terms of: 1.The oil spills are the property of the companies of CRISTAL members; 2. the carrier ships are accountable by TOVALOP; 3. the losses are compensated by the 1969 Brussels Convention on Civil Liability for Oil Pollution Damage.

CRISTAL coverage is intended to provide supplement to the amount of compensation provided by other insurance. The amount of CRISTAL coverage is up to US $ 30 million. After June 1, 1981, it turns to US $ 36 million with a chance for the members to increase this amount up to US $ 72 million if it turns out that the previous amount is not considered sufficient. The broad scope of pollution damage as referred to in CRISTAL which is wider than TOVALOP's pollution damage is caused by:

1. Not strictly rule out the possibility of ecological damages;

The International Tanker Owners Pollution Federation Ltd., 1973, *TOVALOP*. Page 5.

TOVALOP adalah suatu *Limited Company* yang berkedudukan di London dengan nama *The International Tanker Owners Pollution Federation Limited*. TOVALOP berlaku sejak 18 September 1969 yaitu pada saat 50% pemilik tanker mengikutinya dan 14 Juli 1972 mewakili 99% dari seluruh pemilik kapal tanker. Persetujuan pendiriannya ditandatangani pada 7 januari 1969 oleh *B.P. Tanker Coy. Lyd., Esso Transport Coy. Inc., Gulf Oil Corp., Mobile Oil Corp., Shell International Petroleum Coy Ltd., Standard Oil California* dan *Texaco Inc*.

2. Not only apply to beach damage, while the restrictions along this ecological damages are not remote and speculative in nature.[3]

The similarity of these two types of demands is that the recovery are enforceable only within a period of one year. TOVALOP claims are submitted to the tanker owner with a copy

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3 Pada 1 januari 1971, perusahaan-perusahaan pemilik minyak yang tergabung dalam *Oil Companies Institute for Marine Pollution, Compensation Ltd.*, sebuah Badan Hukum Bermuda mendirikan CRISTAL. Para pendiri tersebut adalah; *AGIP SPN., Amoco Trading International Ltd., British Petroleum Coh. Ltd., City Service Tanker Corp., Compagnie Francaise des Pestroles, Elf Oil Corp., Petrofina S.A., Shell International Petroleum Coy. Ltd.*, dan 24 Perusahaan Jepang.

to the Federation. In Clause IV (E) of Insurance Coverage of the provisions of CRISTAL Contract[4] other than the arrangements provided by TOVALOP require that the parties demanding compensation should:

1. *Compensate any person who sustained pollution damage (excluding the owners of the tanker) to the extent that such person has been unable, after having taken all reasonable steps to pursue the remedies available to him, to obtain full compensation for said pollution damage from :*
   (a). the owner of the tanker, and;
   (b). any other person or vessel liable there for, and;
   (c). any other source of compensation available under convention, law, or regulation, including but not limited to a fund established and maintained by means of assessments against Oil Companies.
2. *Compensate the owner for the Cost of Preventive Measures taken by him in respect of such escape or discharge to the extent that the owner has been unable after having taken all reasonable steps to pursue the remedies available to him, to obtain full compensation there for from :*
   (b). any other person or vessel liable there for, and;
   (c). any other source of compensation available under convention, law or regulation, including but not limited to a fund established and maintained by means of assessments against Oil Companies.

Given the nature of TOVALOP as the complementary of CLC, TOVALOP also has the scope of application for the participating countries of the CLC, while the enactment of CRISTAL is not limited to the participating countries of the CLC.

In conjunction with the principle of strict liability which is different from the CLC, Fund Convention, and CRISTAL contract, the TOVALOP terms have just adopted the principles after June 1978.

The voluntary scheme was completed in 1987; TOVALOP plus a supplement by the name of Standing Agreement. TOVALOP Supplement applies only to the crash of the tanker carrying oil cargoes owned by CRISTAL members. For all other cases, only TOVALOP Standing Agreement is used. As with any indemnity obligation of shipowners under the CLC Convention, TOVALOP Schemes are covered by the insurance of the shipowners of P & I Club for tankers. CRISTAL Schemes are funded by the cargo owners including almost the entire cargo of oil transported through the sea.[5]

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4 Kontrak CRISTAL menyebutnya dengan, "*...any loss or damage which is remote or speculative, or which does notresult directly from the escape or discharge of oil*".

5 M. Sumampouw, 1980, Hague-Zagreb Essays 3, *Carriage of Goods by Sea et. Al.*, Hague. Page 188. Lihat Kontrak CRISTAL. Clause I (B).

The approval enhanced has already been used globally by not considering whether the CLC Convention and the Fund Convention apply to an accident or not. Therefore, TOVALOP and CRISTAL are applied almost the same as the CLC Convention and the Fund Convention. CRISTAL and TOVALOP only bear the pure threat situations; only as a preventative measure. TOVALOP Standing Agreement is used for oil spill from tankers in ballast.

The compensation limit under TOVALOP Supplement is 3.5 million for the tankers with the size of no more than 5,000 gross tonnage. The limit increases US $ 493 per additional ton with the maximum payment of US $ 70 million to the ship over 140,000 gross tons. This limit applies only to the cargo of CRISTAL members. TOVALOP Standing Agreement is not used when the other liability under the CLC Convention that bears.

If the limit of TOVALOP Supplement is exceeded, CRISTAL claims can only be done if the total damage cost exceeds the compensation available under the Fund Convention. The maximum compensation paid under CRISTAL includes the amount available under TOVALOP Supplement or under the CLC Convention and the Fund Convention whhich is US $ 36 million for the tanker with the size up to 5,000 tons. The ship that exceeds the maximum of US $ 135 million is for the ship with the size that exceeds 140,000 tons. The other coverage in addition to CRISTAL and TOVALOP is based on the Protection and Indemnity Insurance which is based entirely on the premiums paid by the tanker owner to cover possible losses due to the oil pollution spilled from the tanker.

The compensation which can be prosecuted by Protection and Indemnity Clause is limited to the liability under existing laws by CLC, TOVALOP or CRISTAL. Generally, the coverage for the damages caused by oil pollution is in the form of inserting a clause in the form of the amount of insurance under the Convention on CLC, the liability under TOVALOP and / or CRISTAL in the Insurance agreements of Protection and Indemnity.

In the case of oil pollution at sea, the provisions of the liability included in the relevant conventions are the provisions that have been approved to apply and bind the parties concerned. Given the special nature of the transport of oil at sea as well as the large danger of financial risks, the governing regulation is sui generis in nature. Based on this thinking, on November 29, 1969 and December 18, 1971, the delegation of the Republic of Indonesia in Brussels signed the International Convention on Civil Liability for Oil Pollution Damage and the International Convention on the Establishment an International Fund for Compensation for Oil Pollution Damage. In principle, the provisions on the liabilities of the parties in the accidents causing marine pollution caused by oil spills have been approved.

Indonesia, in further implementation, ratified by the Presidential Decree No. 18 of 1969 on the Ratification of the 1969 CLC and the Presidential Decree No. 19 of 1978 on the Ratification of the Fund Convention. The implementation in Indonesia was later revoked through the Presidential Decree No. 41 of 1998. Furthermore, Indonesia ratified the 1992 Protocol in 1999 by the Presidential Decree No. 52 on the Ratification of the 1992 Protocol on the changes to the International Convention on Civil Liability for Oil Pollution Damage

of 1969. The revocation was based on the assessment the Government of Indonesia in their position as the Party in the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971. It was inefficient and uneconomical, so it was considered necessary to repeal the Presidential Decree No. 19 of 1978 on the Ratification of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971.

The International Conventions are in fact actually a transition of obligation from the perpetrator of pollutants, a tanker (tanker company/owner) in this case, to the third party to perform his obligations in accordance with the polluter pays principle (the principle that the polluter is liable to pay compensation to pollution as a risk of his activities). The transition of obligation to pay compensation is carried out by the third party, the insurance in this case, that has previously been agreed and becomes the condition for tanker transporting agreement. The obligation to pay compensation for pollution by tanker owners is stipulated in international conventions viewed of the interests of the initiators including the conventions made by the states (IMCO / IMO) to avoid the complexities of laws that can arise in the case of oil spills. In addition, it is to meet the needs of the international regulations on the duties and limitations to compensation which can be claimed by coastal states as the victims of oil pollution by tankers.

The International regulation on the Convention on liability and compensation to be paid by polluters (tanker owners) forms two regimes that apply, i.e.:

1. The old regime based on the 1969 CLC and the 1971 Fund;
2. The new regime based on the 1992 CLC and the 1992 Fund along with the 2003 Supplementary Fund.
3. Indonesia, as an oil importing countries, has ratified the 1969 CLC and its amendments of the 1992 Protocol, without ratifying the 1992 Fund Convention and its Suplementary Fund 2003. Thus, the position of Indonesia is under a new regime at the first stages of compensation (primary tier). The regime of liability and compensation for damages that can be prosecuted to the polluters of oil at Indonesia's seas based on the 1992 CLC reached SDR 3 million plus the multiplication of SDR 420 (equivalent to US $ 567) for each additional tonnage for the ship weighing 5,000 to 140,000 gross tonnage and SDR 59.7 (equivalent to US $ 80 million) for the ship over 140,000 gross tonnage.

4. Conclusion

The need for the damages due to pollution from oil tankers are responded through the Civil Liability for Oil Pollution Damage / CLC. CLC has formed two Regimes of compensation due to oil pollution by tankers. The old regimes are in the form of the 1969 CLC and the 1971 Fund Convention. The old regimes were considered not to meet the maximum compensation so that the new regime was formed, known as the three levels of compensation for oil pollution damages by shipowners (The three levels of compensation established by the international

convention), The first level of compensation is based on the 1992CLC. The second level of compensation is based on the 1992 Fund Convention and the third level of compensation is based on the 2003 Suplementery Fund.

Indonesia's position in the compensation for oil pollution damages at sea by tankers has already been on the new regime with the 1969CLC, which was ratified by the Presidential Decree No. 18 of 1969 and the 1992 Protocol as the amendment to the 1969 CLC with the Presidential Decree No. 52 of 1999. The 1971 Fund Convention which was originally ratified by Indonesia through the Presidential Decree No. 19 of 1978 on the Ratification of the Fund Convention was repealed through the Presidential Decree No. 41 of 1998. This revocation by the Government of Indonesia in their position as the Party to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 was inefficient and uneconomical, so it is necessary to repeal the Presidential Decree No. 19 of 1978 on the Ratification of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971. The existence of the new compensation regime for compensation applied in Indonesia is expected to provide maximum compensation for the protection of marine environment from pollution by tankers.

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"DILEMMA IN IMPLEMENTING SANCTION FOR COMPANIES WHO ARE NOT REGISTERED IN EMPLOYMENT BPJS PROGRAM

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ABSTRACT

This study aims to determine the dilemma in implementing sanction for companies who are not registered Employment BPJS program, as well as evaluating theose sanctions policy. This study was conducted through documentary research on employment policy, specifically on employment BPJS program, associated with human rights in the Constitution of Republic Indonesia. The results showed that the general welfare for Indonesian workers one of which is realized by granting social security through Employment BPJS program. This is in accordance with the mandate of the Constitution of the Republic of IndonesiaArticle 34 paragraph (2) which provides that the State established a system of social welfare for all citizens and empower the weak and underprivileged in accordance with human dignity. In application, one of legal provision, as Article 17 of Law No. 24 of 2011, provides that if the companies does not enroll themselves in the employment BPJS program, they will be sanctioned. The sanctions includes fines, does not gain public facilities, up to revocation of licenses, such as revocation of a business license, not acquired the right to participate in the tender project, licenses of hiring foreign workers, and buiding permitt (IMB). In practice, many small companies have not been able to comply with these provisions. If the sanctions are applied, especially revocation of business license, it would eliminate the right of small companies to strive, increasing unemployment, and ultimately disrupt the country's economic development Workers will lose their welfare since there is no income from wages and social security employment. This is contrary to Article 34 paragraph (2) of Indonesian Constitution. That sanction policy for companies who are not registered in the Employment BPJS program needs to be evaluated and reformed, since it would result in violating the rights for the company to strive, can cause disruption of the national economic development, and will hamper government' efforts to provide social welfare for its people.

Keywords: social welfare, workers, company, sanction

ENHANCING THE ROLE OF MUTUAL LEGAL ASSISTANCE IN COMBATING TRANSNATIONAL ECONOMIC CRIME WITHIN THE ASEAN ECONOMIC COMMUNITY

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ABSTRACT

With the beginning of the ASEAN Economic Community (AEC) at the end of 2015, in which this region directs to economic integration, the free movement people, goods, service, investment and other economic activities is unavoidable. The growth of economic activity will generate the spread of economic crime not only in a national territory but also crossed the border or so called transnational crime. According to UN Office on Drugs and Crime (UNODC) released in April 2013, illicit money generated by transnational crime in the region reaches more than US$ 90 billion per year. ASEAN has actually sought some initiatives to combat transnational crime. The most concrete action by member countries is the adoption of 2004 ASEAN Treaty on Mutual Legal Assistance and Criminal Matters (MLACM). Indonesia has also ratified the treaty in 2006. However, after more than a decade, result of the treaty is unsatisfying. This paper tries to analyze the socio-legal aspect that my influence the implementaion of the MLACM. The methode used is normative legal research. Therefore, there must be more concrete action and effort to enhance and empower the treaty to combating the transnational crime within ASEAN Countries.

Key Words: **Mutual Legal Assistance, Transnational Economic Crime, Asean Economic Community AEC**

Introduction

It has been nearly half of century since the document of declaration of the establisment of the Association of Southeast Asian Nations (ASEAN) was signed in Bankok, Thailand. The establishment of ASEAN is actually aimed and purposed to build cooperation in the economic, social, cultural, technical, educational and other fields, and in the promotion of regional peace and stability through abiding respect for justice and the rule of law and

adherence to the principles of the United Nations Charter. In its long history, the noble aspiration of ASEAN people might have been achieving many things, but of course there are many things should be performed.

Evenh though, the establishment of ASEAN was signed by five leader of countries - the Foreign Ministers of Indonesia, Malaysia, the Philippines, Singapore and Thailand- the declaration stipulated that the Association would be open for participation by all States in the Southeast Asian region subscribing to its aims, principles and purposes. The document of the establishment also proclaimed ASEAN as representing "the collective will of the nations of Southeast Asia to bind themselves together in friendship and cooperation and, through joint efforts and sacrifices, secure

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for their peoples and for posterity the blessings of peace, freedom and prosperity." Curently, ASEAN consists of ten members of South East Asia countries and with the poulation of about 626 million people. The more its member and the larger of its poulation, the heavier the burden and task should be carried on.

The latestt and the most importtan achievement of ASEAN was the initiation of agreement of ASEAN Economic Community (AEC). The effort to build an integrated economy or single market is acutually manifestation of values ASEAN declaration, and the Idea of the founding father, as Narciso R. Ramos of Philiphine used to say:

> *"The fragmented economies of Southeast Asia," he said, "(with) each country pursuing its own limited objectives and dissipating its meager resources in the overlapping or even conflicting endeavors of sister states carry the seeds of weakness in their incapacity for growth and their self-perpetuating dependence on the advanced, industrial nations. ASEAN, therefore, could marshal the still untapped potentials of this rich region through more substantial united action."*[1]

The strugle for economy integration of ASEAN can actually not be seen as seperated idea from the ASEAN it self. The first first articulation of the concept of ASEAN economic integration is revealed in the Framework Agreement on Enhancing ASEAN Economic Cooperation signed in Singapore in 1992. The Agreement highlighted the importance of co-operation in the areas of trade; industry, minerals and energy; finance and banking; food, agriculture, and forestry; as well as transport and communications. This Framework Agreement eventually led to the establishment of ASEAN's earliest key agreements.

The idea then adopted formally in 2003, at the 9th ASEAN Summit, that ASEAN Leaders first declared the formation of an 'ASEAN Economic Community' as the agreed goal of regional economic integration, as stated in the Bali Concord II. This was in line with the ASEAN Vision 2020 (adopted in 1997), which aimed to transform ASEAN into a stable, prosperous and highly-competitive region with equitable economic development, reduced

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1 See: Jamil Maidan Flores and Jun Abad., **The Founding of ASEAN, availble at** http://www.asean.org/asean/about-asean/history/, **accessed,**

poverty, and socio-economic disparities, progressing in tandem with the establishment of the ASEAN Political Security Community and the ASEAN Socio-Cultural Community.

The AEC Blueprint 2015 was initiated at the 38th ASEAN Economic Ministers Meeting (AEM) in Kuala Lumpur.

With the adoption of AEC, ASEAN has become one of the largest market in the world with an economy valued at $2.4 trillion. Such a great potential in term economy, AEC faces threath and challage and at the same time become opportunity to incrase the prosperity of its member countries.[2] In the mean time it also has resulted a treath that may become an obstacle to reach the goal of Asean establishment. One of the threath is that the growth of of transnational crime and even it has been expanding in scale and becoming more organised. Fuelled by the forces of globalisation, organised crime groups have seized the opportunities that free trade flows offer especially in economic activity. The United Nations Office of Drug Control (UNODC) estimates that Transnational Organised Crime is at least US$870 billion a year. Of that amount of economic value, UNODC estimates that Southeast Asia alone to generate close to US$100 billion per year. That's more than Australia's two-way trade partnership with ASEAN generated in 2014.[3] Such a challange has also worsen by fear of weak law enforcement. That is why UNODC Representative for Southeast Asia and the Pacific, Jeremy Douglas, said that without effective and integrated border management, and law enforcement and justice strategies, organised criminal activity will continue to grow in the region.[4]

As an organization ASEAN has actually initiate to build mechanism to crete peace and order since one the goal stiulated in the declaration is the promotion of regional peace and stability through abiding respect for justice and the rule of law. The initiation has been formally adopted in ASEAN Mutual Legal Assistence (AMLA) in Criminal Matters, that has been adoted by the Ministers of Justice/Law, Attorneys-General in Kuala Lumpur, Malaysia, on 29 November 2004. At first it was adopted and signed by eight members of ASEAN and then Jan, 2006 Myanmar and Thailand also signed. It means all member of ASEAN unanimously accepted the way and goals stipulated in the Treaty.

Now, after more then one decade after the adoption,[5] it time to performe in depth evaluation about the implementation of the treaty. Not to say that it the imlementation of the AEC gives rise the the important of this evaluation of the ASEAN- MLA in order to improve and anhace the implementation to support the achievement of ASEAN and AEC golas. This article is trying to evaluate the implementation of ASEAN- MLA and try to find some ideas to enhance and increase its role in achieving goals of AEC in the next future.

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2 https://www.usasean.org/why-asean/what-is-asean

3 Cesar Alvarez, The ASEAN Economic Community and the Fears of an Organized Crime Boom, www.asistrategis.org.au/the-asean_ economic-committee, October 2015

4 *Ibid*

5 Indonesia has ratified the agreement since 2006, with Law No. 1 year 2006 Concerning Mutual Legal Assistance in Criminal Matters.

Transnasional Economic Crime In Integrated Economy

Crime and economic activity is two factors that are difficult to separate between each other. On one hand the economic needs has became one of common motives for some one to commit a crime. On the other hand economic activity has given rise to new dimension of crime. It is actually difficult to have one legal definition of an economic or financial crime[6] because the criminal [policy, especially in economic area varies greatly from one country to another. It is also difficult to determine the overall extent of these crimes because their growing perception evolves some of the most rapidly growing predicate offences as well as the fact that many cases are not reported and the investigation to discover the crime requires high level of expertise which is not well developed in many countries especially in developing countries.[7]

However the concept of economic crime is largely meant as a crime for the purpose of economic benefit. Economic crimes refer to illegal acts committed by an individual or a group of individuals to obtain a financial or professional advantage. In such crimes, the offender's principal motive is economic gain. Cyber crimes, tax evasion, robbery, selling of controlled substances, and abuses of economic aid are all examples of economic crimes[8].

In narrow sense, the concept of economic is more direct to the action that may damage the achievement of economic policy or goals of any government. Economic crimes refer to illegal acts committed by an individual or a group of individuals to obtain a financial or professional advantage. In such crimes, the offender's principal motive is economic gain. Cyber crimes, tax evasion, robbery, selling of controlled substances, and abuses of economic aid are all examples of economic crimes.[9] Therefore, with the growth and change in economic activity, then it will give great influence to the concept, definition and types of these kinds of crimes.

One of common phenomena in economic is that an economic activity is no more limit in the special country or to the concept of sovereignty. With process of globalization, economic activity has expanded robustly beyond a country. The next development in the world economy is that the establishment of economic integration that cover neighboring country.[10] It can be said that the firstly formed economic integration is the establishment of European Economic Community (EEC), organization in (1958).[11] Even though the initial signatory of EEC is only six countries, which is known as "the inner six" nowadays it has comprised 28 members

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6 Another approach to such a crime is usually is in criminology, as Sutherland pointed as white collar crime, see more:

7 Abboud Al-Sarraj, he Concept of Economic Crimes As Perceive across the world , Typology, New Trends and Countermeasures, papers presented at Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, April 2005, available at *www.unafei.or.jp/english/.../18Presentation_1.pdf*

8 http://definitions.uslegal.com/e/economic-crime%20/, Economic Crime Law and Legal Definition, accessed,

9 See: http://definitions.uslegal.com/e/economic-crime%20/

10 **Economic integration,** process in which two or more states in a broadly defined geographic area reduce a range of trade barriers to advance or protect a set of economic goals., see; http://www.britannica.com/topic/economic-integration

11 See: Gordon L. Wild, *A Handbook on the European Economic Community*, Frederick A. Preager Publisher, New or, USA, 1965 , available at: *aei.pitt.edu/3216/1/3216.**pdf***

state. The establishment of EEC has inspired other regions to follow the effort to increase the prosperity among it countries. To exemplify the success story of EEC ASEAN as the organization of South East Asia Countries has initiate the establishment of Asean Economic Community.

With the formation of EEC, one of the afraid is that the unalienable impact of an integrated economy is transnational crimes that happen cross the border of each country. Even though transnational crime is not wholly related to integrated economy, but with the initiative, the border of each country is open to access of any product from one to another country. That why The Organization for Economic Co-operation and Development (OECD) has warned the danger of such crimes. For that purpose OECD has also measured and reported transnational crime in many part of the world. In 2013 for example, OECD reported that the amount of iillicit Trade in Electrical and Electronic Waste e-waste from the world to region is $3.75 bn.[12]

Such a figure is also suffered by ASEAN. According to UNDOC assessment, the amount of Migrant Smuggling from South East Countries to United Sates and Europe is $1.55 bn.[13] If such amount of transnational crime combine with other kinsd of product or type of crime, the number will be even far more oustanding. According to OECD, the discussion includes estimates of the revenues generated in selected illicit markets in East Asia and the Pacific, which, taken together, have a combined annual income of nearly US$ 90 billion. This corresponds to twice the GDP of Myanmar, eight times that of Cambodia, and 13 times that of Laos.[14] The probelom of course not only about the transnational crime between ASEAN and other country outside the ASEANT itself but also beteween or among ASEAN member. Eventhough there is no formal assessment on the grade of transnasioal crime esecilly on econoomic crime, it can be assume that the number is high and always increase time by time. There are some reason for such astimation. Firstly, geograhical condition od ASEAN Countriesor that have many coast border. The condition make the border open to acess especially through the see. It can beasertained that the condition will be vulnerable to transnational crime especilly sugling. The second, with the increase of economic develoment, and other modle of communication, it will be easier to make plot for doing a cross border crime. The third, transnational crime especially smugling has traditionalyy become part of economic activity especially for the people live near by the beach. The fourt, the weakness of border controlling of some member of ASEAN country, add with the development of technology that can be used for specific crime, will make transnasisonal crime will olways increase from time to time.

12 See: UNDOC, Transnational Organized Crime in South East Asia and the Pacific, A threat Assessment, 2013, p.101

13 Ibid,p.25

Ibid

14 Ibid, p. x

The next and and the most imortant factor that can worsen the condition of transnational crime that is that the beginning of AEC that has been formally came into effect since last 2015. With about 625 million inhabitants, accounting for almost 10% of the world's population, AEC will become the world 7th largest economy. The region has also seen economic growth average a healthy 4-5% per annum since its formation.[15]

As an endeavor to increase the roserity of its people AEC was build base on 4 pillars:[16]

a. Single Market and Production Base: the region as a whole must become a single market and production base to produce and commercialize goods and services anywhere in ASEAN
b. Competitive Economic Region: the region must emphasize on the competitiveness of its production and capacity for export, as well as the free competition inside of its frontiers
c. Equitable Economic Development: to receive the benefits of the AEC, the people and businesses of ASEAN must be engaged into the integration process of the AEC
d. ASEAN's integration into the globalized economy: ASEAN must not be isolated but an integrated part of the global economy

The condition and effect of transnational crime has actually become seriouse attention of United Nation. Jeremy Douglas, Head of Representation of Nations Office on Drugs and Crime (UNODC) Regional South East Asia and Pacific released that Asia is source and target of illicit trading that has resulted large amount of profit for group of organized crime.[17]

Based on an analysis of the trend of transnational crime, UN concludes with 48 recommendations on how the problems can be addressed, summarized under four imperatives:

1) Understand the problem
2) Establish a normative framework
3) Build technical capacity
4) Expand regional partnerships

This report represents our best effort to understand transnational crime in the region and aims to contribute to policy and programme development. In order to understand the problem of transnational o crime, there should be a regular study or research regarding all

15 With GDP of ASEAN has nearly doubled since 2007 (when the AEC Blueprint was first adopted) to the present, it has reach Progress and Key Achievements with a combined GDP of over US$2.5 trillion, while average GDP per capita grew by almost 80% to over US$4,000. Over the same period, ASEAN has also become more influential, with widening markets regionally and globally. By 2014, it is Asia's 3rd largest, the world's 7th largest, and among the most advanced integrated markets. With a combined population of over 622 million, ASEAN has a vast consumer base, behind only China and India globally. Over 50% of ASEAN's population is under the age of 30, making up a large portion of both the current and future work-force. See: The ASEAN Secretariat Jakarta, *A Blueprint for Growth ASEAN Economic Community 2015: Progress and Key Achievements,* 2015, available at http://www.asean.org/storage/images/2015/November/aec-page/AEC-2015-Progress-and-Key-Achievements.pdf

16 http://aseanup.com/benefits-asean-economic-community-aec/

17 See, Tempo, November 1st, 2014

aspect of transnational crime. Without a regular study it is impossible to understand a very complicated aspect, *modus operandi* and the web of such a crime. Since most of transnational crimes are organized crime, or white collar crime, it will always use sophisticated and up to date technology in its operation.

The next important clue in combating organized crime there should be a strong normative framework both in individual, bilateral and multilateral stage. Each national government should prepare the regulation as the basis for designing policy in combating transnational crime. It will also be the basic for any related institution in law enforcement. Since transnational crime is always cross border activity, its operation will always related to other or other counties. That is why each government should initiate bilateral or multilateral cooperation as the basis for bilateral or multilateral action. It is so vital to integrate national responses into international strategies in order to effectively combat transnational crime in the region. The United Nations Convention against Transnational Organized Crime and its Protocols, and the Convention against Corruption, has actually provide useful platforms for the establishment of a normative framework to guide efforts towards capacity building and expanding regional partnerships.

In building technical capacity, as a response to the excellent both technology, network or capacity of the perpetrator, each national government should always tries to increase the skill and technology owned by its official in performing its duty. In illegal fishing, for example, the criminal usually uses a higher speed ship compare to that owned by the officials. Not to say the sophisticated technology that used in caching the fish that not only can exploit the source in a very large amount, but also it will cause serious impact to the environment.

Since transnational crimes are always performed in an organized crime, the effort to combat them should be in a sound cooperation among neighboring states or in a regional partnership. ASEAN has actually become a forum of strong partnership or cooperation among its member countries. It has also prepared some its legal frameworks in anticipating and combating such a crime. One of them and the most important is that ASEAN Mutual Legal Assistance in Criminal Matters, which has been adopted by the Ministers of Justice/ Law, Attorneys-General in Kuala Lumpur, Malaysia, on 29 November 2004.

AMLA Real Exerience and EmpasiziNg Role

Mutual Legal Assistance MLA[18] is one of effort in combating crime has been a relatively new model in combating across border or transnational crime. It is actually can not separated from the sprout of organized crime in some part of the world. In order to response the danger of organized crime, United Nation has adopted the Convention on Transnational Organized Crime.[19] This convention can be viewed as a model or blueprint for international cooperation

18 MLA is actually a process by which states seek and provide assistance in gathering evidence for use in criminal case.

19 The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transna-

in extradition and mutual legal assistance. Some basic obligations of each member county will be driven factor in pursuing the goals of the treaty as long as member country adopt then in its own regulation its implementation. Article 16 of the Convention allows states parties that make extradition conditional on the existence of a treaty to consider the convention as the legal basis for extradition in relations with other states parties. The convention also allows for flexibility in approach in that all offense under the convention are deemed to be included in existing extradition treaties, thus allowing states parties ease of implementation with respect to those crime. With respect to mutual legal assistance article 18 of the convention is often referred to as a mini-treaty that provides states parties to provide one another the widest mutual legal assistance possible in relation to the offense under the convention. [20]

This treaty in its development has become the major basis for international cooperation throughout the world. He treaty allow for a focusing of effort for either cooperation on certain types of offence or the consideration of regional concerns and the legal system for a specific region. The treaty also obliges the state parties to cooperate whit one another under international law, provided that the request fall within the term of the treaty.

Besides UN Convention on Transnational Organized Crime, G20 has also developed principles in practice regarding MLA. The principle area:[21]

1. An effective legal; basis for providing and requesting MLA in bribery and corruption cases should be adopted;
2. An effective institutional should established;
3. Mechanism of timely response to MLA should be put in place;
4. Cooperation coordination between jurisdictions should be facilitated, in accordance with countries legal system ;
5. International exchange information through other mechanism should be allowed in accordance with countries's legal system.

Just like UN that has anticipated the problem of transnational organized crime and the need for a sound international coordination and cooperation in law enforcement, AMLA is actually also has the same background. ASEAN member countries has actually developed astrong legal framework that regulates the the provision of MLA through the ASEAN MLA and this reflect the common desire and commitment among the ASEAN member states in improving the effectiveness of law enfrocement authorities of the arties in the prevention,

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tional organized crime. It opened for signature by Member States at a High-level Political Conference convened for that purpose in Palermo, Italy, on 12-15 December 2000 and entered into force on 29 September 2003. The Convention is further supplemented by three Protocols, which target specific areas and manifestations of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. Countries must become parties to the Convention itself before they can become parties to any of the Protocols. See: https://www.unodc.org/unodc/treaties/CTOC/

20 UNODC, *Manual on Mutual Legal Assistance and Extradition*, United Nation, New York, 2012, p.2

21 G20 High- Level Principles of Mutual Legal Assistance, *https://star.worldbank.org*

investigation and of offences through cooperation and MLA.[22]

In order to reach the general goal as stiulated in the prable, the Treaty has set up some important provision that bound the member of the treaty. They are among other things are:

1. The widest possible measure of MLA in criminal matters (Article 1);
2. Each Party shall designate a Central Authority to make and receive requests pursuant to this Treaty (Article 4);
3. Execution will be in accordance with the domestic laws of the requested party with consideration for requesting party's procedural requirements (Article 7);
4. Requirements, Grounds for Refusal, Authentication of Evidence have been standardized (Article 3,5 & 8);
5. arties will endeavor to facilitate the grand and execution of requests through consultation (Article 26);
6. Any State may accede to this Treaty upon consensus by the original Parties (Article 30)

Besides the basic provision, the Treaty has also stipulated the scope of asssitne in Article 2.2 that says:

"Mutual assistance to be rendered in accordance with this Treaty may include:

(a) taking of evidence or obtaining voluntary statements from persons;
(b) making arrangements for persons to give evidence or to assist in criminal matters;
(c) effecting service of judicial documents;
(d) executing searches and seizures;
(e) examining objects and sites;
(f) providing original or certified copies of relevant documents, records and items of evidence;
(g) identifying or tracing property derived from the commission of an offence and instrumentalities of crime;
(h) the restraining of dealings in property or the freezing of property derived from the commission of an offence that may be recovered, forfeited or confiscated;
(i) the recovery, forfeiture or confiscation of property derived from the commission of an offence;
(j) locating and identifying witnesses and suspects; and
(k) The provision of such other assistance as may be agreed and which is consistent with the objects of this Treaty and the laws of the Requested Party.

Such above convention both under UN and Asea has actually adopted in domestic law of Indonesia. Law No.1 2006 regarding Law on Mutual Legal Assistance in Criminal Matters.

22 Baizura Kamal, *Internation al Ccooperation: mutual Llegal Assistance and Extradition, .87, see also the preamble of The Asean Treaty on M*mutual Legal Assistance in Criminal matters : desiring to improve the effectiveness of the law enforcement authorities of the Parties in the prevention, investigation and prosecution of offences through cooperation and mutual legal assistance in criminal matters,

Both the general prinsiple, the scope of the treaty and the offencess has also regulated. However there still some obstacles in appling the treaty, tht is due to some legal barriers.

The firs obstacle is the difference of legal system has by each contry. For Indonesia law on MLA, the first difficulties is the requirement to apply request must be based on fix final court decision. In fact judicial system of Indnesia still can not immediately issue its fix and complete decision. Besider, related to the award of the court especially in corruption cases in which in its practice, the court decision does not secifically name the asset in other coutries that can be confiscated. While most forign regulation requireshe that tcourt decision should name and identify clearly the assest to be confiscated.[23] For that purpose, Indonesia needs to increas its capacity and capability in tracing any assets deposite in foreign coutries.[24]

However, the aplication or request for mutual legal assistance by ASEAN contries, icludes Indonesia is still minimum. The reseach of the UNDOC say that total request made since 2005 is just 72 Therequest was appplied for Malaysia is 9, dan 63 apply for Singapore, while other country accept no request. While on the other hand request made by member of ASEAN just 21of that number 16 made by Malaysia, and 5 made by Singapore. From that number no request made for Indonesia and by Indonesia.

The next legal and may be pratical handicape is that related to Central Authority that function to facilitate in or out request for MLA. In Indonesia it is placed on the Department of law and Human Right, that does not directly have relation with any lagal process, while in most of other country, the authority is on the Departmen of Justice that under an Attorney General, that has direct relation with legal process.[25] However, it should not be a very serious obstale, since it is only focused on its administrative function while thechnical function still held by each proposing institution. It can aslo overcomed by forming by a task force that consists of experienced officer from several backgroun and expertice.

From practical experience Indonesia seems still very slow and minimum in taking the advantage from the agreement. Report from National Law Development Body (BPHN) 2013 shows that Indonesia accept more requsts from other countries copared with apply request to other countries. From 2008 to 2013 Indonesia has accepted 26 reques, while Indonesia just apply for 4 request on mutual legal assistance.[26] It means that Indonesia seems not so active in applyin its requesting side, while from quantitave perspective Indonesia has more criminal cases compare to other members ASEAN countries, especially in corrupption case.

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23 Svetlana Anggita Prasanti, *Uaya Pemerintah Indonesia dalam Bantuan Hukum Timbal Balik untuk Masalah Pidana (Mutual Legal Assistant –MLA) Terhada engembalian Asset di Luar Neger Hasil Tindak Pidana Korusi (Stollen Asset Recovery,* available at , pustakahpi.kemlu.go id/dpp/volume 2, Mei-Augustus, 2011_46-56.df , p108

24 One of the example is that the the corruption case, that ist ECW Neloe case in which, the court order to confiscate USD$ 5.5 M depositted in Swiss Bank. Hower the decision can not be folowed up, since the decision did not indicate specificly the assets.

25 Svetlana Anggita Prasanti,loc cit.

26 Badan Pembinaan Hukum Nasional, *Evaluasi Peran Otoritas Pusat dalam Pelsanaan Bantuan Hukum Timbal Balik*, 2014, p.53

Another practical and may be legal obstacle in applying MLA, especially related to assets confiscation. That is the regulation on bank secrecy. Since most rule on Banking of many countres holds tightly the rules on bank secrecy, it always be difficulties in taking the advantage from MLA that has been formed in many level. For that purpose, there should be taking more lanient regulation on bank secracy.

Considering such above obstalces in applying agreement on MLA, there should always be stronger commitment in empashizing the role of ASEAN MLA that has been adopted by all ASEAN countries. Each country should also adopt more progressive measures in its own internal law to avoid various obstacles and barriers in functioning the agreement. There should also be more informal and seperated forums to ease the the way and to built unerstanding and commitment among each institution and sub-system related to MLA. The forum can also be functioned as capacity building forum for each efficers, especially for Indonesia.

Conclusion

Every development in society especially economic development will be followed by increasing number of crime. The establishment of economic integration like AEC will also followed by Transnational Crime that can be threath in achieving the goals of this organization. There have been some initiatives to tackle down the danger of transnational crime through international agreement, both at global, such as Convention on Transnational Organized Crime or regional level such as ASEAN Convention on Mutual Legal Assistant on Criminal Matters. Besides, each member of the treaty should also synchronized his national laws in order to achieving the common goal in combating transnational crimes, especially through mutual legal assistant.

Even though there have been some treaties both at multilateral or bilateral level concering mutual legal assistant, the result is still far from satisfaying. There are still some obstacles, in achieving the goals of the treaty. The obstacle can be due to legal problems or practical problems, especially in its law enforcement. In order to optimally combat the threath of Transnasional Economic Crime within AEC, there should be clear steps taken in enhancing the the role of any agreement on Mutual Legal Assistant especially among member of AEC. There should be more forums to increase the commitment and cooperation among ASEAN countries.

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MODERATING EFFECT OF MARKETING COMMUNICATION ON THE RELATIONSHIP BETWEEN SERVICE INNOVATION CAPABILITY AND SERVICE EXCELLENCE IN HOSPITALITY INDUSTRY-A CONCEPTUAL FRAMEWORK

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ABSTRACT

Hospitality industry in Indonesia has demonstrated critical development and addition more noteworthy consideration in today's business surroundings. Amid the year 2001-2014, the hospitality industry has an average rate of 6.98%. In spite of the fact that developing, the hotel industry confronts new difficulties because of outside and inner elements in a business domain that influence execution. The principle issue of hospitality industry in Indonesia is extreme rivalry among star hotels and non-star hotels. This exceptional rivalry happens due to overabundance supply of hotel, controls as far as hotel improvement and administration benchmarks, and worldwide rivalry where the hotels with a global system to put resources into a few potential territories. The research aims to study the phenomenon of synergy between marketing communication and service innovation capability, to determine and confirm the factors in marketing communication that influence service excellence in the context of Indonesian hotels ranging from 3-star to 5-star. The aftereffects of this study can be utilized to further support the hospitality business. The study seeks to develop a model that link three main variables: service innovation capability, marketing communication, and service excellence. This link has been given little attention by prior research particularly in the hospitality industry. The proposed model is discussed in the paper.

Keywords: Service innovation capability, marketing communication, service excellence, hospitality industry

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Introduction

Hospitality industry in Indonesia has indicated critical development and increase more noteworthy consideration in today's business surroundings. From the year 2004-2008, the hotel industry has a normal development rate of 5.76% (BPS, 2010). The normal commitment of the hospitality segments to aggregate Gross Domestic Product taking into account year 2000 consistent cost and current cost amid 2004-2009 added up to 0.69% and 0.5%. Hospitality industry is firmly identified with tourism. The tourism industry contributes the quantity of sightseers who possess the hotels. In 2006 Indonesia's tourism industry positioned 6th regarding foreign exchange profit capability of the 11 send out products. In 2009, this position rose to number three. Statistics by the Ministry of Culture and Tourism of Indonesia demonstrated that there were 6,452,259 foreign voyagers went by Indonesia in 2009 contrasted and just 5,321,165 in 2004 (BPS, 2009). The quantity of foreign visitors going to in 2010 added up to 7,000,571 or around 8.5% development contrasted with that of in 2009. Indonesian tourism receipts have expanded from U.S. $ 4797.90 million in 2004 to U.S. $ 6297.99 million in 2009 and U.S. $ 7,600.00 million or Rp.63 trillion for 2010. For 2011, the Ministry of Culture and Tourism will focus on the quantity of foreign vacationer added up to 7.7 million people groups. A comparative inclination can be found in various hotels and hotel rooms. In 2003 there were 263,469 spaces for star-hotel and non-star hotel, while in 2009 there were 334,817 rooms accessible in Indonesia. As far as the quantity of hotels accessible, there were 1,240 star hotels and 12,692 non-star hotels in 2009 contrasted and 1,014 star-hotels and 9,847 non-star hotels in 2004 (BPS, 2009). These statistics demonstrate that the hotel industry in Indonesia is developing.

Despite the fact that developing, the hotel industry confronts new difficulties because of outside and inner elements in a business situation that influence performance. Outside variables incorporate extreme competition from contenders alike. The fundamental issue identified with the neighborliness industry in Indonesia is the extreme competition among star hotels and non - star hotels. This serious competition happens in light of abundance supply of hotel, controls as far as hotel improvement and service benchmarks, and worldwide competition where the hotels with a global system to put resources into a few potential regions. To make due in the business competition and qualify the operational, the hotel occupancy rate ought to be at any rate of 40% (Interview session with administrator PHRI West Java, 2015). The occupancy rate of hotel staff to gauge achievement in drawing in guests to a specific hotel and is measured by the quantity of rooms sold isolated by number of rooms accessible. Insights distributed by the Central Bureau of Statistics demonstrate that from year 2004-2009, the normal occupancy rate was just moderate going from 44.98% to 48.31% (BPS, 2009). At present, so as to survive, hotels in Indonesia performed a restricted promotion; local people don't have a system or universal participation and indicated constrained service development. In competition, the hotel industry ought to have the capacity to offer innovative services to guests and do the best possible promotion strategy as per its business sector fragment.

Service Innovation Capability

Service sector has ruled the world's economy. In many nations, benefits these days help more financial qualities than horticulture, raw materials and manufacturing all together. Service economies' overwhelming position is clearer in developed countries. Up to seventy-five percent of the riches and 85% of work are created by services (Tidd and Hull, 2003), and newest occupation development originates from services.

The importance of service has been perceived by enterprises, institutes, and governments, and related research is progressing. Inside different angles and orders of Service Science, service innovation along these lines turns into one focal part because of its basic part. Since Goods-Dominant Logic has been standard rationale for quite a while, the extent that innovation is concerned, the experience from manufacturing will be reminded to most corporations and customers firstly. On the other hand, there are fundamental qualifications between service innovation and manufacturing or high-tech innovation. With the movement from Goods-Dominant Logic to Service-Dominant Logic, the innovation concept and process require likewise move from conventional viewpoint to another services point of view.

As recommended by Edvardsson (2005), *"service is a perspective on value creation rather than a category of market offerings. The focus is on value through the lens of the customer, and co-creation of value with customers is key and the interactive, processual, experiential, and relational nature form the basis for characterizing service"*. Thus, client focused and processual thought can likewise be seen in one of the meanings from TEKES, a Finland's research Agency. "Service innovation is a new or significantly improved service concept that is taken into practice". It could be for instance another client collaboration channel, a dissemination framework or an innovative idea or a combo of them. A service innovation dependably incorporates replicable components that might be recognized and efficiently recreated in different cases or situations. The replicable component could be the services result or the services handle in that capacity or a piece of them. A service innovation benefits both the service producer and customers and it enhances its developer's competitive edge.

Services are the principle products gave by the hotel. Canina et al. (2005) has expressed that the intensity of labor, immediate consumption, and an enjoyable lodging experience are a few qualities that are stressed by the hotel. With these uncommon qualities, the hotel industry is presently stood up to by the pressures and challenges in giving better service than customers. Particularly for international tourist's hotel, traveler markets globalization has expanded the trouble for the hotel management ought to give a positive customer experience and straightforwardly to customers of diverse cultures (Tang et al., 2013).

O'cass and Sok (2013) expressed that predominant value for customers made through service innovation. With a specific end goal to make the best customer value and maintain competitive advantage, the hotel must constantly create new services to meet customer's desires and necessities. Service innovation ought to be connected to give significant services to customers higher than their prices. Enhanced nature of services and products, expand

customer value services and expense decrease of services, is possible by the hotel through service innovation.

Pine and Gilmore (2011) has expressed that the experience decides how customer value is made. The agreeable convenience and addition visitor experience is a huge traveler hotel customer' needs. Accordingly, making a practical and recreational value to live up to customer' needs is the center of global traveler lodgings. Procurement of amusement services (i.e., recreational offices and a voyage through the encompassing attractions), offers convenience and feasting services is vital to the formation of customer value. To please clients and meet the utilitarian prerequisites, the hotel must use imaginative ways and incorporate existing services.

According to O'cass and Sok (2013), customer value gave by the service organization is emphatically impacted by service innovation. The development of new service not just gives clients an interesting customer experience and excellent core value (Moller et al. 2008; O'cass and Sok 2013; Paswan et al. 2009), additionally permits hotels to separate themselves from contenders and improves their service quality and notoriety (Ottenbacher and Gnoth 2005). Consequently, to keep up a heading position in the business, hotels must have the capacity to ceaselessly overhaul their services to stay in front of contenders (Agarwal et al. 2003).

For service innovation dynamic capability, this study adopted from Pöppelbuß et al. (2011), that contains sensing, seizing, and transforming (Teece et al., 1997). Sensing refers to the distinguishing proof of the need to change service operations or opportunities for service innovation, seizing alludes to investigating and selecting plausible open doors for change, and transforming is concerned with the execution of changed (or new) benefits in the organization. Adjust to this observation, the models of new service development, service engineering, service innovation, or services design might be seen as particular portrayals of the element ability service innovation.

Sensing refers to the services of distinctive knowledge and learning that need to be deciphered into heading issues and unmet services needs before a more centered conceptualization of new services results follows in the seizing stage (Den Hertog et al., 2010). Sensing principally incorporate three key exercises: 1) checking, 2) assessment, and 3) enumerating. Examining may require the consistent dialog with clients, faculty, and innovation suppliers. Assessing alludes to the capacity of an organization to immediately screen a specific open door or requirement for administration development as to, for example, the issue circumstance overall (Chai, 2005), business targets (Bitran & Pedrosa, 1998; Bernstein & Singh, 2006) or general attainability (Majaro, 1988). The enumerating movement alludes to decisively characterizing the issue and explaining side conditions (e.g., innovation, enactment and social angles) that need to be considered inside the advancement of conceivable results, e.g., by method for new service process (Basadur et al., 2000) or administration ideas (Goldstein, 2002).

Seizing: Seizing recognize three principle exercises: 1) result improvement, 2) result assessment and determination, and 3) result enumerating. The result improvement alludes

to the action of administration association's capability to produce distinctive potential results and therefore to distinguish conceivable ways it could take in upgrading their administration offerings as indicated by the long ago defined issue, for example, administration methodology plan, idea advancement, issue determination, building option results, or thought refinement. The improvement of new results additionally comprises in inventively modifying existing administrations into creative bundles. The movement of result assessment and determination that take into account educated choice making and hence for selecting the most sufficient answer for a particular issue. The result specifying capability includes the last determination of the to-be procedures, strategies, offices, data frameworks, members, and practices that need to be placed set up for the new service. Here, the improvement of an extensive undertaking arrangement for the execution of the chose result needs to be advanced and usage venture groups and in addition control components must be set up.

Transformation: Transformation isolated into three exercises of unfreezing, changing, and refreezing (Lewin & Cartwright, 1951). Unfreezing alludes to separating existing work structures which is a vital viewpoint when executing new service methods and interfaces to the client. The changing action alludes to the genuine execution of the new service. At last, the solidifying action identifies with all errands important to cultivate disguise of the recently executed service process, for example, persistent inspiration (Mento et al., 2002) and trainings (Scheuing & Johnson, 1989). Moreover, the utilization of data frameworks (in light of the fact that product meets expectations in a characterized manner) and the utilization of correspondence and advancement devices (through which clients embrace institutionalized desires) can help solidifying another administration. The objective of this movement is to attain a routinization; this implies that the staff receives the new service offering and changes the unequivocal information about what the new service is similar to and how to convey it into inferred learning (Stevens & Dimitriadis, 2005).

Service Excellence

Organizations are increasingly providing service excellence as an integral part of their superior service to win the customers' hearts and stay competitive in the market (Berry &Parasuraman, 1992). Service excellence, which is viewed as being "easy to do business with" (Johnston, 2004), delivers promises and is as an expression of very high satisfaction (Oliver, 1997). This suggests that the service organization does not only need to satisfy the customers but has to delight them as well (Aziz &Wahiddin, 2010).

Service excellence in this study is based on service process and delivery, service-scape, customer participation, and customer responsiveness. Flexibility and customization in service process and delivery are highly appreciated by customers (Bettencourt &Gwinner, 1996). Well planned and designed service delivery may directly contribute to the whole service excellence. Servicescape is related to the style and appearance of the physical atmosphere and environment in a service organization that has some impacts on customers' experience (Lovelock et al., 2005). Dube&Renaghan (2000) also confirmed the importance

of architecture and design as key value drivers that influence the customers' perceptions of service excellence.

Customers' participation increasingly plays active and even leading roles in service production and delivery processes (Xue& Harker, 2002) in most of the service organizations. The nature of service characteristics that is highly simultaneous requires customers to be part of the service transaction or as a co-producer. The customer's engagement in service as a co-producer is important in the cost reduction and service quality improvement (Heskett et al., 1997). Thus, the degree of service success may depend very much on the customer's participation to make the service happens. In other words, in some services, the customer is acting as a partial employee of the organization.

Marketing Communication

Marketing communications is a means to express itself and show the actual positioning to customers. Reid (2005), in service and consumer goods companies, shows the relationship between integrated marketing communication (IMC) performance(in terms of cross-functional strategic planning, inter activity, and mission marketing) and market performance(brand advantage, customer satisfaction, and sales performance). Cizmar and Weber who focused in the Croatianhotel industry mention that marketing effectiveness is positively associated with the performance level, the scope ofmarketing activities, the way marketing information is used in strategic and operational management and also with thestatus of the marketing department within the hotel company. The marketing activities consist of advertising, promotionalmaterials and PR that correlated with hotel performance in terms of occupancy rate and revenue per availablebed.

The study of marketing-finance interface could be a way to improve the relationship marketing communicationand performance. Denizci and Li (2009) mention that in tourism and hospitality industries which include airlines, hotels and restaurants there are positive marketing efforts contributed to the firms' financial performance. Marketing effortsare measured by advertising expense and consumer satisfaction score while the firm's performance is measured by ROE,ROA, PM, stock return, and Tobin's q. The analyses reveal that IMC practices (integration of marketing communication function between company and advertising agencies) vary across firm size, industry type, product/service orientation,and customer orientation. Potluri in Ethiopia and Kola and Akinyele(2010) in Nigeria conducted research of the effectivenessof advertising and personal selling practices of service companies in order to improve the existing communicationand customer satisfaction. They concluded that advertising and personal selling indicated moderately effectivein providing information, creating awareness, and changing attitude and ineffective in building company image andenforcing brand loyalty. The research also identified the lack of integration between advertising and personal selling. Nykiel(2001) stated that the hospitality industry has developed many different marketing communication concepts.

Marketingcommunication has become a major contributor to driving occupancy or providing market advantage. Pjero andShyle(2008) conducted a study in Albania hotel industry concluded that the marketing communication was used in the hotel industry to improve how to act and to survive in a tight competitive market. Their study is enhanced by Pjero, Agaraj, and Shyle(2008) in Albanian reality business to measure the effectiveness of marketing communication with performance,but their study was not specifically conducted in the hospitality industry. The hotel industry determines promotionbased on their clients and their area of operation and tends to attract more customers from regional markets, national, and international. Mateljic (2010) in his research on Croatia hotels, said that promotion can help differentiate the product from other similar products that already exist in the tourist market. Each hotel has to find its way of promotionand figure out its unique and recognizable design. Sangkaworn and Mujtaba(2010) based on their study in the hotels and resorts in Chiang Mai, Thailand, mentioned that the tools of promotion that commonly used are printed media, local radio, brochures distribution and bill-boards nearby.

Peattie and Peattie (1996) conducted a study of price-based promotional techniques at tourism and travel markets, but there is growing awareness that non-price based promotions can add value for the consumer while meeting a range of marketing communications objectives. One of the non-pricepromotional tools is the use of consumer competitions. From the above studies conducted by researchers that rangingfrom marketing communication concepts, tools and techniques, this study will take the marketing communication mixin developing model. Sikdar and Vel(2010) reveal that promotion strategies play a crucial role in the launch of new productsto the market that help attract the customer's attention towards the new product in a market cluttered with similarproducts. Total advertising expenditures have been found to have a positive impact on the market entry studies. In the21st century marketplace, the ability to measure a combination of marketing communication activities may be more important than trying to choose the impact or influence of any single element. In the marketing arena in which the allocationof limited resources is critical, it is more important to find the best and most effective set of brand communicationtools and activities, not just those who can most widely distributed at the lowest cost.

Tung, Lin, and Wang (re-applied the SCP (Structure-Conduct-Performance) paradigm to international tourist hotelsindustry in Taiwan through three simultaneous equations, market share, advertising and profitability. Kang, Lee, andHuh (2010) stated the relationship between CSR activities (public relations) and financial performance in the hospitalitycontext. This study examines different impacts of positive and negative CSR activities on financial performance of hotel, casino, restaurant and airline companies, theoretically based on positive and negative effects. Findings suggestmixed results across different industries and will contribute to companies' appropriate strategic decision-making for CSR activities by providing more precise information regarding the impacts of each directional CSR activity on financial performance. From the above reviews, the researcher came to the conclusion that there is a relationship between marketing communication and service excellence.

Service Innovation Capability and Service Excellence

Service innovation capability refers to a firm's ability to develop new services through aligning strategic innovative orientation with innovative behaviors and processes (Hou, 2008). Meeting clients needs and providing innovative products are essential to deliver service excellence (Eisawi et al., 2012). Such activities as being able to identify the needs; to change, to explore, to select feasible opportunities; and to implement the new services in the organization are supporting factors in the hotel's service excellence.

Proposed Model of Service Innovation Capability and Service Excellence

Based on the above discussion, we propose the following model to be further investigated as shown in Figure 1. We argue that service excellence is influenced by the service innovation capability at the hospitality industries. Therelationship is moderated by the marketing communication.

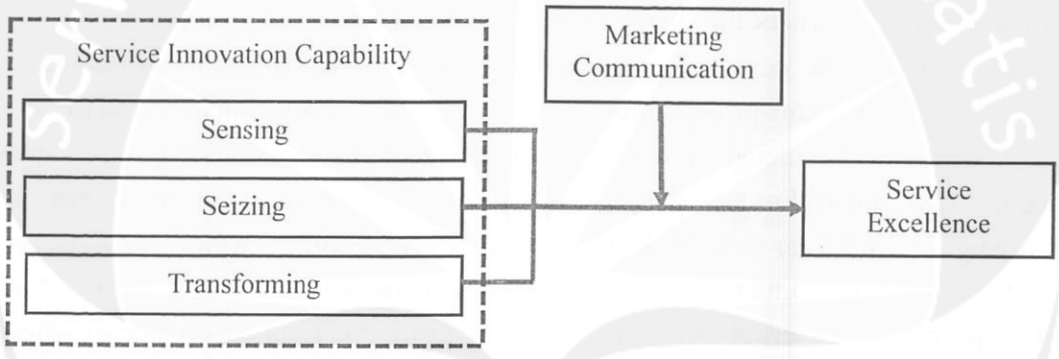


Figure 1. The model of service innovation capability and service excellence

Conclusion

This study has proposed a model of service innovation capability in relation to the service excellence in the hotel industry. The marketing communication is expected to moderate the relationship. Thefindings of the model are significant to the research and the hotel industry for their business performance and improvement especially in becoming more responsive to their customers.It is expected that this study will contribute to the development of conceptual model that relate service innovation capability and service excellence by involving marketing communication in the hotel industry. For the practice, this studyaims at helping hospitality industries to better plan and move towards effective and intense marketing communicationand greater service innovation capability implementation and practices which would assist hospitality industry to create the appropriateenvironment to encourage and promote customer satisfaction. For the government as a policy maker to increasethe tourism sector specially to improve the regulations related to hotel business. This

study will be the empiricalresearch of the involvement marketing communication mix in service innovation capability, specifically studying the hospitalityindustry and that focuses on integration of IMC (integrated marketing communication) component.

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HUMAN RESOURCES EMPOWERMENT STRATEGY IN LOCAL TELEVISION IN WEST JAVA

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ABSTRACT

Local television is a limited reach television in a particular region. Through local television broadcast, it is hoped that culture and local wisdom would be able to be spread around the region. This provides local government an option in featuring all available local potential through television. The existence of local television becomes a foundation in increasing the local economic, education, and culture development.

In reality, local television is losing the competition against national television; the local viewers prefer national television rather than local television. The causes are limited investment, low creativity, and lack of quality in human resources, which inline with the quality of television program being produced. The improvement of human resources quality, especially in the staffs and management of television station, is required.

The research concerns on the attempt of finding the correct strategy for improving human resources element of local television in West Java. A purposively chosen sampling of local televisions are Green TV IPB (Bogor), Dian TV (Sukabumi), RTVPurwakarta (Purwakarta), Sembilan TV (Garut). This research uses qualitative study method by using mixed method of questionnaire, focus group discussion, and in-depth interview to local television caretaker.

The result of this research conveys that local television has not yet implementing specific strategy in handling human resources factor as limited resources including financial and facilities become the main reason behind this. Local television staffs have to work double beyond their job description, which makes their jobs, cannot reach its maximum performance. The need to rectify human resources management, colliding with the problem of limited resources that they have, which is why the improvement will need to consider that problem. The establishment of a company culture environment in a conducive way, a high solidarity resulted from a better company-working environment, and more strategic planning associated with human resources management.

Keywords: Human resources, strategy, local television, west java.

Introduction

Human resource is one of the important factors in an organization. Every component in the organization is involving human force, the more competent an individual in managing the organization affecting the possibility of an organization in reaching its objective. Ideally, human resource is focusing on accommodating company's strategy, for this employee becomes company's partner, having the same opportunity in an organization's progress.

The existence of human resource is also important for local television media. The occurrence of local television, especially in West Java Province, has some promising start in supporting a regional development. There are some hopes on the increase of local investment through local television, in a way that region potential can be broadcasted. Local television is a limited reach television in a particular region. Through local television broadcast, it is hoped that culture and local wisdom would be able to be spread around the region. This provides local government an option in featuring all available local potential through television. The existence of local television becomes a foundation in increasing the local economic, education, and culture development.

The purpose of local television is to filter transformation of other cultures in order to increase local culture without affecting national television role. Local television provides a locality program, which in the end will have a positive effect on regional development, such as the increase of public involvement, opening employment, and encouraging the initiation of production houses.

In order to become a potential media, which is capable to unearth and wrap local culture wisdom in an excellent program, it is easier said than done. The responsible role of local television, in providing a high quality program through a more educated presentation and suitable for local public, is demanding a high quality infrastructure and human resources. Some local television in West Java Province seems to be forcibly established, without any proper preparation, lacking required infrastructure and funding.

Previous research shows data and illustration on situation and condition of local television in West Java Province. Some of them are: the limited human resources skill in management of broadcast production and marketing, there is no specific strategy from local television management of local television to increase the management skill of its human resources, especially in broadcasting area.

Human resources problem is a very important but complex, especially in local television, lack of funding forcing them to ask employees to work on several area, which in the end decreasing their work productivity.

The non-existence of specific strategy in increasing the human resources skill in their ability to make a program, is affecting the output of the program, as television production process needs a creative employee to work on the ideas or messages for the audiences. The production of a program, which generating advertisements and high rating, needs an accurate management program to support this.

The other occurring problem in human resources matter is the high level of employee's turnover, which would be detrimental for the company as they have to open a new recruitment, having new crews, and added costs to have training for their new employees.

This research is focusing on finding a fit and suitable strategic model of human resources management in future local television, especially in West Java Province. The model includes human resources recruitment, placement, human resources management, and improving professional skill of human resources through training.

The scope of this research is in the public relations area of employee relations in human resources of local television in West Java.

Purpose of Research

1. Standard pattern of human resources recruitment in local television in West Java Province.
2. Standard pattern of quality improvement for human resources of local television in West Java Province
3. Cooperation pattern of partner institution in increasing skill of human resources in local television in West Java Province.
4. What are the strategic steps of local television in increasing ability of human resources in local television in West Java Province?

Literature Review

Local Television Concept

The presence of local television is a positive move in broadcasting world, its effect can be traced back to the implementation of UU no.32 tahun 2002 (Law no.32 year 2002) on broadcasting. The law regulates the management of broadcasting system, free from influence and interest,solely for the public affairs and strengthening local entity in a regional autonomy spirit.

There is a fundamental change in the broadcasting management system in Indonesia since the new law of broadcast implementation recently. The elemental change is the authority given to an independent entity in managing Indonesian broadcasting.

Local television presenting a new breakthrough in Indonesian broadcasting area is inline with the spirit of regional autonomy. It opens the opportunity for local government to increase their unexposed potential through audiovisual media, which has not been able to be shown in private national televisions.

Local television also provides locality, which is what the local has expected, and allowing more positive impact in the optimization of regional development by intensifying public participation.

Komisi Penyiaran Indonesia (KPI or Broadcasting Commission of Indonesia)

KPI is an independent institution, truly free from any intervention and interest of power. KPI becomes the only authoritative institution, based on regulation being implemented, that regulates broadcasting affairs in Indonesia.

One of the duty and obligation of KPIis to give public assurance in receiving suitable and correct information as part of their human rights. In broadcasting democratization embodiment, one of the spirits is broadcasting decentralization, which gives a wider community, especially in regional area, to establish broadcasting institution suitable with local customs, cultures, and values. Broadcasting decentralization encourages public to transform themselves from objects to subjects in broadcasting area.

The implementation of UU no.32 Tahun 2002 (Law no.32 year 2002) along with the establishment of Broadcasting Commission of Indonesia stimulate the broadcasting community, especially private sector, to invest a large number of funding in the broadcasting business. The same happened in the regional area, in particular after the implementation of regional autonomy, which triggered the birth of local broadcasting media with the fund coming from regional government budgetary fund.

Local Television Human Resources

Establishing a television station needs a solid capital and investment to be able to provide infrastructure, production tools, operational resources, as well as human resources. The availability of human resources is an obligatory requirement in establishing a television station. A large investment could be wasted if unskilled human resources handling them.

Sufficient investment and human resources could lead to a local television being able to have a chance to exist in digging out and packaging of local wisdom into a watchable television program. In this case local television is a necessity and needs.

Local television in Indonesia ought to have quality human resources in journalism, by improving the quality through periodic training, which is needed to develop required skill to operate the tools, understand the contemporary media development, and creativity process consciousness. Reward and punishment are also considered to be effective to improve the mental state of available human resources. Local television success is not only measured by the capital gain through advertising but also television station's strategy in maintaining its identity.

Human Resources Management Process

Human resources management is firmly connected to human management in an organization, and a deciding factor in winning the business competition. Human resources management according to Bangun (2012:6) is planning, organizing, staffs arrangement, supply movement and monitoring, development, compensation commitment, integration, service, and separating labors to reach organizational objective. Human resources procurement

includes working analysis, human resources planning, human resources recruitment, selection, and placement, as important factors. Procurement in local television, especially in West Java, has already appliedsome specific criteria working analysis, human resources placement, human resources planning, human resources recruitment and selection; but in practical it is a problematic work to do due to limited infrastructure and funding.

Human resources development is a process of improving human resources through education and training, which is essential for new employee as well as the existing employee to understand the tasks in hand and improving their skill for new technology, especially when they are placed in the new department.

The award for highly decorated employee can be in a form of financial compensation such as salary, incentive, and bonus; or non-financial compensation such as insurance, retirement, and other incentive including health insurance.

The integrated system of employee placement suitable for a particular job and in line with organizational objective should be implemented, which encourage a high work motivation, and leadership able to manage proper human resources, is needed to create a unified and harmonic rapid development.

Employee Relations

An employee relation is connected through human resources relationship pattern between employees (higher to lower rank and vice versa). Thisis very crucial to maintain company existence, as an inadequate communication could be a potential source of conflict and misunderstanding.

Some issues that needed to be resolved in developing a strong employee relations are by creating an ideal working environment where: employees feel safe and secure during working hour, employees know and understand the task in hand, employees know the position in the company, which lead to increase of productivity, performance, not only in employee level but also in management level.

Some steps towards ideal employee relations are as follows: initiating the right company culture, opening communication channel to discover the needs of employee, providing a decent compensation for the employee, handling complaints in a more acceptable way to create trust.

Television Ethics

Television ethics associated with program being broadcast and its impact are part of the duty of local television employee. Law no.32 Year 2002 on broadcasting and *Pedoman PerilakuPenyiaran dan Standar Program Siaran* (Guidance on Broadcasting Behavior and Program standard) are obligatory guidelines for all broadcasting stations to follow, along with the requirement of self-censorship for each program.

Law no.32 Year 2002 on broadcasting regulates four broadcasting institutions in Indonesia: Public broadcasting institution, Private broadcasting institution, Community broadcasting

institution, and Subscriber based broadcasting institution. The Public broadcasting institution in the national level are TVRI (Government owned television station) and RRI (government owned radio station), they both act as strategic partner for local television in order to increase public service for people in regional area.

The presence of local television ought to be the trigger for regional autonomy in economic sector, as the advertising revenue coming from local companies eventually will increase economic growth regionally.

Methodology

This research uses qualitative method with descriptive approach using in-depth interview, observation, and literature review for the data collecting process. There are three analysis unit for this research: (1) policymaker at local television in West Java, (2) employees of local television in West Java, (3) Human Resources Department at local television in West Java.

In the previous research, purposively taken sample were from Bandung TV, PJTV, Radar TV Tasikmalaya, and Cirebon TV. While for this second researchthe sample is coming from Green TVIPB of Bogor, Dian TV of Sukabumi, RTV of Purwakarta, and Sembilan TV of Garut.

Result and Discussion

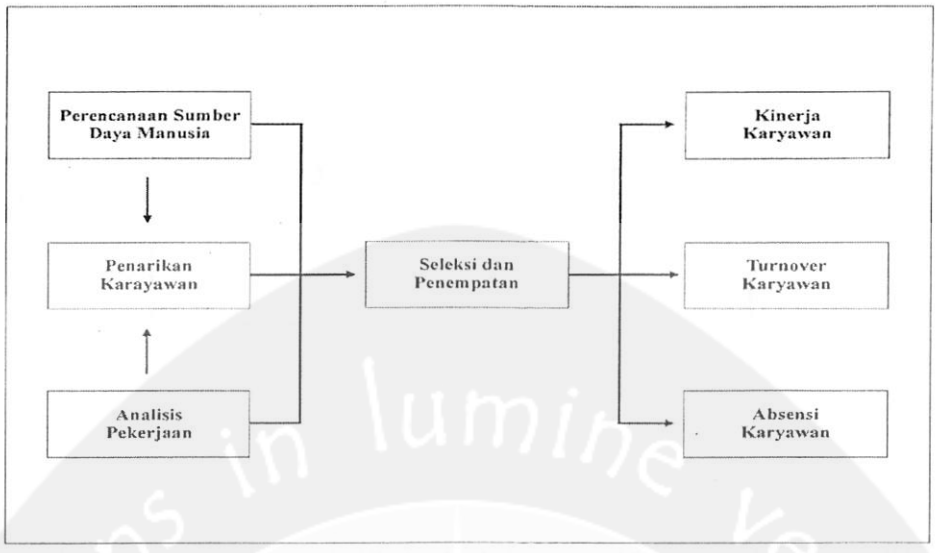
Local television management's purpose of increasing human resources quality is to produce a high quality-broadcasting program.

1. Standard pattern of local television human resources recruitment in West Java

Recruitment is a process of seeking candidates, which qualified categorically and sufficient in quantity (Bangun, 2012:140). The process requires a particular company to do whatever it takes to acquire employees needed, suited to the situation and condition of a particular company.

The occurring problem confronted by a company is the difficulty in acquiring work force with knowledge, skill, and ability suitable for a particular job. In connection with this research, local televisions are using a varied recruitment method, such as Cirebon TV, which is recruiting SMK (Specialty High School) students doing internship at the station; while Bandung TV, on the other hand,uses selection for the recruitment, with less requirements on skill and ability as they eventually will be trained by team of Bandung TV.

The result of the research on recruitment pattern of local television can be seen in the form of a model as follow:



Source: Human Resources Management (Bangun, 2012:158)

Explanation:

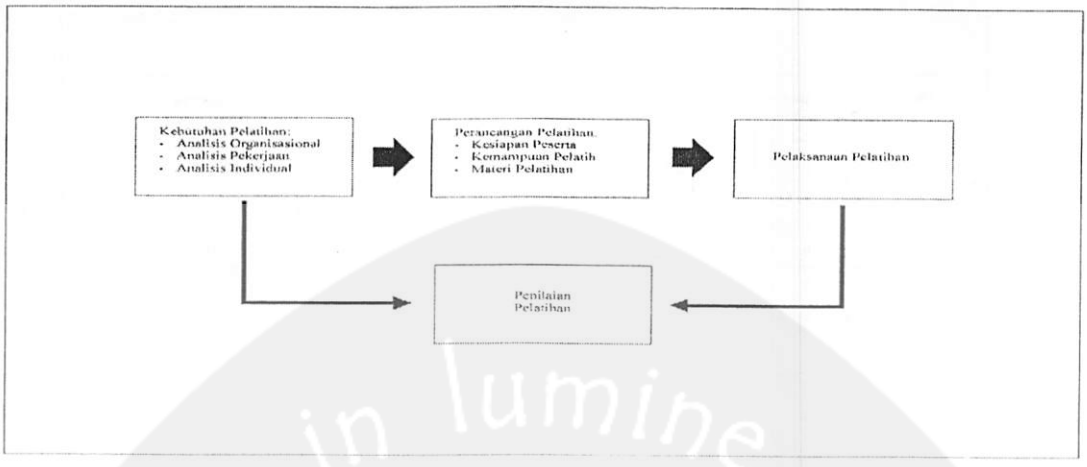
Selection of employee candidates is linked to a suitable field of a candidate skill. Furthermore, placement is connected to adjustment of skill and the line of work will be encountered. Mistakes and inaccuracies occurring in selection process will affect on low achievement, high turnover, and low attendance. The problems of human resources in local television in West Java is the employees moving to other more promising national television after they have worked really well on the job.

2. Standard pattern on increasing quality of human resources at local television in West Java.

Increasing human resources quality is really connected to human resources development, which has a purpose to reach organization's objective. The development could be in a form of providing employee for further education, participating in formal or non-formal training preferable for employees' skill.

Benefit can be reaped through human resources ability development. An employee will have more skill and improving his/her productivity. The high spirit will eventually provide the company more benefit, which is why it is necessary to have an adjustment between human resources quality and company's strategic planning, it can be said that human resources quality development ought to be planned from the beginning.

At local television in West Java, from both previous and current researches, result shows that human resources quality development is not in the initial planning. The cause is the limitation in providing the quality development program. The model of this pattern can be seen as follow:

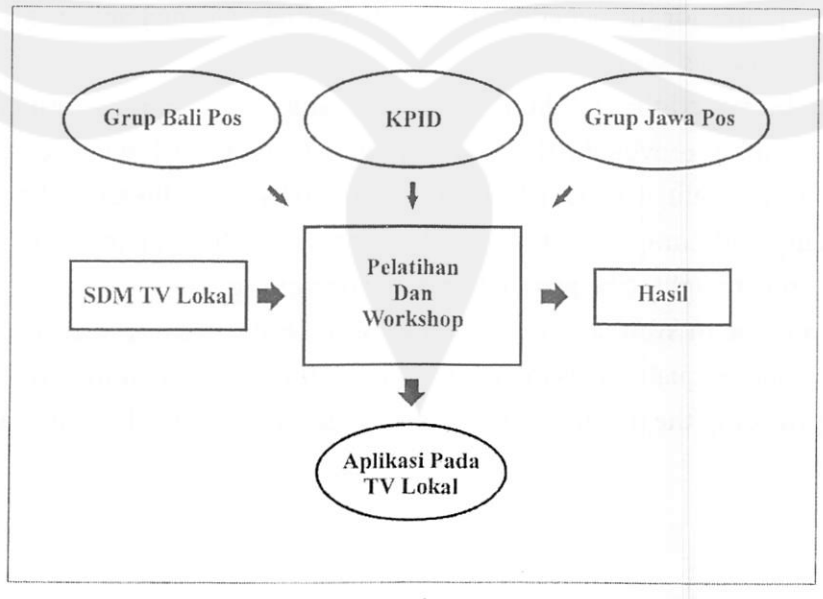


3. Pattern of cooperation between partner institutions in improving human resources quality at local television in West Java.

The human resources quality development techniques can be don internally or externally, within the company or organization or can be done with cooperation with external party. The research reveals the fact that local televisions do not have any plan in having cooperation with external parties. Bandung TV, for example, sends some employees to a training organized by Bali TV merely because both are under the same group of Bali Pos. Another example is Radar TV of Tasikmalaya sends its employee to training organized by JawaPos, which is under the same group.

Other local television in West Java sends its employee to a training organized by both KPI and KPID (Broacasting Commission of Indonesia Regional Office). Nevertheless the content of the training is more general rather than a specific material needed by employee of local television.

The following is the model of pattern of cooperation between partner institutions:



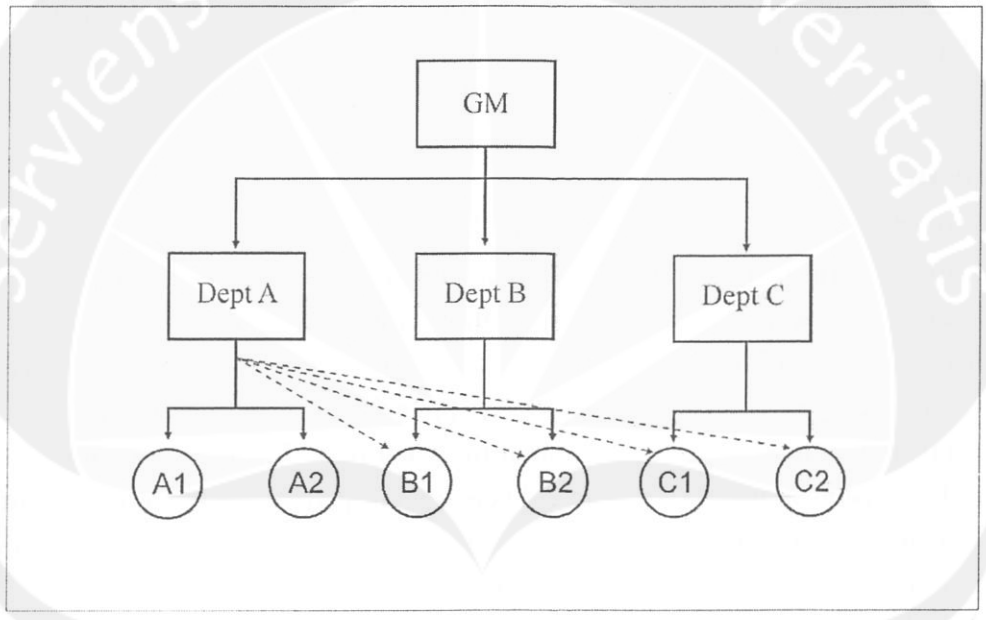
Source: Human Resources Management (Bangun, 2012:203) with modification.

4. Strategic Steps Of Local Television In Increasing the Quality Of Human Resources In Local Television In West Java Province

Strategic step in increasing the quality of human resources is started by improving employee relations' activity in the company. Non-formal interpersonal communicationcan be used to explain any problems rising, preventing misunderstanding. This activity also has horizontal, vertical, and diagonal communication.

The next step is to establish work stability by designing a workload suitable with interest and ability of employees, creating a flexible work standard, task introduction, work signification, freedom in creativity, periodic feedback and performance evaluation. Conversely, in practice, local television has not done it properly as the limited resources and high turnover still existed.

The model of strategic steps will be as follow:



Source: Human Resources Management (Bangun, 2012:371)

Conclusion

This research can be concluded as follow:

1. Local televisions are using a varied recruitment method, such as Cirebon TV, which is recruiting SMK (Specialty High School) students doing internship at the station; while Bandung TV, on the other hand, uses selection for the recruitment, with fewer requirements on skill and ability, as team of Bandung TV eventually will train them.
2. Local television in West Java shows that human resources quality development is not in the initial planning. The cause is the limitation in providing the quality development program due to limited structure and infrastructure as well as funding. For that matter local television can not optimize its human resources planning.

3. The research reveals the fact that local televisions do not have any particular plan in having cooperation with external parties. Bandung TV, for example, sends some employees to a training organized by Bali TV merely because both are under the same group of Bali Pos. Another example is Radar TV of Tasikmalaya sends its employee to training organized by JawaPos, which is under the same group. Other local television in West Java sends its employee to a training organized by both KPI and KPID (Broacasting Commission of Indonesia Regional Office). Nevertheless the content of the training is more general rather than a specific material needed by employee of local television.
4. Strategic step in increasing the quality of human resources is started by improving employee relations' activity in the company. Non-formal interpersonal communication as well as horizontal, vertical, and diagonal communication can be used to explain any problems rising, preventing misunderstanding. It is very useful in establishing work stability by designing a workload suitable with interest and ability of employees, creating a flexible work standard. In practice, local television has not done it with maximum effect.

Suggestion

1. Local television in West Java, with all their limitation, still needs to create human resources recruitment standard pattern suitable for the need of the company, starting from planning, work analysis, implementation, and evaluation.
2. Local television in West Java is required to have human resources quality improvement level standard pattern, which appropriately applied to the needs of the company; starting from mapping the needs, structure and infrastructure, and financial condition.
3. Local television should have a planned cooperation pattern with external parties based on the needs of the company. Each local television has its own specific problems requiring a specific treatment, in this case human resources quality improvement.
4. Local television should implement employee relations' activity by creating a plan on every communication activity to eliminate any existing prejudice.

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TYPOLOGIES AND DIMENSIONS OF ORGANIZATIONAL CULTURE: CORRELATIONS TO STRATEGY IMPLEMENTATION

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ABSTRACT

Organizational culture in Atma Jaya Yogyakarta University is a primary component of functional decision making in the university itself. Affected by highly diversified culture of employees, the university needs to identify its organizational culture and moreover how to take benefit from that.

Every organization or institution is characterized by specific values, attitudes, internal relationships and external policies, which is interrelated and provides a specific profile. Therefore, a specific internal culture is usually formed in the frame of an organization, which constitutes of the strategic and coherent approach of valuable assets, where people who work in it both individually and collectively contribute to the achievement of its objectives.

Especially in Atma Jaya Yogyakarta University, aiming a worldwide university makes the university have to face increasing socio-cultural challenges in the next few years. In order to identify current and preferred culture of the university, OCAI was used as a psychometric tool. Through the use of a simple survey, participants identify their perceptions of both existing culture and their desired future culture. Based on OCAI tested to a number of samples of faculty members, there are gaps between the ideal culture desired and current university's culture.

In this study with OCAI, we found that the university's current culture tends to a hierarchywith an average score of 38.34. It affirms the university's emphasis on standardized procedures and an emphasis on rule reinforcement.However, ideal culture in the minds of faculty members diverged around market and adhocracy culture.This indicates that most of the employees want to fulfill their self-actualization and self-affirmation needs.

NEW PRODUCT DEVELOPMENT STRATEGY OF CREATIVE INDUSTRIES: A CASE STUDY OF DKI JAYA AND WEST JAVA PROVINCE

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ABSTRACT

Globalization weights have started to majorly affect the act of product development over an extensive variety of industries. Another worldview has risen whereby organizations are using gifted building groups scattered far and wide to develop products in a collaborative way. Creative industries in Indonesia are confronting the same test and in addition worldwide organizations that is profoundly focused and to maintain their prosperity by new product development. The target of this study was investigating the acts of new product development in creative industries by including strategy, process, organization, the performance assessment of new product development itself. This study led through study utilizing the survey that have utilized already with changes balanced with attributes of Indonesia creative industries and interview with manager and director level of product planning, product engineering, product development, marketing planning, and R&D. All out creative companies have partaken in this study are 113 organizations comprising 19% private, 12% SME, 12% joint venture, 9% home industry, and the rest were others. The aftereffects of this study are 51% of companies concurred with that new product development very commanded by heading of top management level (top-down) and 47% concurred with suggestion from outsiders. From 113 companies, 73.45% aim to meet consumer demand. Followed by improving quality (61.06%), creating new markets (55.75%), and follow the industry's trend (46.02%). Extend product life cycle (40.02%) the next sequence as the company's goal to develop new products, followed by the product diversification (23.01%). Following the decreasing production cost was selected by 15.04% of respondents and only 14.06% who chose to apply the new technology. The monetary allowance portion for R&D from sales, 51% companies assigned around 0-9% and 46% around 10-20%. The strategy of product development of creative industries in DKI Jaya and West Java were new products. From the characteristics for new products, almost half creative companies developed real products that not available in the market yet by derivative products.

Keywords: Creative industry, new product development strategy, R&D, West Java, DKI Jaya

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INTRODUCTION

New product development is analogous to climbing high peaks and steep cliffs, challenging, invigorating, and empowering experience of the people involved. To be able to successfully climb to the top of the cliff, we require a set of tools, neatly arranged plan, and team support each other and work together using a set of these tools when necessary in due course. Successful new products also require a process that is well planned and mature (Cagan& Vogel, 2002). Team that varies background of diverse disciplines must work in unison to the direction in which the product will be brought and through the Fuzzy Front End process to create products that meet the needs, wants, and desires of consumers. Within the company, new product development is an integrated part of the company's strategic plan. Ansoff and Stewart (in Morse & Babcock, 2007) split the four alternative strategies of new product development, namely: first-to-market, follow-the-leader, me-too, and application engineering.

Reinertsen(2005) and Hariandja(2004) stated that the product development process becomes more specialized and dynamic as well as the need to change for the better. The products produced by the company are always moving towards dynamic to satisfy the needs of consumers. Overall new product development is the core engine of growth companies. Therefore, the company is required expertly manage it (Hariandja, 2004). As the rapidly changing market in accordance with the development and competitive conditions which are no longer so easy as times past, the companies in Indonesia, especially those engaged in the creative industry are required also to move more quickly in order to satisfy what the consumer desires. A comprehensive study conducted by Information Resources Inc. (IRI) in 2000 showed that of the 21 categories of packaged goods are launched to the market, 52% fail (Schneider &Yocum, 2004). These results prove that the new product development requires the right strategy together with the supporting aspects such as human, infrastructure, culture, and continuous innovation.

The Creative Industry Mapping Study which has been directed by the Department of Trade of Republic of Indonesia on 2008, embraced the creative business definition from UK DCMS Task Force 1998 so that the creative business in Indonesia can be characterized as: "The industry originating from the inventiveness, aptitudes and also singular interest use to make the thriving and the work occupation by the creation and utilization of innovative and individual creation powers". In light of the definition, the Department of Trade in the study gathered and set 15economic activities sorted as the Creative Industry.

Table 1. The Types of Creative Industry in Indonesia

No.	Type of Industry	Description
1	Advertisement	The creative activity related to the advertisement product andcreation, among others are market research,advertis ementcommunication planning, outdoor advertisement, advertisementmaterial production, ,public relation campaign, advertisementpresentation at the printed and electronic medias.
2	Architecture	The creative activity related to the building blue print and production information, among others: garden architecture, city planning, construction cost planning, inherited building conservation, auction documentation, etc.
3	Art and Antique Market	The creative activity related to the creation and trade, work, antiques and jewelry by auction, gallery, shops, supermarket and internet
4	Craft	The creative activity related to the creation and distribution of the handicraft made of jewelry, accessories, goldsmith, silver, stone, glass, porcelain, fabric, marble, limestone and iron
5	Design	The creative activity related to the graphical design creation, product, industry, packaging, and company identity consultation.
6	Fashion Design	The creative activity related to the cloth design creation, footwear design and other model accessories design, mode cloth production and its accessories, consultation of fashion product line, as well as fashion product distribution
7	Video, Movie and Photography	The creative activity related to the production creation of video, movie and photography service, as well as the video and movie record distribution. Including the scrip writing, movie dubbing, cinematography, and movie exhibition.
8	Interactive Game	The creative activity related to the creation, production and distribution of computer game and video as the entertainment, ability and education
9	Music	The creative activity related to the creation, production, and retail of sound records, record copy right, music promotion, lyric writer, song or music writer, music show, and music composition.

10	Performing Arts	The creative activity related to the business related to the content development, show production, ballet show, traditional dances, contemporary dances, drama, traditional music, theatre music, opera as well as ethnic music.
11	Publication and Printing	The creative activity related to the content writing and publication of book, journal, newspaper, magazine, tabloid and digital content as well as the news office activity.
12	Computer and Software Services	The creative activity related to the information technologydevelopment including the computer services, softwaredevelopment,system integration, design and analysis system, software andhardware architecture design as well as portal design.
13	Television andradio	The creative activity related to the creation business, production and packaging, broadcasting as well as television and radio transmission
14	Research andDevelopment	The creative activity related to the innovative business offering the science and technology invention as well as science and technology application for the product improvement and new product creation, new process, new material, new tools, new method and new technology which can meet the market demand.
15	Culinary	The creative activities to produce processed food products typical of Indonesia that could be improved competitiveness in the retail market and the international market.

Source: Department of Trade Republic Indonesia

The creative economy developed by 5.8% in 2013, in accordance with national GDP. At Rp.642 trillion, the portion represented a little more than 7% of Indonesia's economy in 2013, as indicated by Statistics Indonesia (BPS). While the creative economy still produces the vast majority of its profits on the home business sector, fares are making up for lost time and rose by 8% to 119 trillion RP in 2013. The culinary business is the greatest of the creative commercial enterprises yield, trailed by design and workmanship. With respect to fares, style represented just about 66% of shipments in 2013, trailed by crafted works, service figures appear. The United States, Japan and Germany are the principle send out destinations for Indonesian design articles (Global Business Guide Indonesia, 2014).

To be able to survive in the market, the company is always trying in various ways to stay ahead of its competitors by creating a very new product, different process, utilizing the infrastructure of the same or different, requiring new skills, launch derivative products to save costs or to creating a product that was radical/breakthrough. New product development is

inseparable from the role of top level management pattern top-down or bottom-up depending on how the innovation process to produce those products. In creating products, innovation plays an important role, especially in terms of the effect on the habits and consumer behavior with minor or major effect and competencies and complementary assets of the company with its increase or completely destroy.The innovation consists of incremental, major, strategic, and radical (Markides&Geroski, 2005).

Indonesia's creative industry at this time to face the level of competition and a great challenge, especially in the ability to create new products as an indicator of success or failure in generating cash and influence the minds of consumers. If not careful, then the chance to win the competition can be detached. Comparative advantage as an indicator of success is no longer a back-bone in winning the battle in the world of business that requires high intensity and concentration. Innovation and design are keys to win the competition in the era of creative economy now. Innovations in the development of new products and services becomes key to how large companies can survive and also offset with the process that continually improve the ability and competence on the other.

The study of the indicators of success of new product development in Indonesia has not done particularly telescoped creative industry. For it is very good and gives a direct impact for companies creative for more than learn what the main indicators in the successful development of new products. This study is intended as a learning arena and to contribute in terms of improving Indonesia's competitiveness in the global arena. The focus of this study is based on the strategy applied by the company in the development of new products.

LITERATURE REVIEW

In today's business world, innovation is the key to win the competition in the market. Sophistication brought about by new technologies, product life cycles are shorter and the global economy has added to pressure the company to constantly innovate in order to survive the onslaught of products from competitors. Therefore, companies that innovate will have a better chance to survive, whereas companies that only "silent" and does not follow the changes will be swept away and disappear.Development of new products, as the main activity in the innovation process in the company has been seen by many researchers as a key factor of success. Shepherd and Ahmed (2007) believe that new product development is the key to success, growth and prosperity in the modern enterprise. Ozer (2000) also has the same opinion, the new product is vital for companies to be able to survive for a long time.

At present, companies are vying to introduce their new products or services, by producing better products, or products that are completely new and have not been there before. In addition, they also offer faster delivery and lower prices than competitors. The process of developing new products in a company usually intended to apply new technologies, create new markets, extending product life cycles, product diversification to new markets, reduce

costs, or to meet the needs of customers.Successful development of new products will require consideration of the balance between short-term and long-term, the ability and the internal and external constraints, the performance evaluation process and the product on the market, where all factors must be aligned with the objectives and business strategy.To achieve this objective, the company must set up processes and new product development strategy correctly. Type of new products, new product development procedures, organizational structure, and performance evaluation of new products are some of the factors that must be considered in planning and organizing the development of new products to achieve the desired performance.

METHODOLOGY

This study focuses on the creative industry in Indonesia with coverage of scale and size ranging from micro, small, medium and large with the form of ownership of the state, enterprises, domestic investment, foreign direct investment, and the joint venture which is also indicated by the number of permanent employees, the company's revenue, assets of the company and the company's strategy in the development of new products. Categorization of types of new products refers to research conducted (Wheelwright & Clark, 1992) includes derivative products, platforms, and radical. The study variables were measured through a questionnaire that has been used by Goldense Group Inc. (2004) with some modifications to suit the characteristics of the creative industry in Indonesia and from literature related to new product development.

The number of samples obtained from this study is 113 companies. Of the 113 companies are grouped into different types, namely: advertisement, architecture, arts and antique market, craft, design, fashion design, video, movie and photography, interactive game, music, performing arts, publication and printing, computer and software services, television and radio, research and development and, culinary. Distributing questionnaires covering centers of industrial area in DKI Jakarta and West Java. Distributing questionnaires carried out by first making contact with the parties directly involved with new product development process in the company. The parties are authorized in this case consists of a manager level up to director level with the field directly related such as: marketing, product engineering, R & D, product planning, product development, design, and fields that have a direct link with the development of new products.

RESULTS AND DISCUSSIONS

Respondent Profile

Types of creative industries covered in this study consisted of 44% of culinary, 24% others, 22% fashion, 4% design, 3% craft, and 3% video, film and photography.Creative industry coverage obtained in this study has been adequately described the creative industry forum in Indonesia. From preliminary observations also showed that the creative industry

is all that goes into the Directory of Creative Industry Classification from Department of Trade incorporated into this study. This is due to there are some companies that the research samples do not have divisions and departments of product development, product engineering, product planning, or research and development. Only companies that have divisions and departments mentioned above are targeted for this study. This profile is shown in Figure-1 below.

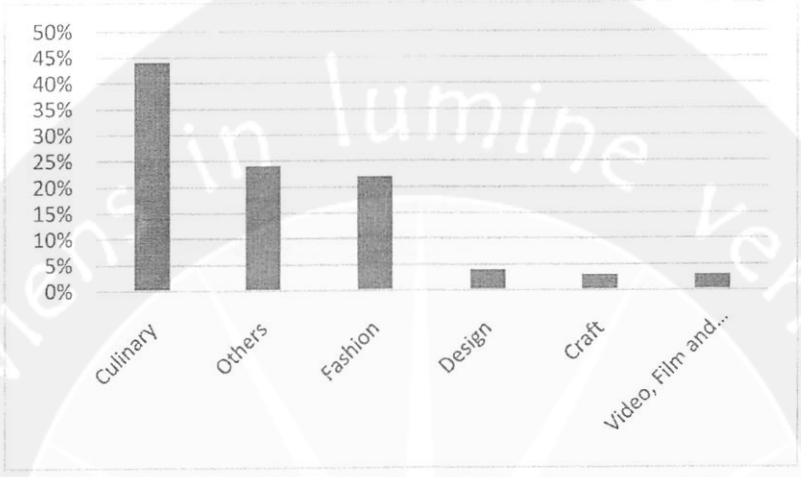


Figure-1. The type of industry

From data processing result that the size of the company there are 33% of companies are classified as micro, 32% small companies, 30% medium-sized companies, and 2% of large enterprises as shown in Figure-2 where the data size of the company's group already represents the characteristics of the size of the creative industry located in West Java and DKI Jaya.

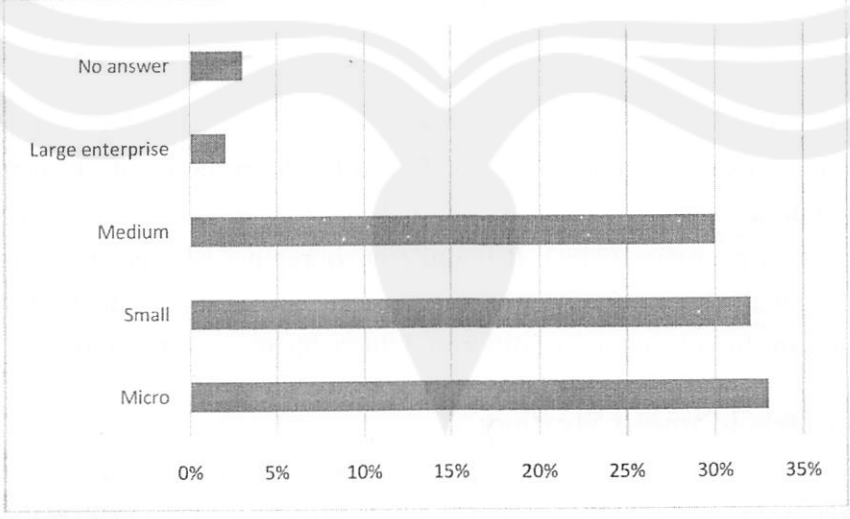


Figure-2. The size of the company

From the type of ownership of the company is shown in Figure-3 below, the profile of respondents consisted of others 40%, 19% private, joint venture 12%, small and medium enterprise (SME) 12%, home industry 9% and CV 8%. From this data it appears that private and others type of ownership showed high participation in the study and spread largely.

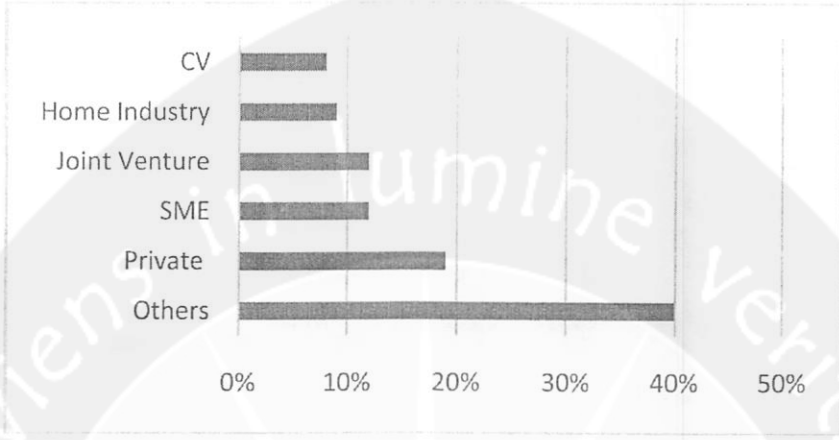


Figure-3. Type of ownership

From the total number of permanent employees, most distributions in the range of companies with a number of employees between 1-99 peoples to contribute 93%, while companies classified as large of number of employees is only 7% as shown in Table 2.

Table 2. Total of permanent employee

Total Permanent Employee	%
1 – 19	87%
20 – 99	9%
100 – 250	3%
251 – 500	1%

Another characteristic that is reflected in the survey of new product development is the scope of the company's business area conducted by the respondent. As many as 79% of companies making sales in the country, and the rest is exported to various countries dominated by Asian countries (21%). It is quite encouraging, because it means that the products that manufactured by the creative industry in Indonesia has a market not only in the country but also abroad, given the fairly competitive business competition.

New Product Development Strategy

From the total respondents, 69% agrees the concept selection conducted in Indonesia as domestic market. Approximately 21% do not agree that the company considers the products developed are not entirely new. This suggests that in order to be able to compete in a highly competitive market, companies are required to provide differentiation to the product made

by a company before.For the process to create a new product in the company, 36% support the different processes on the contrary 20% did not indicate approval. In terms of creating new products 28% more support for the use of the new process and vice versa 54% do not support. This proves that not all products are produced and provide differentiation require different processes and tools from the previous. It is influenced by factors of assets, efficiency, infrastructure, and funds needed, and also depends on the scale of the company and scope of its operations. The ability to compete with the processes and limited infrastructure is very heavy in this competitive era. The company strives to conduct its operations with a high degree of efficiency but on the one hand should be able to adapt to the needs of its customers.

From factors new skills required to make the product, 56% support that product development requires new skills to be able to produce a quality product, different, and received by the market. Product development strategy undertaken by the company, over 44% of respondents companies are trying to follow a strategy of first-to-market by developing products that did not exist on the market before. This strategy requires a budget that does little and marketing efforts to create innovative products. If seen from product development strategy based on derivatives/derivative, then companies in West Java and DKI Jaya tend to look for opportunities to try to develop a product that does not exist in the market but by following the flow of the previous product with the same platform. This strategy is executed with the aim to save costs and maintain existing networks with more and more using the same components, but still provide differentiation (Hariandja, 2005).

The ability of innovation to create breakthrough products that are classified/radical, firms in West Java and DKI Jaya province still have to learn more to global companies. The study shows that only 24% of companies that support that they produce a product that was radically contrary to the market and 43% do not support this. It shows that the innovation process is not running too fast and still requires conduces shape and ride. This fact requires creative companies in West Java and DKI Jaya should be more instrumental to try something new compared to the existing one. Clark and Fujimoto (1991) stated that effective product development is not achieved simply by increasing the cost of R & D, relies on technology radical or introducing tools and new techniques but a pattern consistent overall view of the system of total development includes organizational structure, technical skills, process completion issues, culture and strategy. The consistencies not only work in broad system architecture but also in the level of detailed work.

New product development cannot be separated from the pattern found in the company's leadership and culture growing in it. Strong leadership can provide the vision, mission and a clear direction in the development of new products. The study shows that in the development of new products, the top two-boxes 51% is agree that always directed by the top management. For the proposed development of new products, top two-boxes 47% of respondents always get it from outsiders. From this study, showed results that are new product development begins with the top-down pattern but proposals outside parties in this case not only consumers

but could be other parties involved with the company holding a significant portion. In the economy of creative, sources of ideas from different layers. The involvement of all parties in the development of new products should be the concern of all parts in good company with the pattern of top-down, bottom-up, peer-to-peer, inside-out, or outside-in.

The study conducted on the creative industry in Indonesia as shown in Table 3, shows that of the entire development of new products made by the company, 73.45% aim to meet consumer demand. Followed by improving quality (61.06%), creating new markets (55.75%), and follow the industry's trend (46.02%). Extend product life cycle (40.02%) the next sequence as the company's goal to develop new products, followed by the product diversification (23.01%). Following the decreasing production cost was selected by 15.04% of respondents and only 14.06% who chose to apply the new technology. In this item of questionnaires, the respondent given the preference to choose more than one option. The results of this study support the fact that occur in a competitive era now that satisfy consumer demand to the company goals in order to survive. Drucker (2006) stated that the essence of a business is to create customer, customer, and customer. This is in line with the statement of Drucker.

Table 3. The objective of new product development

The Objective of new product development	%
Fulfilling consumer's demand	73.45%
Improving product quality	61.06%
Create new market	55.75%
Follow the trend in industry	46.02%
Extend product lifecycle	40.02%
Product diversification	23.01%
Decrease production cost	15.04%
Application of new technology	14.16%

The development of new products require no small cost compared to the cost for other activities such as marketing, production, customer retention, and others. Table 4 below shows the allocation of the budget required by the company's R & D activities. More than 51% of creative companies in West Java and DKI Jaya province spend R & D budget is only around 0%-9% of its annual sales and the rest 46% around 10%-20% of annual sales. This resulted in the introduction of new products merely derivative products alone, rarely can produce radicals that are highly loaded with technology and requires considerable cost. New product categories radical, global, technology-based differentiation and future trends have not been part of creative industry in West Java and DKI Jaya. Required commitment, consistency, and coherence to achieve successful performance of new products and qualified.

Table 4. Budget allocation for R&D

The average of R&D budget	%
0 – 4 %	27%
5 – 9 %	24%
10 – 14 %	36%
15 – 19 %	10%
No answer	3%

Allocation of funds R & D in the company would be different, depending on the industrial subsector, the number of people involved, the duration of the new product development project, the size of the company and the company's strategy. Studies have shown that in general, the manufacturing industry in Indonesia is quite minimal in allocating funds for R & D activities of the company. The lack of funds allocated to R & D activities showed that the company's commitment to developing new products is not too high.

The company only innovating "moderation" and not willing to create a new product that is "better" than they are today, which is really something different than exist today. In addition, the funds will be minimal causing part of R & D can't make the necessary technology investments to be able to create new products that can compete in the market. Another impact of fund allocation of R & D activities is at least a new product development project that is able to be financed by the company. Thus, not surprisingly, the manufacturing industry in Indonesia will produce a new product which is quite small. If the company want to survive in an increasingly competitive global market, it must allocate a larger R & D so that the ability to conduct research and development of products can be increased, which led to the emergence of innovative products.

Studies conducted in the creative industry in West Java and DKI Jaya shows that type of newly developed products leads to derivative products as shown in Table 5.

Table 5. Type of New product

Variable	Point out of 5 scale
Derivatives products	3.38 / 5.00
Produk *breakthrough*/radikal	2.65 / 5.00

Associated with the low funding of R & D as described previously, it is not surprising that the type of new products produced by the manufacturing industry in Indonesia leads to derivatives, where the product developed a modification / improvement of existing products today, which was developed to meet the needs of consumers. This supports previous findings that the biggest new product development goals are performed by the industry is to meet consumer demand.

Derivative products have the feature shorter life cycle and low margin aiming to survive in a competitive and saturated market. This is in contrast with breakthrough products/

radicals are able to create new markets with high margins, but require resources far greater. Type of derivative products are generally developed by the creative industry in West Java and DKI Jaya resulted in the product does not produce a significant increase in profit due to its low margin. Although it has different advantages and disadvantages, but these products are relatively the same as competitors. Consumers are sensitive to the comparison between the costs and benefits (cost and benefit) will carefully compare the price to be paid by the benefits. The relatively short life cycle that caused the company to be able to launch new products in a fairly short time anyway.

Therefore, in order to maintain and increase corporate profits, the creative industry in West Java and DKI Jaya should begin to direct the development of new products towards products that radical. With the launch of this type of product, even the company will be able to create new markets, because of the unavailability of solutions for consumers prior to the product.

Data collected from respondents indicated that the creative industry in West Java and DKI Jaya is characterized by a low number of new products were successfully launched into the market. A total of 52% of the total respondents launched less than nine products each year as shown in Table-6.

Table 6. Total of new product launch

Total of new product launch	Percentage
0 – 4	35%
5 – 9	17%
10 – 14	18%
15 – 19	6%
≥ 20	23%

The low number of new products were successfully launched indicates that the creative industry in West Java and DKI Jaya province is not active in the business development of a new product or process innovation. These conditions need to be wary of considering the development of new products is a key factor of success to be able to compete in today's business world. With a low number of products launched, it is feared that someday the industry will not be able to survive against the onslaught of new products emerging from abroad, such as China, Malaysia and Vietnam.

However, the small numbers of new products related to the allocation of R & D funds are quite small. This resulted in new product development part only able to do research and development in very limited quantities, so that not many products succeed. Other factors that affect the least number of successful new products launched include the time required and the quality of human resources. As mentioned previously, the time required to complete the new product will be very different depending on the sub-sector of the industry as well as the difficulty of process in idea and manufacture. The more complicated the process of making

a product, and then the time required will be longer. This process can be accelerated by the mastery of technologies that will help people in doing research and product development.

The qualities of human resources in the creative industry in West Java and DKI Jaya that will either encourage the emergence of new products are innovative. With the level of expertise and skills and always up-to-date on the latest knowledge, the new range of products can be born. The low number of new products were successfully launched by the creative industry in West Java and DKI Jaya (less than 9 products) around 52%, may mean that the quality of human resources available to date does not support the creation of new products. Companies with foreign ownership would prefer to offices in other countries are considered to have a better quality of human resources to conduct research and development of new products. In fact, to be able to have the skills in this field, human resources have to implement it, so the quality will improve little by little. If the quality of human resources is not corrected, then the new products produced by the creative industry in West Java will not increase, and they will only do process alone, according to the new products that have been developed elsewhere. Developing a product requires the allocation of resources and the strategy of the company in accordance with the character of the products of the company, as well as the impact on the market of the product to be developed. Figure-4 below shows how the relationship between the characteristics of the products that will be developed on the changing nature of the technology of these products and their impact on the market, which is based on the framework of Aggregate Project Planning (APP).

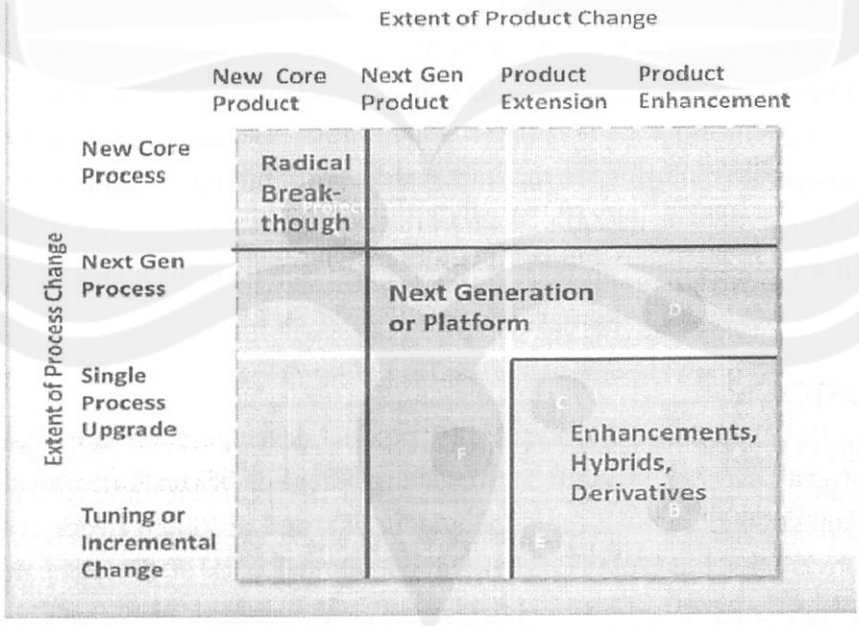


Figure-4. Aggregate Project Planning Framework (APP)
Source: Wheelwright and Clark (1992)

APP framework, can be used as a tool for connecting between corporate strategies is used, with a mechanism of allocating the company's resources in product development projects.

Handling of new product development in the creative industry in the company must be aligned with the goal of short-term and long-term. Product development must be an integral part of business strategy in order to achieve the desired profit and growth. Innovation as an important part of business strategy is the reason why the company should have clear rules of procedure regarding the implementation of new product development. This is to ensure that the process is running properly, so that the evaluation and improvement can be easily done. However, only 58% of companies have a formal procedure for new product development, while the rest 42% conduct new product development process in the absence of formal procedures, nor did new product development altogether.

The existence of a formal procedure in the development of new products becomes important to know whether there are stages that have been executed properly. In addition, it is important for the purposes of the evaluation process, which the company can determine the role and the time required from the relevant sections to complete the task, and analyze the results of the development of new products.The above findings show that more than half of the creative industry in Indonesia realizes the importance of the development of new products by having and running a formal procedure. By having these procedures, new product development process can take place effectively and efficiently, so that the time required to develop new products can be shorter. In developing new products, 44% stated that new product development is done by serial, 27% combination, and 19% concurrent.

In general, it can be seen that the new product development process in the creative industry in Indonesia has a tendency to be serialized. With these properties, it is not surprising that the new product development process is slow and takes longer, because the proposals or new product ideas cannot be directly realized if there is still a long unresolved activity. Any problems that arise in the process of development of new products will be returned to the responsible in the previous process. As a result, the solution of these problems is likely to be completed within a longer time, so that when the product is launched into the market, the company will lose momentum and competitors may have taken advantage by being first in the market.

CONCLUSIONS

These studies suggest that the focus of new product development in the creative industry in West Java and DKI Jaya province is on meeting the needs of consumers as key factors in the application strategy rests on the development of a new product category with a budget derived relatively not too large compared to the annual sales of the company as well as the direction of top-level management significantly. To produce a radical, having a clear differentiation, loaded with technology, requires a large budget in research and development as well as commitment and consistency coupled with the creation of a conduces environment and innovative organization and collaboration with those universities as research centers and government institutions.

From the above analysis, some conclusions can be drawn as follows:

- In applying the new product development strategy, the company is responsive to the market. Wishes and market changes is a major trigger in determining the direction of new products development.
- The creative industry in West Java and DKI Jaya province was marked by the launch of a new product level is low and 52% of companies stated only have less than nine new products every year, with a focus on derivatives and not radical (breakthrough).
- More than half of companies only allocate less than 9% of annual sales to fund R & D activities
- Initiatives to develop new products generally come from the direction of the top level management and also from outside.
- This study stated that 58% of companies have formal procedures in new product development, but does not have a special unit to handle this event, where 16% stated that the activity is not have the autonomous unit and 28% held by department marketing and collaborate with another department.
- Part of marketing a greater role in providing and determine new product ideas, while the R & D is instrumental in realizing the idea became feasible to produce. Part of production tends to play a passive role, merely implementers.
- In terms of the performance of new products, the implementation of new product development to benefit the company, both internally and externally.

To obtain better results, further studies should involve also creative companies outside West Java and DKI Jaya that have center of gravity for creative community such as Yogyakarta, Bali, Central Java, East Java, Sumatra, Kalimantan, and Sulawesi with samples of diverse creative industries. It also required further study on the innovation performance and innovation culture of creative industry in Indonesia to see the differences in the indicators used in the development of new products in terms of strategy, processes, organization, and performance evaluation.

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STUDENTS' ATTITUDES TOWARDS BUSINESS ETHICS: ACOMPARISON BETWEEN INDONESIA AND LESOTHO

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ABSTRACT

The purpose of this study is to investigate Indonesia and Lesotho management students' attitudes towards business ethics with different levels of religiosity and gender in preferences to three business philosophies: Machiavellianism, Social Darwinism and Moral Objectivism. Data was collected from both Indonesia and Lesotho undergraduate students using (ATBEQ) questionnaires. The total questionnaires that were distributed were 300, however out of those questionnaires returned only 229 were completed. The results indicate that there are significant differences across countries and it is found that Indonesia and Lesotho students show no differences attitudes towards Social Darwinism and Moral Objectivism; while Lesotho students show more favorable attitudes towards Machiavellianism than Indonesia students.The results also indicate that gender does not influence preferences for the three business philosophies.

KEY WORDS: ATBEQ, Attitudes towards business ethics, Indonesia, Lesotho.

INTRODUCTION

This research is built upon the work of Bageac*et al*, (2010). The purpose of this study is to investigate management students' attitudes towards business ethics as a comparison research between Indonesia and Lesotho. The primary aim was to assess management

students' attitudes towards business ethics in preferences to three business philosophies: Machiavellianism, Social Darwinism, and Moral Objectivism.

The research was conducted in the context of undergraduate management programs in Indonesia and Lesotho Universities. This study was never conducted in the mentioned countries before.

1. Background of the study

Successions of researchers have been investigating a range of aspects of ethics in business from 1970s (Small, 1992: 746). Moreover the study of business ethics on its own has just taken its stand, thus business ethics became into view for only a few decades as a standalone field in management sciences (DeGeorge, 1987), to become one of the most significant research directions for international business (Cardy and Servarajan, 2006; Phau and Kea, 2007).

1.2 Statement of the problem

The increasing globalization of international economies making business practices more uniform the social organization of production, marketing, customer relations etc, are all becoming increasingly similar throughout the developed world.

It has become widely accepted that businesses must function and operate within the social, ethical and legal values accepted by society (Bordieanu, 2012). In globalization age, business ethics is one of the strongest assets to create, maintain and enhance goodwill and customer loyalty.

And it goes without saying that it is worse in developing countries such as Indonesia and Lesotho in which it might lead to different preferences of business philosophies: Machiavellianism, Social Darwinism and Moral Objectivism. Thus, Hofstede and Hofstede (2005) note that some business practices, such as the preferential employment of relatives, may be the norm in some cultures but unacceptable in other cultures. It is in this context of international differences in ethical attitudes towards business that the current study attempts to assess significance differences.

1.3 Research Question

Since the previous studies have shown significant differencesbetween different countries on the bases of ethical attitudes towards business and management student's preferences on three business philosophies, the current study would like to research on this question:

1. Are there significant differences between Indonesian and Lesotho management students' attitudes towards business ethics in preferences to three business philosophies: Machiavellianism, Social Darwinism and Moral Objectivism?
2. Are there significant differences between Indonesia and Lesotho management students' attitudes towards business ethics with different levels of religiosity in preferences to three business philosophies: Machiavellianism, Social Darwinism and Moral Objectivism?
3. Are there significant differences between Indonesia and Lesotho management students'

attitudes towards business ethics with different gender in preferences to three business philosophies: Machiavellianism, Social Darwinism and Moral Objectivism?

1.4 Benefits of the Study

The results of this comparison study will bring an input to academia when it comes to the global plenary, and see how these societies are developing prospective employers when it comes to business ethics and being social responsible. In addition, since business students are considered to be the prospective managers and administrators of the future and the results of this study could be one indicator of the way future managers might be expected to behave.

1.5 Objective of the Study

As the previous studies haveshown significant differences across countries fromdifferent continents level of religiosity and gender, the objectives of the study are:

1. Toassess if there are significant differences between Indonesia and Lesotho management students' attitudes towards business ethics in preferences to three business philosophies: Machiavellianism, Social Darwinism and Moral Objectivism.
2. To assess if there are significant differences between Indonesia and Lesotho management students' attitudes towards business ethics with different levels of religiosity in preferences to three business philosophies:Machiavellianism, Social Darwinism and Moral Objectivism.
3. To assess if there are significant differences between Indonesia and Lesotho management students' attitudes towards business ethics with different gender in preferences to three business ethics: Machiavellianism, Social Darwinism and Moral Objectivism.

RESEARCH METHODOLOGY

Introduction

The main purpose of this chapter is to give in details the methodology used to carry out this research. The chapter commences with the population of the research followed by a sampling procedure and then methods of data collection under which subjects of the research are discussed.

2.1. Population

Research population was Indonesian and Lesotho students. Thus the data was collected from these two countries.

2.2 Sampling Procedure

The sampling was taken from undergraduate management students of these two countries. This research used purposive sampling and convenience. In this technique the researcher purposely chooses subjects who, in their opinion, are relevant to the project(Bougie, *et al*, 2010).

2.3 Methods of data collection

2.3.1 Subjects

To empirically test the hypotheses, Iused a questionnairesurvey. Determining sample size to ensure that I got the correct sample size, here the method used by Ferdinand (2004) states that the number of a representative sample at least 5 times the number of grains of questionnaires . Therefore, data was collected from a sample of 229management students (114Lesotho and 115Indonesian students). Since I replicate the previous study of Bageac*et al*2010I used business students in order toinsure the comparability of the results.

The survey wasself-administeredduring class hours breaks in Indonesia while in Lesotho, the questionnaires were sent to a friend through email who distributed them among classmates and after they were filled in and they were sent back by email.

2.5 Research instrument and measures

The questionnaire was divided into two sections. Inthe first section, the attitudes of the respondentstowards the three business philosophies that were measuredusing the ATBEQ. Researcher used the original version of the questionnaire developed by Neumann (1987), as cited in Preble and Reichel which is based on the Stevens (1979). TheATBEQ is consisted of 30 items, which were measured onfive-point Likert scales, ranging from 1 (totally disagree) to 5 (totally agree). Furthermore,in the second section of the questionnaire, researcher added items to measure demographicdata, such as age, gender (1 = male, 2 =female), religion, and the level of religious practice(1 = practicing, 2 = occasionally practicing, 3 =non-practicing). For Indonesian students the survey (s) were translated into their language. To ensure the quality of thetranslation, the reseàrcherwas helped by a supervisor to translate as he is the native speaker of Indonesian language.

2.7 Method of data Analysis

Previous studies of students' attitudes toward businessethics based on the ATBEQ (Moore andRadloff, 1996; Phau and Kea, 2007; Preble andReichel, 1988; Sims and Gegez, 2004; Small, 1992; Bageac,*et al* 2010)used rather unsophisticated and exploratory dataanalysis techniques. In general, they computed meansand standard deviations of each item and used simplet tests to compare results across countries at the itemlevel. However, in the present study the researcher used SPSS version 15 to simplify the process of data analysis and sustain the accuracy of the analysis.

Finally, to testthe proposed hypotheses, researcher conducted a multipleanalysis of variance (MANOVA), in which the threebusiness philosophies were entered as dependentvariables and country, gender, and level of religiouspractices were used as factors. I used MANOVA rather than independent t tests because the threebusiness philosophies are moderately correlated.

2.8 Validity and Reliability

To check reliability of the Questionnaires the researcher used Cronbach Alpha since

the previous study of Bageac encounters weak reliability of some of the ATBEQ items.In addition, in order to check its Validity the researcher used the Pearson Product Moment Correlationformula.

RESLUTS

3.1 Testing Instrument

The validity test of the provisions of this study is as follows (Hadi, 2000):

1. An instrument is valid if the calculated value r>r-table. r-table value obtained by the formula: degrees of freedom (df) = n - 2 or 229-2 = 227 is equal to 0.130.
2. Tests using 5% (α) error level.After the validitytest, valid questionnaires were then tested for reliability. Measurements of reliability in principle indicate the extent to which measurements can provide relatively different results when performed on the same subject. The higher level of reliability of a measuring instrument, the more stable and more reliable the measuring instrument is in measuring a phenomenon. An instrument is reliable if the value of Cronbach's Alpha> 0.6 (2009).

The summaryof results for validity and reliability are as follows: (Appendix 2)

Tabel 4.1
Validity and ReliabilityTest

Variable	Grain	r-arithmetic	Information	Koef. Alpha Cronbach	Information
Machiavellianism	q1	.385	Valid	0,746	Reliable
	q2	.413	Valid		
	q6	.409	Valid		
	q7	.282	Valid		
	q9	.449	Valid		
	q19	.462	Valid		
	q20	.336	Valid		
	q21	.344	Valid		
	q22	.471	Valid		
	q23	.242	Valid		
	q24	.338	Valid		
	q25	.454	Valid		
Social Darwinism	q11	.434	Valid	0,774	Reliable
	q12	.514	Valid		
	q13	.441	Valid		
	q14	.593	Valid		
	q15	.546	Valid		
	q16	.345	Valid		
	q17	.533	Valid		
	q18	.400	Valid		

Moral Objectivism	q3	.567	Valid	0,807	Reliable
	q26	.507	Valid		
	q27	.531	Valid		
	q28	.557	Valid		
	q29	.599	Valid		
	q30	.645	Valid		

Sources: Primary Data processing 2013

The validity of the test results for each of the questions have value-count r> r-table, then all of the questions in this study showed validity.

Reliability test results show that all the variables in the study had a Cronbach alpha coefficient> 0.6, it can be concluded that all of the study variables revealed reliability.

3.2 Demographic Characteristics of Respondents

To determine the demographic characteristic, a sample of respondents in this study used the percentage analysis.Percentage analysis results that have been done are as follows : (Appendix 3)

Table 4.2
Distribution of Respondents

Characteristic		Country	
		Indonesian	Lesotho
Age			
17-20		53(46.1%)	11(9.6%)
20-25		62(53.9%)	78(68.4%)
25-30		0(.0%)	25(21.9%)
Total		115 (100%)	114(100%)
Religion	Non-practicing	41(35.7%)	65(57.0%)
	Practicing	74(64.3%(	49(43.0%)
Total		115 (100%)	114(100%)
Gender			
males		63(54.8%)	68(59.6%)
Females		52(45.2%)	46(40.4%)
Total		115 (100%)	114(100%)

Sources : Primary Data processing 2013

3.3. Differences Between Indonesian and Lesotho Management Students' Attitudes Towards Business Ethics

Below are the results which have been found usingManova analysis: (Appendix 4)

3.3.1. Differences in Attitudes Towards Business Ethics Based in Country Differences

Table 4.6
Significance Tests Based onCountry Difference

Effect		Value	F	Sig.
Country	Pillai's Trace	.080	6.245(a)	.000
	Wilks' Lambda	.920	6.245(a)	.000
	Hotelling's Trace	.087	6.245(a)	.000
	Roy's Largest Root	.087	6.245(a)	.000

Sources : Primary Data processing 2013

Hypothesis 1 proposed that Indonesia students would attribute relatively higher importance to Moral Objectivism (Hypothesis 1a), lower importanceto Machiavellianism (Hypothesis 1b), and lower importance to Social Darwinism (Hypothesis1c) than would Lesotho students. There was a significant country differences for Machiavellianism while there was no significant country differences with Moral Objectivism and Social Darwinism. That is management students of Indonesia and Lesotho have showed no differences in preferences to Moral and Social Darwinism.

3.3.2. Different Attitudes Towards Business Ethics Based on ReligiosityDifferences

Table 4.8
Manova Test Significance Analysis Based on ReligiosityDifferences

Effect		Value	F	Sig.
Religion	Pillai's Trace	.040	3.035	.030
	Wilks' Lambda	.960	3.035	.030
	Hotelling's Trace	.042	3.035	.030
	Roy's Largest Root	.042	3.035	.030

Sources : Primary Data processing 2013

Under the provisions of the significance test using the Manova analysis, it can be concluded that there are significance differences in students' attitudes towards business ethics based on different levels of religiosity.

Hypothesis 2 proposed that across countries, students who practice a religion more frequently would attribute higher importance to Moral Objectivism (Hypothesis 2a), lower importance to Machiavellianism (Hypothesis 2b), and lower importance toSocial Darwinism (Hypothesis 2c) than students who practice a religion less often and not at all.

3.3.3. Differences Attitudes Towards Business Ethics Based on Gender Differences

Tabel 4.10
Manova Test Significance Analysis Based on Gender Differences

Effect		Value	F	Sig.
Gender	Pillai's Trace	.007	.529(a)	.663
	Wilks' Lambda	.993	.529(a)	.663
	Hotelling's Trace	.007	.529(a)	.663
	Roy's Largest Root	.007	.529(a)	.663

Sources : Primary Data processing 2013

Under the provisions of the significance test of Manova analysis, it can be concluded that there are no significance differences in students'attitudes towards business ethics based on different levels of gender.

3.3.4. Differences Attitudes Towards Business Ethics Based on DifferentCountries and level of religiosity

Table 4.12
Significance testing Attitudes Towards Business Ethics Based on DifferentCountries and level of religiosity

Effect		Value	F	Sig.
Country * Religion	Pillai's Trace	.014	1.059	.368
	Wilks' Lambda	.986	1.059	.368
	Hotelling's Trace	.015	1.059	.368
	Roy's Largest Root	.015	1.059	.368

Sources : Primary Data processing 2013

Under the provisions of the significance test of Manova analysis, it can be concluded that there is no significance differences between attitudes towards business ethics ofIndonesian and Lesotho undergraduates' students with different levels of religiosity.

3.3.5 Differences Attitudes Towards Business Ethics and Gender Based on DifferentCountries

Table 4.14
Significance testing Attitudes Towards Business Ethics and Gender Based on Different Countries

Effect		Value	F	Sig.
Country * Gender	Pillai's Trace	.010	.701(a)	.552
	Wilks' Lambda	.990	.701(a)	.552
	Hotelling's Trace	.010	.701(a)	.552
	Roy's Largest Root	.010	.701(a)	.552

Sources : Primary Data processing 2013

Under the provisions of the significance test of Manova analysis, it can be concluded that there is no significant difference between attitudes towards business ethics of Lesotho and Indonesian students based on different gender.

3.3.6. Differences in Attitudes Towards Business Ethics Based on level of Religiosity and Gender Differences

Table 4:16
Significance testing of Attitudes Towards Business Ethics Based on level of religiosity and Gender Differences

Effect		Value	F	Sig.
Religion * Gender	Pillai's Trace	.028	2.100(a)	.101
	Wilks' Lambda	.972	2.100(a)	.101
	Hotelling's Trace	.029	2.100(a)	.101
	Roy's Largest Root	.029	2. 100(a)	.101

Sources : Primary Data processing 2013

Under the provisions of the significance test of Manova analysis, it can be concluded that there is no difference between the attitudes towards business ethics of both Indonesian and Lesotho undergraduates' students with the level of religiosity and a different gender.

3.3.7. Differences in Attitudes Towards Business Ethics Based onDifferent Countries, level of religiosity and Gender

Table 4:18
Significance testing Attitudes Towards Business EthicsBased on Different Countries, level of religiosity and Gender

Effect		Value	F	Sig.
Country * Religion * Gender	Pillai's Trace	.014	1.017(a)	.386
	Wilks' Lambda	.986	1.017(a)	.386
	Hotelling's Trace	.014	1.017(a)	.386
	Roy's Largest Root	.014	1.017(a)	.386

Sources : Primary Data processing 2013

Under the provisions of the significance test of Manova analysis, it can be concluded that there is no significant difference between the attitudes towards business ethics of students from countries, level of religiosity and different gender.

3.4 Findings of the research

As shown in the summary of results for validity and reliability presented in Table 4.1, the validity of test results for each of the questions have value-count r> r-table, then all of the questions in this study are valid.Reliability test results show that all the variables in the study had a Cronbach's Alpha coefficient> 0.6, it was found that all of the study variables revealed reliable.

Manova analysis was used to examine the differences between Indonesian and Lesotho Management students' attitudes towards Business Ethics based on the different countries, gender and religious practices. I found that there is a significant difference between Indonesia and Lesotho studentsbased on their different attribution towards three business philosophies. These students showed a different interest to these business philosophies based on their countries and that supported the previous researches that students from different countries have different perspectives towards business ethics.

However it was found that there were no significant difference between these management students in preferences to Moral Objectivism and Social Darwinism. The only significant difference was found on Machiavellianism. Thus Indonesia and Lesotho management students only have differences in this philosopher.Manova analysis was conducted and, it was foundthat there are significance differences in students' attitudes towards business ethics based on different levels of religiosity. As it is presented in Table 4.8

The results show that students who do not practice religion were found to have a better assessment on the dimensions of Machiavellianism and Moral Objectivism, while students who are practicing religion have a better assessment on the dimensionsof Social Darwinism. It can be seen in Table 4.9.but the significant difference was found in preferences to Moral Objectivism and Machiavellianism while to other philosopher there were no differences found. Moreover even though statistically I found significant difference with the attitudes towards business ethics of students, in relation to Moral Objectivism empirically there was no support of this hypothesis 2.

Manova analysis was conducted and, it was found that there are no significance differences in students' attitudes towards business ethics based on different levels of gender. As shown in Table 4.10. Therefore, Descriptive Statistics Based on Gender suggested that both females and males have the same assessment on Machiavellianism, Moral Objectivism andSocial Darwinism. This is indicated in Table 4. 11.

I tried to check whether there is a significant difference of the students based on Country and religionbut manova analysis revealed that there is no significance difference between attitudes towards business ethics of Indonesian and Lesotho undergraduates' students with different levels of religiosity. As shown in Table 4.12. In addition to that,descriptive statistics based on different countries and differences in level of religiosity showed that the students of Indonesia with different levels of religiosity have attitudes towards business ethics similar as students from Lesotho with different levels of religiosity. As shown in Table 4.13.

Furthermore I tried to check whether I can find any significant difference of the country and gender of the students' attitudes towards business ethics, but manova analysis illustrated that there is no significance differences between attitudes towards business ethics of Indonesian and Lesotho students based on different gender. As shown in Table 4.14.

I tried to take religion and gender of the students and check if I can get any significant difference but after Manova analysis was used, it was found that there is no difference between the attitudes towards business ethics of both Indonesian and Lesotho undergraduates'

students with different level of religiosity and a different gender. As shown in Table 4.16. Descriptive statistics by gender and different level of religiosityresults analysis showed that there were no significance differences between attitudes towards business ethics amongst students of the same relative level of religiosity and different gender. A shown in Table 4.17.

Finally I found that manova analysis results based on differences in the country, level of religiosity, and gender has no significance differences between the attitudes towards business ethics of students from countries, level of religiosity and different gender. As shown in Table 4.18. For descriptive statistics by country,gender and different level of religiosity,results of this analysis found that attitudes towards business ethics among students from Indonesia and Lesotho are relatively the same with different level of religiosity and gender. As shown in Table 4.19.

Thus to conclude these findings one will see that the first hypothesis which proposed that there is a significant difference of students' attitudes towards business ethics from different counties based on different business philosophies was significant in preferences to Machiavellianism but there were no support to Moral Objectivism and Social Darwinism. Secondly, the second hypothesis that proposed that there is a significant difference of students' attitudes towards business ethics based on their level of religiosity, that is, students who fully practice religion will show more adherence to business ethics than those who occasionally practice and non-practice at all, was statistically significant but empirically did not find a support.

And on the other hand, the thirty hypothesis proposed that there is a significant difference of students' attitudes towards business ethics based on gender, and that is it assumed that females will have higher adherence towards business ethics than males, but there was no significant difference found between females and males in this study and that gave no support of the hypothesis. The following table shows the summary of this:

Table 4.20 Summary of finding for hypothesis

Predictor variables	Country	Religion	Gender
Hypotheses	1	2	3
(a) Moral Objectivism	Not Supported (.185)	Supported (.023)	Not Supported (.842)
(b) Machiavellianism	Supported (.002)	Supported (.036)	Not Supported (.600)
(c) Social Darwinism	Not Supported (.398)	Not Supported (.860)	Not Supported (.495)

DISCUSSION AND CONCLUSION

The first Hypothesis (1a) suggesting that Indonesia students favor Moral Objectivism in business ethics morethan Lesotho students and Hypothesis(1c), stating that Lesotho students favored SocialDarwinism more than Indonesia students, are rejected. In fact, Indonesia and Lesotho business students in preference to Social Darwinismin business ethics have shown no difference. This is contrary to Neumann's theory, (1987)which suggested that Social Darwinism is the most prevalent philosophy in business ethics. On the other hand, Hypothesis (1b), which maintains that Lesotho students favor Machiavellianismmore than Indonesia students, has been fullysupported.

When trying to find the reasons behind this results, one finds the precious literature, which pointed that a high growth rate,capitalism and that a country's values are founded on many mythical reference points and those myths became into being becauseof different economic, political,and social events. The accelerated industrializationprocess, the need to eliminate the economic gap separating undeveloped countries from developedcountries involves, in most cases, a sort of oblivion of certain traditional practices and values, aswell as an unreserved adoption of new capitalisticvalues, such as competition and material success(Bageac*et al.*2010). This can be evident with favorability of Machiavellianism by Lesotho students. Furthermore, anotherexplanation can be found with Lesotho corruption rate, which favors a Machiavellianism attitude even if compared to Indonesia is lower.

To give more details about this it is a fact that, Transparency International has placedsome African countries high on its list of most corrupt countries of the world. Onecan draw a conclusion from this assessment that either Africanculture has no regard or concern for ethics, or thatthere has been a gradual loss of the concept of theethical and the moral in contemporary Africansociety (Gichure, 2006). This latter has been the most accepted theory which, further more, suggests that this loss of theethical is particularly noticeable within the familyand in the exercise of public office (Dalfovo, 1992).

Apart from that the process of social transformationthattook place in Africa through the contact ofAfrican cultures with external cultures, principallythe European and Asian over the last 150 years (Kigongo, 1992); and this situation can be related to many countries that experienced colonialism and social transformation becausethe results of that transformation,automatically relegatedpeople to a state of poverty,since there was nomatch between the new types of goods and lifestyles,which the new cultures introduced and exhibitedand which most societies could not afford tobuy, and the simple goods which peopletraditionally possessed and used. In line with thisimbalance were the effects of colonialism on the people in some countries, such as the loss oftheir ancestral lands – most of it prime farming land –thereby losing their traditional means of economicself-support, their simple but acceptable standard ofliving, and with it their traditional social status (Gichure, 2006).

The evolution of the ethical problems in modernIndonesia and Lesotho can simply be seen within a paradigm of hunger. For instance (Gichure, 2006) made a wonderful example of this situation. If a person from any cultural background isstarved for a very long time, and then suddenly,a lot of food is placed before him, that person canadopt one of two kinds of reactions: either they simplyeat what food is placed before him as his share and, ifnecessary, share it with other equally hungry persons;or he may instead decide not just to take what is hisbut to grab and hoard as much of that food as he canso that she or he may never need to experiencestarvation again, at least not for a long time. Thefirst reaction is in line with "the golden rule ofmorality" or I consider it as Moral Objectivism in which both Indonesia and Lesotho did not show any differences, which meaning they might have the same favorability on this philosopher. The latter is in keeping with Hobbestheory of self-interest, of the "man in the state of nature" and the modern theory of Ethical Egoism.

This reflects Machiavellianism favored by Lesotho students and Social Darwinism that did not give a clear stand of differences between Indonesian and Lesotho students. Another reason behind this might be because, Indonesian students nowadays' competitive advantage as one of the orientations of the target to win the competition in business.This condition is natural because the competition in businesses is getting tougher. This demands for entrepreneurs (students) to use varieties of ways which can include both elegant way / ethical (good) and not elegant / unethical in their businesses in order to achieve organizational goals and their ability to survive and make a profit.

The results of this study brings a strong support to literature view (precious studies) that suggested that adherence of ethics in business can only be found in rich or developed countries only, while less developed or developing or poor countries will have less ethical values. Among the studies that gave evidence of this, is the study of Inglehart(1997) who argued that, more developed countries will have high ethical values while poor countries will often have less ethical values, hence the pursuit of one's self-interest remains the prerogative of the least developed countries. Due to the mentioned reason above, I think that's why Indonesia and Lesotho students to some business philosophies did not show any differences because their people may be are both interested in one's self-interest rather than ethical values.

The more pronounced focus on Moral Objectivism among Lesotho students could be due to their cultural background as Africans. In many African languages there is no correct word that can be translated as ethics. But in all societies in African there were those actions that were forbidden, operating as the systemic grid for ensuringthat social life and practices were conducted alongsocially acceptable patterns. Furthermore they were unwritten, but passed from one generation to another by the word of mouth, andthose practices wereunderstood and well respectedas the bedrock of social interaction including tradetransactions. For example, it was understood that adherence to ethical behaviour in full view of thewider public would elicit respect and honorwhereas failure to follow the society's acceptedbehaviour would render one to contempt and ridicule or to some form of sanction, reprimand orpunishment,

depending on the magnitude of theoffence. African communities therefore, were governed by well established codes of ethical behavior (Prah, 1993).

Business behavior based on Machiavellianism is more oriented to obtain results in an amoral way. While students, who favored Moral Objectivism in business ethics, show that they preferto use right means in doing business (good ways to attain profit) by considering the minimization of possibilities for using unethical means.

In addition, the reason why Lesotho students may tend to be Moral Objectivism oriented might be business competition is less compared to Indonesian students. However some of Lesotho students favored Machiavellianismin business ethics and they might be people who personally like power and want to achieve their goals rather less of whether their means are ethical or not. In addition, regulations or rules that are applied by the Lesotho government in business might be better than business regulation in Indonesia.

Hypothesis 2 proposed that across countries, students who practice a religion more often would attribute higher importance to Moral Objectivism (Hypothesis 2a), lower importance to Machiavellianism (Hypothesis 2b), and lower importance to Social Darwinism (Hypothesis 2c) than students who practice a religion less often or not at all. Inconsistent with Hypothesis 2a: religion practicing business students favored Moral Objectivism in business ethics morethan non-practicing business students.Consistent with Hypothesis 2b: Non- religious practicing business students favored Machiavellianism in business ethics more thanpracticing business students and inconsistent with Hypothesis 2c: Non- religious practicing business students prefer Social Darwinism in business ethics more thanpracticing business students. In sum, support for Hypothesis 2 was found statistically for both Machiavellianism and Moral Objectivism however for Social Darwinism no differences were found.

Today, religion is a compulsory subject in Indonesia and Lesotho education systems. In Indonesia one can consider the most famous and influential state philosophy called *Pancasila* as a basic ideology. Thus the official state ideology of Indonesia is *Pancasila,* these principles of the constitution which became the guiding imperatives included:Belief in the One and Only God and other four. The aim of *Pacasila*was to guide Indonesian people morally and to unify the diverse groups within the Indonesian archipelago. *Pacasila* incorporates nationalism, internationalism, social welfare, religion and togetherness (Agus, 2006). It is during Senior High School education that extensive use of facilities, curriculum, and resources related to *Pacasila* and civics education are fully engaged (Conners, *et al*, 2010). Of course it is important to note that religion is compulsory to Indonesian citizens, therefore every single individual must have a religion. This can be seen in the results above in Table 4.2, that the highest percent of 64.3% was from students who claim themselves practicing religion. As we have seen that religion has a high influence to adherence to business ethics that was suggested by literature review in this paper Hypothesis 2, was also supported statistically.

On the other hand, most of Lesotho's schools that we have today were built by the missionaries before independence. It was during that era that religion was taught as a compulsory subject in all schools before government schools and even today in Christians

schools (all schools that belong to churches) it is therefore compulsory for students to learn it. A large number of Lesotho students take themselves as Catholics, Christians and so forth and therefore practicing religion 43% as the highest percent compared to non-practicing and as it is shown in table 4.2. Religion made an environment where everything is not considered allowed hence there are things that are forbidden and ethics does constitute a priority. And this can be seen with the Indonesia and Lesotho students in general who showed a positive result in adherence to business ethics and religiosity across countries.

Nevertheless, because of colonialism, Indonesia and Lesotho lost their traditional ways, means to survive, and their subsistence economyand immediately entered into a modern era, a new social and economic organization, and new economic values to go with it. Apart from that, colonialism was unwilling to offer the education and skills necessary to sustain this new economic system in Indonesia and Lesotho people.

The other reason I think why there is no difference between Indonesia and Lesotho when it comes to Social Darwinism is that, the nature of these three business philosophies is "contrary". For instance, there is a natural conflict between Moral Objectivism with Machiavellianism and Social Darwinism. To make an example of this, one is aware that there is no problem with competition for these three philosophies but there comes a problem when it comes to the "means" of competing. Hypothesis 3 proposed that women favored Moral Objectivism more importantly in business ethics, whereas men favored high value on Machiavellianism and Social Darwinism. Hypothesis 3a: Female business students prefer Moral Objectivism in business ethics more than male business students. Hypothesis 3b: Male business students prefer Machiavellianism in business ethics more than female business students. Hypothesis 3c: Male business students prefer Social Darwinism in business ethics more than female business students. This Hypothesis was rejected because it was not statistically supported.

This could have been caused by an unbalance in the distribution of gender between the two country samples. Thus in my data,percentage based on the analysis of gender characteristics is known that, the majority of respondents (57.2 %) are males while the remaining (42.8 %) females. Even though most of the literature on this issue suggested that females are more ethical than men (e,gPeterson *et al.*, 2001 and Bordieanu*et al*, 2012), the results of this study are different from the previous researchers and hence provide no support. In my study I found that gender has no effect on business ethics, meaning both female and men have the same perspective towards business ethics. This could have been caused by their background (Indonesia and Lesotho students' background) as it has been mentioned above that colonialism had changed Indonesians and Lesotho people's way of behavior.

These results provide support for previous studies that highlight no differences between the ethical positions of men and women, for instance (McCuddy& Berger, 1996 and Kidwell *et al*, 1997). This could also be seen in the perspective of human rights (50, 50) where today female and men have equal rights and this does not only bring about equal right in the family but also equal responsibilities. If both females and men have the same responsibilities it means everybody in the family has to see to it that they put something on the table and when

it becomes a bit difficult to get for instance money in a right way (ethically) both females and men will be forced to go for another means, therefore they might find themselves using an unethical means.

This can be seen opposite to the theory of Hofstede (Hofstede and Hofstede, 2005) where it is pointed that due to cultural values women are supposed to be more focused on a meta-ethics, (Moral Objectivism) since they seem to put an emphasis on groups and protection while men are supposed to attribute more attention to opportunist approach (Machiavellianism) to attain competitive goals. In today's world as it is outlined already, not only men are favoring a more opportunist approach (Machiavellianism) to achieve competitive goals, thus women also do. This idea is supported by the descriptive statistics by country and gender in this study even though it was not statistically significant but the results show that Indonesia and Lesotho females students favor Machiavellianism more than men from these two countries, as it can be seen in Table 4.15.

5.1. Managerial Implications

Several important implication scan be drawn from the paper. Perhaps the most important one revolvesa round the importance of respecting business ethics across different countries and understanding different attitudes of prospective managers towards business ethics. Since these Indonesian and Lesotho Management students, are the source of new entrants into the business world and they are foundation for the ethical structures being built by organizations. Within the realm of multinationalbusiness, an increasing number of managers and others are witnessing a clashbetween the norms and attitudes of differentcultures towards basic questions of right andwrong (Crunbaum, 1997).

Countries vary in numerous ways that affect societal norms towards ethical decision making and accompanying choices of behavior and these include laws, ethics, education, and customs, among others. Therefore policies that are made based on one's country alone should be avoided as they lead to conflict between the countries and unfairness in the perspective of globalization. However, understanding the role of culture on ethical behavior is a major issue.

Knowing th edifferences inculture between the two societies can help avoid costly problems and failure (Pitta, 1999).

It is very important for managers to consider and apply business ethics in their organizations for sustainability reasons. Thus business ethics is concerned with how profit is made and how much profit is made, whereas traditional profit-centred free-market based business is essentially mere concerned with how much profit is made. Traditional profit-centred business seeks to maximize profit and return on investment with no particular regard for how the profits are made and what the social effects of the business activities are. Ethical factors are also a significant influence on institutions and public sector organizations, for whom the traditional priorities of service quality and cost management must now increasingly take account of these same ethical considerations affecting the commercial and corporate world. If management wants their organization to sustain longer, they must develop and

regularly review policies, procedures, practices and institutions influencing ethical conduct in the public. It is through management students that can promote government action to maintain high standards of conduct and counter corruption in the public sector. Policy makers must incorporate the ethical dimension into management frameworks to ensure that management practices are consistent with the values and principles of organizations.

It is evident that an organization that consider business ethics sustain longer and has few turnovers because business ethics is not concerned only with profit making but also with the social life of employees. Employees react differently towards their organization depending on how they are treated. If employees perceive that their institutions (organization) provide fair treatment they may experience positive feeling towards the institution. This positive feeling is instrumental in developing their affective commitment. The fair treatment may also result in the employees to have a sense of obligation to stay in the institution to repay the organization for such treatment which in turn foster their normative commitment (Putranta, 2008).

5.2 Limitations of the research study

This study has several limitations worth to be noted. Firstly, when it comes to sampling, it can be seen that the sample group sizes are not equal. But the researchers suggested that the sample groups should be equal in order to say they represent Indonesia and Lesotho without any biasness. An individual can see that the majority of respondents were from Indonesia while the small number was from Lesotho and also in terms of gender distribution it can be seen that the majority of this research respondents were males hence this might have effected the results.

Secondly, there is a time limitation, due to the fact that the data was collected once, meaning that in order to provide a better insight, a repetition of the study at different points in time might bring relevant insight to the output. Thus, in terms of the data sources, it might be difficult to assess generality, because of the fact that the study is made only on one country in Asia (Indonesia) and one from Southern Africa (Lesotho). It is hard to generalize that Indonesia is representative for whole Asia, and Lesotho is representative for whole Africa. The most important limitation of the study was brought with regards to questionnaire design. Because of the fact that Likert Scale was used, central tendency bias might have taken place, from the point of view that respondents might avoid extreme response categories. In addition, the social desirability aspect is very essential to be taken into account as an implication, because of the fact that some respondents might have answered what they think it is moral, rather than what they actually think.

5.3 Future research

More cross-cultural research on the attitudes ofstudents towards business ethics should be conducted.Although not yet in the work life,business students represent the future generationof managers. Especially in the internationalcontext, the power of multinationals and thescope to their activities require that more shouldbe known about the grounds for the decisionsof the managers.

5.4. Conclusion

1. There are differences in attitudes towards business ethics among Indonesian and Lesotho students. Lesotho students have a better assessment on the dimensions of Machiavellianism.However forMoral Objectivism emperically Lesotho students have shown a better attribute while statistically no difference were found.On the other hand, Indonesian students have a better judgment on the dimensions of Social Darwinism however this was shown only emperically but statistically no differences were found of the student for this philosopher.
2. There are differences in attitudes towards business ethics based on different levels of religiosity. Non-practicing Students have a better assessment on the dimensions of Machiavellianism and signaficant differences both statistically and empereically were found. For Moral Objectivisam significant differences were found but however incosistence was also found with hypothesis, that is non-practicing student have better attributions to Moral Objectivism more than practicing.While students with non-practicing level of religiosity have also a better assessment on the dimensions of social Darwinism emperically but did not show any differences statistically.
3. There were no differences in attitudes towards business ethics based on different levels of gender. Male and female students have the same assessment on the dimensions of Machiavellianism, Social Darwinism, and Moral Objectivism.
4. There were no differences in attitudes towards business ethics among Indonesian students and Lesotho with different levels of religiosity. Indonesian students with different levels of religiosity have attitudes towards business ethics are the same as the Lesotho students with different levels of religiosity.
5. There were no differences in attitudes towards business ethics among Indonesian students and Lesotho with a different gender. Both Indonesian and Lesotho students with different gender have common attitudes towards business ethics.
6. There were no differences in attitudes towards business ethics among students with the level of religiosity and a different gender. Student attitudes towards business ethics were relatively similar at levels of religiosity and a different gender.
7. There were no differences in attitudes towards business ethics among students of these countries, the level of religiosity and different gender. Attitudes towards business ethics of students is relatively equal among students from both Indonesia and Lesotho with the level of religiosity and different gender.

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LAW-SOCIAL JUSTICE: 2

LEGAL PROTECTION TO INDIGENOUS PEOPLE IN THE LAW ON VILLAGE

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ABSTRACT

The objective of research was to explain law protection to indigenous people in Act of Village. The research method employed was a normative law research because Act of Village becomes its focus of study. The research material used was secondary data, the one obtained from the result of literary study related to research material. Secondary data consisted of primary and secondary law materials. The instrument of collecting data used was literature review. The analysis of data and law material was conducted qualitative using hermeneutic interpretation method. The result of research showed that the existence of Indigenous People was a social realitythat had longer existed than Indonesia Country had. Such the reality had gotten law protection from government. In Human Right perspective, the recognition on traditional rights of Indigenous People should be interpreted referring to Human Right law by imposing state obligation to respect, to protect, and to meet the Human Rights of indigenous people. From juridical perspective, indigenous people had gotten law protection governed in Act of Village.

Keywords: indigenous people, human rights, law protection.

A. INTRODUCTION

The concept of Indigenous People stems to the concept of constitutional people. The term "constitutional people" (society)is a transliteration from Dutch term *rechtsgemeenshappen*, called indigenous people in legal study library (Taqwaddin, 2010). The concept of indigenous people was introduced for the first time by Cornelius van Vollenhoven. The feature of

indigenous people is when people observe any ethnics in Indonesian nation, it can be seen a so broad bottom part, a society consisting of interconnected bands; related to nature invisibly, to outside worldand to material nature, so that they behave in such a way that to give a clear description, the band can be called *rechtsgemeenshappen* (Poesponoto, 1979).

Briefly, Ter Haar formulates it as anorganized permanent band with its own power and richness in the form of visible and invisible object. Indigenous people (*adatrechtsgemeenschap*) are anorganized permanent group of people with power and authority of managing distinctive wealth (richness) in the form of objects, either visibly or invisibly (Soemadiningrat, 2002).

Other customary law experts conceive indigenous people in Java, clan in South Sumtera, *nagari* in Minangkabau, *kuria* Tapanuli, and *wanua* in South Sulawesi. Hazairin (1981) defined it as a societal unit having equipments to stand alone, that is, having law unity, ruler unity and living environment unity based on the mutual right to land and water for all of its members.

Indigenous people leader affiliated in *Aliansi Masyarakat Adat Nusantara* (*AMAN* =Archipelago Indigenous People Alliance) formulates indigenous people as a group of individuals bond to its customary law order as the collective citizen of law alliance because of shared residence based on hereditary (Alting, 2010). In the form and structure of constitutional society constituting customary law alliance, its members are bond to territorial and genealogical factors.

Territorial indigenous people or constitutional alliance is an organized permanent, the members of which are bond to a certain residence area, either secularly as life place or spiritually as the ancient spirit adoring place. Meanwhile, an organized community unit the members of which are bond to same lineage from one ancestor, either indirectly or because of marriage or customary tie, is called genealogical law alliance (Hadikusuma, 2003).

The existence of customary law plurality as well as its assumers can be conceived from customary law environment and its *kukuban*,because indigenous people entitys are closely related to customary law environment. Without the presence of indigenous people entity, customary law cannot survive. Customary law is generally spoken rather than written, but it prevails effectively within its society, because it always accommodates the values to which the corresponding society adheres. The very simple and less detailed formulation will not reduce the society's respect and compliance with it (Sudjito, 2014).

An area with uniform feature and customary law characteristics overall is called *Rechtskring* by Van Vollenhoven, or law circle. Other addresses are customary law environment, customary law area, and customary law area (Soepomo, 2003). Customary law environments as well as law *kukubans* (*rechtsgouw*) or sub-customary law environment and division including 19 law *kukuban*, for example, in Aceh, Batak, Mentawai, Minahasa, Bali, Lombok, Java, and etc (Soekanto, 2010). Based on the construction, it can be observed the diverse customary law environments in Indonesia. It shows the plurality of customary law community (indigenous people) in each of customary law environments and each of *kukubans* (part/section) of customary law environment (Kusumohamidjojo, 2000).

The existence of customary law societyhas received protection *de jure* in legislation enacted in Indonesia. For that reason, specifically the research will discuss law protection for indigenous people in Act of Village.

B. METHOD

This study was a normative law research because it studied Act of Village as its focus. Normative law research puts a norm system according to principles, norms, legislation principle, court verdict, agreement and doctrine as its research object (Ali, 2010). Research material employed secondary data, the one deriving from the result of literature review related to the material of research (Dewata, 2010). Secondary data is the preexisting data. By the binding power, there are three law materials: (a) primary law material with binding power, namely, UUD 1945 (1945 Constitution) and Law No.6 of 2014 about Village; (b) secondary law material explaining primary law material including various books, articles, journals, paper, research report, related to research object; and (c) tertiary law material providing clue or explanation about primary and secondary law material like Dictionary.

The instrument of collecting data used in this research was literature review. Literature review was used to collect literatures relevant to research topic (Creswell, 2009). Analysis of data and law material was conducted qualitatively using interpretation method. Interpretations used were futuristic interpretation and hermeneutic interpretation by considering the synchronization of legal text and context vertically and horizontally to the relevant legislation (Hamidi, 2011). From the result of analysis, answer to the problem formulatedwill be found, and so will be the conclusion of research that can be the basis for formulating the recommendation of research so that this research can be beneficial as expected.

C. DISCUSSION

1. The existence of Indigenous people from Human Rights Perspective

Factually, Indigenous People have their own area, but still existing in a broader scope, Republic of Indonesia country. In this case, Indigenous People has autonomy to develop rules, habits, and systems, but in other bigger legal power environment surrounding it, the power coming from the state.

The recognition of Indigenous People existence and their traditional rights governed in Articles 18B clause (2); 281 clause (3) and 32 clause (1) of 1945 Constitution. Article 18B clause (2) governed that the state recognizes and respects indigenous people entity as well as their traditional rights as long as they are still alive and consistent with the society development and the principle of Republic of Indonesia Country, governed in law. Article 281 clause (3) reads: "*Identitas budaya dan hak masyarakat tradisional dihormati selaras dengan perkembangan zaman dan peradaban* (Cultural identity and right of traditional community is respected in line with time and civilization development)". Constitutional approach to Article 281 clause (3) of 1945 Constitution is Human Rights (HR) approach. It can be seen clearly

in the procedure of 1945 Constitution putting Article 281 clause (3) of 1945 Constitution in Chapter XA about Human Rights along with other human rights.

Article 32 clause (1) reads, "*Negara memajukan kebudayaan nasional Indonesia ditengah peradaban dunia dengan menjamin kebebasan masyarakat dalam memelihara dan mengembangkan nilai-nilai budayanya* (*State promotes Indonesian national culture amid world civilization by ensuring the society freedom in maintaining and developing cultural values)*". Meanwhile Article 32 clause (2) reads, "*Negara menghormati dan memelihara bahasa daerah sebagai kekayaan budaya nasional* (State respects and maintains local language as national cultural wealth)". This stipulationbecomes constitutional foundation in viewing society from cultural dimensions. The right governed in this stipulation is the one to develop cultural values and local language with cultural approach. The construction of Articles 32 clause (1) and clause (2) of 1945 Constitution is not as complex as that of Article 18B clause (2) and Article 281 clause (3) of 1945 Constitution because it is not followed with constitutional preconditions.

It is noteworthy that Article 18B clause (2) lies in Local Government Chapter, while Article 281 clause (3) lies in Human Right Chapter. The two articles of 1945 Constitution in fact still use the concept of "conditional recognition and respect". In addition, the two articles govern "traditional rights" and "traditional community's right".

From legal theory perspective, recognition is related to meta-norms. H.L.A Hart mentions three types of meta-norms: recognition, change, and authority norms. Particularly, recognition norm is the one determining which behavior norm contains certain constitutional community that should be complied with (Sidharta, 1999).

The recognition can be studied from Human Right theoretical perspective. The relationship between government and citizen in Human Right framework generates human rights within citizen on the one hand, and state obligation on other hand. Human Right theory identifies 2 (two) forms of basic state obligation based on Economic, Social, and Cultural Right Covenant: (1) obligation of conduct and (2) obligation of result (Atmaja, 2012).

Obligation of conduct includes: (1) obligation to recognize, (2) obligation to promote, (3) obligation to respect; (4) obligation to protect and obligation to fulfill. Particularly, obligation to recognize means the one to recognize economic, social, and cultural rights as human rights (Zen, 2007). In relation to indigenous people entity, the obligation to recognize means the one to recognize the rights of indigenous people entity as human rights.

Human rights theory also identifies violation approach. Maatstricht guide defines the basic characteristics of Social, Economic and Cultural right infringement in relation to three types of obligations: obligation to respect, obligation to protect, and obligation to fulfill. Maastricht guide mentions that the failure of undertaking one or all of those obligations is the infringement against these rights. Maastricht guide also elaborates as follows:

1) Obligation to respect. State should respect Human Right without intervening with. This obligation requires the state not to take action leading to the limited access to the corresponding right.

2) Obligation to protect. This obligation requires state to ensure that there is no infringement against corresponding rights by third party and to give sanction to the offender. This obligation includes the presence of legislation ensuring such the rights.
3) Obligation to fulfill. It requires the state to take legislative, administrative, fiscal, judicial actions, and other adequate action in order to meet all of those rights completely (Chapman, 2003).

Constitutionally, the state's obligation over human right is governed in Article 281 clause (4) of 1945 Constitution (UUD NRI 1945) stated that protecting, promoting, enforcing and fulfilling human rights are the state's responsibility, particularly the government's". The word "protecting" does not actually exist in Article 18B clause (2) of 1945 Constitution. Previously, the word "protecting" includes in draft amendment to Article 18 of 1945. Then it is removed as it is conceived that word "protecting" has been included in "recognizing". This debate occurred in the 51st meeting of PAH I BP-MPR on Jun 29, 2000, with the agenda of fraction's end perspective on the finalization result of second amendment to 1945 Constitution.

Finally, from Human Right perspective, the recognition of Indigenous people's traditional rights in Articles 18B clause (2) and 281 clause (3) of 1945 Constitution should be interpreted referring to the provision of Human Right law by imposing the state with the obligations to respect, to protect, and to fulfill the human rights of Indigenous people entitys. The obligation to respects requires the state to not actually infringing the rights of indigenous people, among others by means of, enacting the laws ensuring the rights (human rights) of indigenous people.

2. Law Protection to Indigenous People in Act of Village

The Republic of Indonesia state government has been established to protect every Indonesian nation and bloodshed, to promote public welfare, to intellectualize nation life, and to implement the world orderliness based on independence, eternal peace, and social justice. Law No.6 of 2014 about Village was developed with the spirit of applying Constitution's mandate, namely the regulation of indigenous people corresponding to Article 18B clause (2) of 1945 Constitution.

The indigenous people entity is established based on there basic principles: genealogical, territorial, and combination of them (genealogical-territorial). Meanwhile, Law No.6 of 2014 mentions that indigenous people entity is the genealogical-territorial combination. The implementation of such the indigenous people entity has been existing and living in Republic of Indonesia Country's area such as *huta/nagori* in North Sumatera, *gampong* in Aceh, *nagari* in Pakraman/customary village in Bali, *lembang* in Toraja, *banua* and *wanua* in Kalimantan, and *negeri* in Maluku. One example of indigenous people entity plurality existing in customary law environment and its divisions (*kukubans*) can be observed in the indigenous people entity existing in Bali area. Pakraman as an indigenous people entity in Bali, in Van Vollenhoven's perspective, is one out of 19 (nineteen) *kukuban hukum* (jurisdiction) or *legal circle* (*rechtskring*) (Soepomo, 2003).

In Article 1 Number 1 of Act of Village, village is defined as village and *customary village* or called in other name, furthermore village is a constitutional community units with territorial borders authorized to govern and to manage governmental affairs, local community interest based on community initiative, origin right, and/or traditional right recognized and respected in NKRI (Republic of Indonesia Country) government system. It means that terminologically village is divided into two: village and customary village.

In the explanation of Law No.6 of 2014, it is described that village and other synonym has been existing since the Republic of Indonesia Country had not been established. It can be seen from the explanation of Article 18 of Republic of Indonesia's 1945 Constitution (before amendment) mentioning that "Territorially, in Indonesia Country there are more than 250 "*Zelfbesturende landschappen*" and "*Volksgemeenschappen*", like that in Java and Bali, Nagari in Minangkabau, hamlet and clan in Palembang, and etc. Those areashad Original structure and for that reason, they can be considered as special area. Republic of Indonesia Country respects the position of special areas and any state regulation concerning willrecollect the origin rights of area". Therefore, its existence should be compulsorily recognized and ensured for its survival in Republic of Indonesia Country.

Diverse characteristics and types of Village, or its synonym, do not inhibit the founding fathers of this country to choose unity state as its form. Although it is realized that in a unity country, there should be homogeneity, but Republic of Indonesia Country keeps recognizing and ensuring the existence of constitutional community unity and indigenous people entity as well as their traditional rights.

In relation to structure and organization of Local Government, after the amendment of Republic of Indonesia's 1945 Constitutional, the regulation of Village or its synonym, from its government aspect, refers to the provision of Article 18 clause (7) confirming that "Structure and Organization of Local Government is governed in law". It means that Article 18 clause (7) of 1945 Constitution allows the presence of governmental structure in Indonesian government system.

With the construction combining self-governing community and local self-government function, it is expected that the indigenous people entity is so far a part of Village area, arranged in such a way that it becomes Village or Customary Village. Village and Customary Village basically undertakes similar duty. Meanwhile, the difference lies only in the implementation of origin right, particularly pertaining to social preservation of Customary Village, customary village regulation and management, customary peace meeting, composure and orderliness maintenance for indigenous people, and the government governance based on original structure.

Customary village has government, Village financial, and Village Development functions, and gets facilitation and building from Regency/Municipal government. In such position, Village and Customary Village get same treatment from Government and Local Government. For that reason, in the future, Village and Customary Village in the future can change the Village face and effective government governance, efficient development implementation, and

community building and empowerment in its area. In similar status, Village and Customary Village are governed distinctively in this Law.

The organization of Village or its synonym has characteristic prevailing commonly in entire Indonesian area, while Customary Village or its synonym has different characteristics from common Village, particularly because the strong customary influence on local government system, local resource management, and social-cultural life of Villagers.

Customary Village is in principle an inherited local community governance organization maintained hereditarily that is still recognized and struggled for by Customary Village leader and community in order to function to develop local welfare and social-cultural identity. Customary Village has more dominant origin right that Village does since Customary Village was born as original community within society. Customary Village is an indigenous people entity historically has territorial border and cultural identity composed of territorial basis authorized to govern and to organize the Customary Village's community interest.

Act of Village has governed village corresponding to 1945 Constitution by putting Village to be located in Regency/Municipal, recognized and respected in Republic of Indonesiastate government system. The objectives of Act of Village enactment are, among others: (1) to give recognition and respect to Village that has been existing with its diversity before and after the establishment of Republic of Indonesia country (NKRI); (2) to preserve and to promote custom, tradition, and Villager culture; and (3) to reinforce the Villager as the subject of development.

Article 96 of Act of Village mandates Government, Provincial Local Government and Regency/Municipal Government to organize the indigenous people entity and to establish it as Customary Village. The establishment of Customary Village can be conducted when the following preconditionsare met: (a) indigenous people entity and its traditional rights is really still alive, whether territorially, genealogically, or functionally; (b) indigenous people entity as well as its traditional right is considered as consistent with society development; and (c) indigenous people entity as well as its traditional right is consistent with the principle of Republic of Indonesia country (NKRI).

Indigenous people entity as well as its traditional rights still alive should have area and at least meet one of or the combination of following elements: (a) the community, the members of which shared the same feeling within group; (b) customary government regulation; (c) customary property and/or object; and/or (d) customary law norm set. Customary law norm in Bali, in Pakraman Village, is called *awig-awig* (Windia, 2013).

Indigenous people entity as well as its traditional right is considered as consistent with society development when: (a) its existence has been recognized based on the enacted law, either general or sectoral one; and (b) the substance of traditional right is recognized and respected by corresponding indigenous people entity and broader society and not in contradiction with human rights.

Indigenous people entity as well as its traditional right is consistent with the principle of Republic of Indonesia country (NKRI) when it does not harm the existence of NKRI

as a political and legal entity not harming the sovereignty and integrity of NKRI; and the substance of its customary law norm is consistent and not in contradiction with the provision of legislation.

The establishment of customary village is carried out with Local Regulation of Regency/ Municipal. The establishment of Customary Village after the establishment of Customary Village was conducted by considering the Village Government organization factor, the implementation of Village Development, Village societybuilding, and Village society empowerment and supporting infrastructure.

The authority of Customary Village based on origin right includes: (a) government regulation and organization based on original structure; (b) *ulayat* or customary territory regulation and management; (c) preservation of Customary Village's social-cultural value; (d) customary dispute settlement based on the customary law enacted in Customary Village in the area corresponding to the principles of human rights emphasizing on the settlement through discussion; (e) the organization of Customary Village justice peace meeting (trial) corresponding to the provision of legislation; (f) composure and orderliness maintenancefor Customary Village community based on customary law enacted in Customary Village; and (g) customary law life development corresponding to social-cultural condition of Customary Village.

The implementation of authority based on the origin right and local-scale authority of Customary Villageis organized and managed by Customary Village by considering diversity principle. In addition, customary village is assigned authority by Government and Local Government. The assignment from Government and/or Local Government to Customary Village includes the organization of Customary Village, the implementation of Customary Village development, Customary Village societal building, and Customary Village community empowerment as well as funding.

The regulation and organization of Customary Village Government is carried out corresponding to origin right and customary law prevailing in Customary Village that is still alive and consistent with the development of community and not in contradiction with the principle of Customary Village Government organization in the principle of Republic of Indonesia Country. Customary Village Government undertakes Customary Village discussion and conference function corresponding to the original structure of Customary Village or established as a new one on the initiative of indigenous people.

Particularly, institutional structure, position filling, and position tenure of Customary Village Head based on customary law are determined in Provincial local regulation. Basically, Customary Village Regulation is adjusted with customary law and norm prevailing in Customary Village as long as it is not in contradiction with the provision of legislation.

D. Conclusion

In conclusion, the existence of Indigenous People was a social reality that had longer existed than Indonesia Country had. Such the reality had gotten law protection from the state through various existing policies. In Human Right perspective, the recognition on traditional rights of Indigenous People should be interpreted referring to Human Right law by imposing state obligation to respect, to protect, and to meet the Human Rights of indigenous people. From juridical perspective, indigenous people had gotten law protection governed in Act of Village. As a recommendation, the state in this case government should play an active role in evaluating a variety of policies to realize the protection to the existence and to fulfill the human rights of indigenous people.

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"LEGAL ASSISTANCE TO THE WITNESS BY THE ADVOCATE IN THE LEGAL PROCESS"

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ABSTRACT

In Indonesia, legal assistance recently is only focused on legal aid to accused or defendant, and not to witness. How does the legal assistance of witness at police examination and court proceeding? This paper aims to criticize the Indonesian policy on legal assistance to witness and proposes that witness should also be given the right to obtain legal assistance. The research was conducted on the policy of criminal justice system in Indonesia, especially on legal assistance of witness in police examination and court proceedings. The result associated with the theory of human rights, is designed to be the basis to propose of granting the right of witness to obtain legal assistance in police examination as well as in court proceedings. Legal policy to give legal assistance to the witness will protect her/him optimally against acts of abuse, pressure, and threats. The study concluded that the Indonesian criminal justice system has not provided optimal protection to the witness againts act of abuse, pressure, and threats. Such protection can be provided in the form of legal advice and legal assistance to the witness. The theory of human rights as implied in Article 3 of Law No. 39 of 1999 stipulates that "Everyone has the right to recognition, security, protection, and fair process of law and to have legal certainty and equal ity before the law". Based on that equal right principle, including in the legal process, it was concluded that lawyers can play a role providing advice and legal assistance to witness in the police investigation process as well as in court proceedings. With that legal assistance witness then can be protected optimally.

Keywords: legal assistance, legal advice, witness, lawyer.

THE DIFFERENCE BETWEEN KOREAN LAW AND INDONESIAN LAW: Study of Inheritance Law

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ABSTRACT

Korean law and Indonesian law are very different, including their family law, specifically inheritance law. Nowadays there are a lot of marriages between two people who were subjected to the different law because of their different nationality. It is interesting to be studied since those inter-nation marriage tend to be a conflict of law related to their different family law, including marriage and inheritance law. This study are subjected comparatively to the inherintance law of Korea and Indonesia. Based on the documentary research, it is found that Korea historically uses civil law system for their family law, while Indonesia uses mix yurisdiction, both civil law, Islamic law, and Adat Law. Korea uses inheritance civil law system as it is provided in the Korean Code of Civil law. While Indonesia uses mix yuridiction, both inheritance civil law, Islamic law, and Adat law. Korea inheritance law is enacted equally to all Korean citizens. In Indonesia, inheritance civil laws is applied to Indonesian citizens of Chinese and European descent; Islamic law is applied to Indonesian musleem citizens who choose Islamic law than customary , customary inheritance laws applied to indigenous peoples.

Keywords: Korea, Indonesia, inheritance law

Chapter 1

Korean civil law was born in 2nd February 1958, and it starts to operate two years later in 1st January 1960, until these days the Korean civil law has been developed over twenty six times (26 times) and still improving for the needs of people in Korea. The inheritance law was born in 13th January 1990 and it is regulated on chapter five (5). In this paper it will be focus on inheritance law, because it seems interesting to compare the Korean law and Indonesian law on inheritance. The chapter five of Korean inheritance law starts article 997, it will start when inheritance is initiated due to death. In article 1000 it regulated follows by;

1. Lineal descendant of ancestor
2. The existence of a direct ancestor
3. Ancestor of brothers and sisters
4. The collateral blood relatives within four villages of ancestor

Such as like the following it only written about the family, it is not written about wife and husband. However in article 1003 it says that;

1. If the heir is the spouse of ancestor under Article 1000, Paragraph 1, Item 1 and No. 2 of the Rules has become a co- heir to his heirs and their heirs do not have equal standing when is the sole heir.
2. Spouse died or been disqualified before the start of the inheritance if the article1001 is the heir and co-heir with equal standing under the provisions of that tune when there is no heir is the sole heir.

There are also some exceptions to it, and it is regulated in article 1004; next person who falls under any of the heirs do not.

1. A party who tries to deliberately kill or be killed in the senior ranks of the East or the lineal ascendants, ancestor, their spouses or inheritance
2. Now knowingly leads to immediate survival, and death was added to injury ancestor and his spouse
3. Impeding the withdrawal of wills or wills on fraud or compulsion to inherit the ancestor party
4. The person who makes a will about fraud or compulsion inherited ancestor
5. Testamentary forged on inheritance ancestor, modulation, destruction or concealment one party

It also regulated in article 1009;

1. If the heir of the same rank number share of inheritance that is to the equator.
2. Share of inheritance spouse of a lineal descendant inherits the ancestor's when the joint when adding fifty (50) percent the share of inheritance of a lineal descendant, and inherited lineal ascendants and co- adds fifty (50) percent share of inheritance of immediate survival.

It seems not that interesting about Korean law after reading the top but it makes different here on article 1008 about contribution part;

1. considerable period of cohabitation during the co-heirs, specifically provide for nursing ancestor in other ways , or that person 's contribution prescribed by agreement of co-heirs in the property value of the ancestor of the inheritance initiated at the time when there who have contributed specifically to the maintenance or increase of the assets of ancestor by adding a contribution to a report that a deduction in calculating inheritance pursuant to Article 1009 and Article 1010 share of inheritance solution as its party share of inheritance (It revises 31st March 2005).

2. In paragraph 1 or no consultation does not take into account the circumstances of the case no other solution can consult the Family Court at the request of the timing of contributions by contributors in paragraph 1 , and how much inheritance and determined the contribution.
3. Contribution shall not exceed the amount deducted from the value of the bequest ancestor of the value of the property when the inheritance disclosed.
4. Claims by paragraph 2 may be the case referred to in Article 1014 or if claims by the provisions of Article 1013 (2).

So by looking at this law it is a little awkward because as family need to count for the cohabitation and nursing, for writer do not understand about this article because for example when a husband and a wife get second marriage and live for a month but suddenly the husband past away, then because of the law the wife would not able to gain much of inheritance even though by the law it is stated a family. So it seems this law does not protected for the couples that getting the second marriage. On the other hand it could protect the wealth from the people whom just getting marry for the property. There are lots of actual cases that happen in Korea that aiming for the property in different ways. Such as in 2013 there were two women that try to get together with an old man whom sixty eight years old (68 years old) because of money and the two women knew that the old man was in loneliness.

On the other part Korea uses the testament that regulated in article 1012: ancestor may be able to determine the method of dividing an inheritance or testament to entrust a third party to set them, and to prohibit the splitting of the period not exceeding five (5) years from the date of commencement of inheritance. Also there could be able to give up the inheritance; Heirs can make a simple approval or limited approval or abandoned within three months (3 month) from the date that the start should inherit. However, that period is the Family Court of inspection by interested parties or claims to extend it. Also the Heirs are able to check inherit before he or she makes the give up announcement.

Lastly the testament is regulated in 1060;the testament would have no effect unless it follows the way of court. Next article it is clear about who could able to make the testament; In the case of paragraph 1 shall be doctors Bookkeeping and signed by the testament in the state of physical and mental recovery. The testament could be made up by five kinds that are handwritten certificate, record, process, deeds, secret deeds and deeds count. The testament occurs in effect from the time of the testator's death and the effect of wills arises from the time they have fulfilled those conditions when those conditions when there is a testament to the stop condition is fulfilled after the death. The testator may at any time withdraw all or part of the testament as an act of will or a lifetime, and the testator does not give the right to revoke the will.

Chapter 2

In Indonesia it also regulated in Kitab undang-undang hukum perdata also known as KUHPerdata (it is also known as the BurgerlijkWetboek). Inside the book, it starts from the article 830 about inheritance, and it stated "Inheritance only happened because of the death." And in the article 832 stated that According to the law, the heirs are entitled to be run in families, both authorized by law and outside of marriage, and the husband or wife who lived the longest, according to the following rules. When run in families and spouses who live longest nothing, then all treasures belong to the state, which is required to settle the debts of the deceased, as far as the price of legacy insufficient for it. The law also regulated that Children or descendants, though born and various marriages, inherited the legacy of their parents, their grandparents, or families of their blood the next in a straight line to the top, regardless of sex or birth first. They inherit equal parts magnitude of the head for the sake of the head, when the deceased family they are all related in the first degree and each entitled for himself; they inherited the stake for the sake of the stake, if they're all over much inherited as a substitute (in article 852). However when If the deceased left no descendants, husband or wife, brother or women, the wealth legacy should be divided into two equal, one part of the family of flesh in a straight line dad up, and a part of another family straight line mother to above, without prejudice to the provisions of Article 859. The family is the closest degree in a straight lineup; get half of the section reserved for the line, with the exclusion of all other heirs Hali (article 853).

Not only that it also state about people who are considered inappropriate to be heirs, and thus unlikely to get an inheritance, are:

1. He who has been convicted of killing or attempting to kill the deceased;
2. He is the ruling Judge had been blamed for the calumny has filed charges against the heir, that heir never committed a crime punishable by five years' imprisonment or more severe punishment again;
3. He had prevented people who had died violently or real acts to create or retract his will;
4. He had embezzled. Destroy or falsify the will of the deceased, it stated in article 838.

Next article it regulated all about the inheritance what it included or not; the heirs, by itself because of the law, have the ownership on all items, all the rights and all the accounts of the deceased. If there is a dispute about who should be the heir, and thus entitled to property rights as described above, then the judge may order that all the treasures was placed first in the Court of storage. Countries should strive to keep it placed in position ruling by the judge, and is obligated to instruct sealing treasures it, and ordered the manufacture of granularity treasure, in the form prescribed for acceptance of inheritance with privileges will process property, with a threat to reimburse the costs, losses and interest (article 833).

The law of testament is regulated from article 874 through 912. A will or testament is a person's deed contains statements about what he wanted to happen after he died, which can

be revoked by him (article 875). Provisions with the wills of the property may also be made public, also with a general's title, and also with special rights pedestal. Each assessment is thus, whether made by the removal of the name of the heirs, as well as those with the name of the grant will, or which by any other name, has the power according to the rules set out in this chapter (article 876).Notary must write or have written the will of the testator in clear words according to what was spoken by the heir to him. If delivery problems conducted without the presence of witnesses, and the manuscript was prepared by notary, then the heir should raise again its will as it is in the presence of witnesses, before the manuscript was read before the testator. After that will be recited by the Notary in the presence of witnesses, and after reading it, by Notary should be asked to read the heir whether it has to load his will. If the testator's will expressed in the presence of witnesses and poured directly into the post, then the readings and questions such as the above should be carried out also in the presence of witnesses. Furthermore, the certificate must be signed by the testator, notary and witnesses. If the testator states cannot be signed, or when he stymied in that it also causes obstruction to the statement and should be included in the deed of the will. Having met all the formalities it, it must be explicitly included in the will (article 939), also it should be the heir was about to make a will is closed or secret, he must sign-setting commencement, either if he himself wrote it or if he sent someone else wrote them; paper load-setting commencement, or the paper used for the cover, when the cover is used, it must be closed and sealed. Delivered testator should also be covered and sealed to the Notary, in the presence of four witnesses, or he had to explain that in the paper listed his will, and that the will was written and signed, or written by someone else and signed by him. Notary must be a deed explanation of it, written on paper or cover, this deed must be signed either by the testator or by a notary and witnesses, and if the testator cannot sign the deed that explanation because of obstacles that arise after the signing of the will, it must be mentioned because of forces. All these formalities should be fulfilled, without switching to another deed. Probate closed or secret that should be kept in the original papers that exist on the notary who had received (article 940). On the contrary, if the words in the letter might be interpreted differently depending on a variety of opinions, it is better to first investigate what it might mean the testator, rather than adhering rather than the literal meaning of the words is contrary to that purpose (article 886). So it could protect from any fraud and force of written testament. It also able to make or revoke a will, people must have the ability to reason (article 895), so when he or she makes the testament it could be made by the will. There are certain types of testament and they are; the will only be made with a secret or handwritten deed itself, the public deed or by deed or deed secret closed. And then, the Heir may demand the return will be secret at any time for accountability origin Notary him get, so that it can be proved with the return of an authentic deed. With the return, the secret will be deemed to be revoked.At the time of the testator's death, both the heirs appointed by will, and those who by law are given most of treasures that, by law, obtain possession of the property of the deceased. Article 834 and 835 apply to them

Chapter 3

In Indonesia there is religious law about Islam, andthe inheritance law also regulated in Islam law. Article 171 stated; what is meant by:

a. Inheritance law is the law governing the transfer of ownership rights to inheritance (tirkah) heir, determine anyone deserves to be the heirs and how many parts each.
b. Heir is a person who at the time of death or declared dead by the decision of the Court of Muslims, leaving heirs and treasures.
c. Heir is a person who at the time of death have blood ties or marriage relationship to the deceased, a Muslim and not blocked because the law to be an heir.
d. Inheritance is a treasure left by the testator either in the form of objects that belonged to him and his rights.
e. The estate is an innate property plus part of the joint property after being used for the purposes of the testator during illness until death, corpse handling charges (tajhiz), debt service, and giving to relatives.
f. Probate is the provision of an object from the heir to another person or institution that will take effect after the testator dies.
g. Grant is giving an object voluntarily and without compensation from one person to another surviving person to have.
h. Foster child is a child in the maintenance of everyday life, educational expenses and so shift of responsibility from the parents of origin to the adoptive parents based on the decision of the Court.
i. Baitul Mal is a Religious Treasure Hall.

The next article stated; Muslim heirs seen if known of ID or recognition or practice or witness, while for newborns or children who are minors, according to the religion of his father or the environment. And it also stated which groups could get the inheritance;

1. Groups of heirs consisting of:
   a. According to the blood ties: - male group consists of: father, son, brother, uncle and grandfather. - Group of women consisting of: mother, daughter, sister of the grandmother.
   b. According to the marital relationship consisted of: widowed.
2. If all the heirs exist, then who is entitled to inherit only: children, father, mother, a widow or widower.

Chapter 4

It is interesting that Indonesia and Korea have some similarities but it is also very different. In Indonesia itself the national law and the religious law are different, but the Islamic law is looks similar to old Korean law before South Korea was born and during the Choson dynasty, however after South Korea change into presidential it is getting similar to Kitab undang-undang hukum perdata (KUHPerdata). In this writing the Korean law seems very

difficult because there are lots of articles that regulated about the law of inheritance however in article1060 regulated that if the person writes the will the judge would regulated as the will written that is valid. On the other hand Indonesian law seem simple but in reality it makes a bit annoying.

Closing

By reading this paper it could seems that there are some similarities among the law in Korea and Indonesia, but also the difference. Inheritance law in both countries are important and useful to the next generation.

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LAW: 3

THE EFFECTIVENESS OF CRIMINAL SANCTION OF ACT NO.16 OF 1997 ON STATISTICS

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ABSTRACT

One of the successful factor of state development is due to qualified, accurate, and accountable statistical information. In the 21st century, supplying of the statistics information in economy, social, political, cultural, and resource based is more needed, because it is used as a base plan in establishing objective of national development policy.

The legal base of national statistics implementation is the Statistics Act 1997, which regulate of official Statistics (BPS) as an independent state institution. One of important task of BPS is to conduct statistical development, which aims improve law awareness and public contribution on the importance and usefulness of the statistics.

The Act of Statistics regulate about criminal sanction concerned to the respondents in order to be obedient in meeting its duty in providing information, to guarantee the implementation of statistics by BPS that obtain accurate and qualified result. However, the fact in the field, the respondents who were not willing to provide information, were not followed up with the punishment.

The efforts to improve law awareness to the public is importance and the usefulness of statistics persuasively was more importance rather than relied on the repressive efforts in form of criminal sanction. Should the law awareness of public was established formerly, then the law sanction was emerged. When the public had understood and been aware toward the meaning and function of the statistics, automatically a public was aware on the duty and willing to contribute in the implementation of statistics activity.

The law could be said effective if there was positive law effect; in that time, the law achieved the target in guiding and converse the human behavior until being law behavior. The regulation of criminal sanction for the respondents in the Act of Statistics was less precise when the law awareness of the public on the meaning and function if statistics was lack.Therefore, the effort to make effective the development task of BPS was more important to grow the public care on the importance meaning and function of statistics that aims to the optimization of the basic statistics implementation.

Keyword: *effectivity, criminal sanction, Statistic.*


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THE RELEVANCE OF EXHAUST EMISSION REGULATION STANDARDS IN INDONESIA WITH THE CURRENT ENVIRONMENTAL CONDITIONS

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ABSTRACT

Air polution remains a significant environemental problem. Bad air quality makes the ozone layers thinner, contributing to climate change. As the country with the highest population among ASEAN countries, Indonesia has a high utilization of motor vehicles, the exhaust of which acts as a major pollutant. This paper will argue that the exhaust emission standard in Indonesia is obsolete given the increased number of motor vehicles used and the environmental conditions currently. The main aim of this research is to understand the relevance of exhaust emission regulation standards in Indonesia with the current environmental conditions and to update standards to address climate change. The methodological design used to approach the objectives and to verify the hypothesis is based on the analysis of quantitative and qualitative data. Based on the data, the regulation of exhaust emission standard in Indonesia still uses the old unenvironmentally-friendly standard that can contribute to high pollution levels. In these conditions, Indonesia is still not ready yet to face climate change. This paper suggests that Indonesia must review the regulation of exhaust emission standards and change into renewable energy standart or place greater control on the utilization of motor vehicle through various policies in order to make necessary improvements.

Key words : the regulation of exhaust emission standard, air pollution, environmental conditions

THE DEVELOPMENT OF A GOOD COOPERATIVE GOVERNANCE MODEL

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ABSTRACT

Cooperative was expected to develop society's economics potential and to create economics democracy in accordance with what had been entrusted in the Constitution of 1945. The shift of legal politics in Cooperative –the cancellation validation of the Laws No.17 of 2012 by Constitutional Court Verdict No.28/PUU-XI/2013- had made the Laws No.25 of 1992 back into effect, though temporary, and that arouse the necessity to construct a model of Cooperative governance which could articulate the norms of Pancasila (the five basic principles of Indonesian Republic) and the Constitution of 1945 into the Law of Cooperative. First of all, the model of Cooperative governance must be able to fulfill the juridical frame set as the regulation in Cooperative governance . This research was categorized into legal research with juridical normative approach, and oriented to construct a good model of Cooperative governance . The arrangement of Cooperative in the future (*iusconstituendum*) must pay attention to many crucial problems. Cooperative's existence could not be reduced merely as a legal entity (=corporate body), yet should be concentrated as a developing economic movement in the society. Cooperative could not undergo the process of dehumanization because being replaced with capital domination. Cooperative had been developed based on the principle of independency. Cooperative's independency concentration was measurable by the members' role as an organ support in Cooperative, either in the manager's or the supervisor's organ. Therefore, fulfilling juridical demand only was not enough to encourage Cooperative to be able to be an economic institution with parallel role like other economic pillars. As an economic institution, Cooperative must have had effective behavioral practice as the base of Cooperative governance that fitted out the juridical frame existed to aim the prosperity in society.

Keywords: good Cooperative governance , prosperity .

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Introduction

The verdict of Constitutional Court in the Case No. 28/PUU-XI/2013 affirmed that the Law No. 17 of 2012 was diametrically contradictory with the values in the Constitution 1945 and for temporary put the Law No. 25 of 1992 back into effect. The shift of legal politics had caused Cooperative lost its 'soul' as the society economic generator. Meanwhile, the empirical condition demanded some renewal so that Cooperative governance could keep up with the time development.

Cooperative was an economic organization with a unique characteristic compared to other economic organizations. The difference was laid on the ethical value system that became the base of its life and was spelled out in its principles which later on functioned as ethical norms that patterned the Cooperative operational system as an economic organization.[2] The main characteristic of Cooperative was the cooperation among members with the goal to reach life prosperity together. This very characteristic was then formulated as a *self-help* principle.

At the beginning, Cooperative was being more as a container (of economic activity) for weak economic class. Fray defined Cooperative as: a union with the approval of cooperative effort from the weak and always tried passionately with no egocentric mind so that everyone could run their obligations as members and got the reward comparable with their utilities towards the organization.[3] Together with the time development, Cooperative was formulated as an economic institution which willy-nilly had to cope with the development, especially in its effort to increase prosperity without the limitation from them who had weak economic position. Cooperative was a container to execute economic activities for all society classes with the center of ethical value attached. This ethical value, which was later on defined in the principle and base of Cooperative, became the distinguishable factor of Cooperative with other organizations.

Cooperative had an objective to gain economical profit and increase the members' prosperity, although it was not in the form of capital accumulation. In order to reach the goal, Cooperative must run the business continuously, openly, keeping good relation with the third party, and calculate the profit and loss, and also taking notes all of the business activities in a bookkeeping.[4] Based on this perspective, Cooperative genuinely had a general characteristic as a corporate just like other types of business.

The philosophical foundation of Cooperative was asserted in Pancasila (the five basic principles of Indonesian Republic) as a guiding star, and was derived in the constitutional foundation, i.e. The Constitution 1945. The stipulation of Cooperative was asserted in the Article 33 of the Constitution 1945 with the explanation that says: "*Economic matters are*

2 Asnawi Hasan, *Cooperative in Islamic Perspective, A Review from Ethical Philosophy Aspect, in Constructing National Economic System, Economical System, and Economic Democracy*, Sri Edi Swasono (ed), (Jakarta: UI Press, 1987). pg. 158

3 M. Firdaus and Agus Edhi Susanto, *Cooperative: History, Theory, and Practice*, (Jakarta: Ghalia Indonesia, 2002), pg. 38-39.

4 R.T. Sutantya Rahardja Hadhikusuma, *The Law of Cooperative in Indonesia*, PT. Raja Grafindo Persada, Jakarta, 2005, pg. 101.

arranged as a joint effort based on the familiarity principle". In the explanation of the Constitution 1945 Art.33 subsection (1), it was stated that 'Cooperative had a position as "a national economic pillar" and became an inseparable component in the national economic system. Whereas in the Art.33 subsection (4) of the Constitution 1945, it was stated that: '*National economic was executed based on economic democracy with the principle of togetherness, social justice efficiency, continuity, environmental conception, independence, and keeping the balance of national economic advance and integrity. Based on the spirit of Constitution 1945, it was reformed in Cooperative's operational foundation through the laws beneath*'. The operational foundation of Cooperative was the Law No. 25 of 1992.[5] Based on Art.1 subsection (1) of the Law No. 25 of 1992, there was a statement as follows: "*Cooperative is a corporation composed of individuals or Cooperative corporate body which bases its activities on Cooperative's principles and also as a social economic movement based on familiarity principle.*" Referring to the definition of Cooperative, it showed that Cooperative in Indonesia was not merely viewed as a form of corporate with unique principles, but also as a tool to develop society economic potential and create an economic democracy in accordance with what the Constitution 1945 had entrusted.

The legal shift from the Law No. 25 of 1992 into the Law No. 17 of 2012 and the verdict from the Constitutional Court that abolished the Law No. 17 of 2012 with its injunction that stated to return the Cooperative's operational foundation onto the Law No. 25 of 1992 for temporary, had incurred a problem of the necessity of Cooperative governance that must have been accommodated in the Cooperative operational foundation as ius constituendum.

Stepping from the conclusion before, we then could formulate the problems present as follows: How would the Cooperative governance model refer to the legal politic shift from the Law No. 25 of 1992 to the Law No. 17 of 2012 and later on the Constitutional Court abolished the Law No. 17 of 2012?

The purpose of this research was to create a model of good Cooperative governance based on the synthesis from the Law No. 25 of 1992, the Law No. 17 of 2012 and the Constitutional Court verdict plus its ius constituendum as the aspirated law (read: norm).

Research Methods

This research was a legal research with the juridical normative approach to analyze what had been written within the law in books or the law conceptualized as a norm which became the standards of 'properly considered' human behavior, therefore the data source would

5 Actually the legal foundation of Cooperative had always been renewed by changing to adapt with the time development. The Law No. 25 of 1992 had been altered into the Law No. 17 of 2012, however since the Law No. 17 of 2012 was viewed to have some principle weaknesses, then it was abolished through the judicial review by Constitutional Court in the verdict No. 65/PUU-XI/2013, and the verdict No. 28/PUU-XI/2013. In the verdict's injunction, it basically formulated:
Law No. 17 of 2012 about Cooperative was contradictory to the Constitution 1945.
Law No. 17 of 2012 about Cooperative had no binding legal capacity.
Law No. 25 of 1992 about Cooperative was temporarily valid until the new law formed.

merely secondary data.[6] The approach used in the research was the legislation approach or the laws diversity by examining the Law No. 25 of 1992 with the Law No. 17 of 2012.[7] The approach was then continued with conceptual approach about constructing the concept on the good Cooperative governance, and philosophical approach to refer to the justice aspects in society economy that was based on the justice value, profit value, and certainty value ideas which were included in the good Cooperative governance. This research was conducted in 2015.

Result

In order to make Cooperative bloom and developed, keeping up with the time movement, the Government made some improvement on the operational foundation of Cooperative by altering the Law No. 25 of 1992 and putting the Law No. 17 of 2012 into effect. The renewal of the law was expected to be the Cooperative's law that could be the frame of the norms to create a strong and independent Cooperative, based its activities on the Cooperative values and principles and would also adapt with the development of national and global economic arrangement in the stream of economic globalization and liberalization. The Law No. 17 of 2012 about Cooperative regulated the Cooperative's values and principles, licensing corporate body status, capitalization, leadership/governance , the credit union activity in Cooperative, and the role of government. However, later on with the time progress, the presence of Law No. 17 of 2012 just triggered a new problem because many parties viewed that the law did not reflect the values included in the Article 33 of the Constitution 1945. As an operational foundation, Law No. 17 of 2012 had deviated from the soul, value and spirit of Cooperative implied in its ideal and constitutional foundations, i.e. Pancasila and the Constitution 1945. That, then, became the rationale to charge the presence of Law No. 17 of 2012 through *judicial review* in the Constitutional Court to annul it. Several crucial problems in the Law No. 17 of 2012 which had been the points to execute *judicial review* in the Constitutional Court were, among others, the shift of Cooperative definition that was first emphasized as corporation then changed into *legal entity*, the arrangement of capitalization aspect that opened the outsiders' capital to enter Cooperative had created the potential to scrap the independence of Cooperative, the alteration of Cooperative's purposes, the shift of tasks and functions of Cooperative's supervisor, and the condition and authority of the Board of Cooperative.[8]

In the Law No. 17 of 2012, it affirmed the status of Cooperative as a *legal entity*. The affirmation of Cooperative status as a legal entity was expected to clarify Cooperative presence as an economic organization. Cooperative had to be perceived as an economic system with independent characteristic, just like other economic systems. The legal politics

6 Amirudin, H. Zainal Askin, Introduction of Legal Research Method, Jakarta: PT. Rajawali Persada, 2008, pg. 118.

7 Peter Mahmud Marzuki, Research of Law, Kencana Prenada Media Group, Jakarta, 8th edition, 2013, pg. 133.

8 See the further research result of Robert Ndoen's, The Shift of Cooperative Legal Politics from Law No. 25 of 1992 to Law No. 17 of 2012, Thesis Program of Magister of Law, Faculty of Law, SWCU, 2014.

shift of Cooperative definition in the Law No. 25 of 1992 into the Law No. 17 of 2012, i.e. Cooperative as a *corporation and corporate body* with person by person members, had changed into Cooperative as a *legal entity* founded by an individual, just being considered to threaten the role of Cooperative as a society economic movement because of the process and (establishment) procedure matters which was judged as too bureaucratic. The difference was shown from the diction used to describe Cooperative, i.e. corporation and legal entity that clearly had different meaning. Cooperative as a corporation was the real condition of Cooperative for it genuinely was a group of people with the purpose to enhance their prosperity or their economic life. Repressing Cooperative with the requirement to possess a status as a legal entity would have just created the potential to reduce Cooperative as a society economic movement. The formalization would truly impede the canalization of Cooperative development movement in every social stratum.

Independence had been one of the basic foundations of Cooperative. In the explanation on the Law No. 17 of 2012 about Cooperative, 'independence' meant to be able to stand alone, without depending on other parties, rested on the trust towards consideration, decision, ability and self-effort. Within the word independence, there were also some other definitions like responsible freedom, autonomy, self-supporting, courage to take risk of their own acts, and the will to have self-governance .[9] However, the attempt to place Cooperative as an independent economic organization had faced a potential of being scrapped because in the Law No 17 of 2012 Art.66 subsection 2 that stated that Cooperative capitalization could come from outsiders; and that could debilitate or even eradicate the element of membership capitalization self-supporting.[10] Capital investment from outsiders just created intervention from the investors by ignoring the model of economy democracy which had been Cooperative's principle and foundation.[11] Besides that, the main transformation on capitalization was essentially situated on the capital return to the Cooperative member. In the Law No. 25 of 1992 there was a statement about the capital return to the member when he/she went out of the membership, yet in the Law No. 17 of 2012, the capital would not be returned. By scrutinizing the context of that legal politics change, the authority then analyzed that it had been in contradictory with Cooperative foundations. The foundation meant here was the familiarity foundation as written in Article 33 subsection (1) of 1945 Constitution. In the explanation of Article 33 of 1945 Constitution, it was stated that Cooperative, based

9 The Sheet of State 2012 No. 212 (economy development, Citizen, Prosperity, Cooperative). (Interpretation on the Sheet of Indonesian Republic in 2012 No. 212).

10 Paskalis X. Hurint and Kosmas Lawa Bagho. 2013, Identity of Cooperative and Law No. 17/2012.

11 The difference of participation method in Cooperative governance basically obeyed to the principle of *one man one vote*. The voting right as the manifestation of participating into Cooperative governance did not submit to the principle of capital proportionality invested in Cooperative. Meanwhile, in other types of business besides Cooperative, the way of participating in the business governance submitted to the principle of capital proportionality, which meant the bigger the capital invested, the bigger the voting portion they had. The anxiety on the capitalization system alteration in Cooperative which was adopted by the Law No. 17 of 2012 was the domination of the investor that would result in an asymmetrical participation model.

on its historical side, was a corporation building which had been in accordance with Article 33 because it based on economic democracy, production was run by all, for all, under the leadership or ownership of society, and gave priority to people prosperity, instead of individuals. Based on the explanation of Article 33, it was clear that Cooperative was a group of people, not a group of capital. The Cooperative experts also declared this, for example Moh. Hatta that defined Cooperative as a group of people that do action together to improve their economic life based on the sense of helping each other. By viewing the consideration context, so the Cooperative capitalization must be under control of Cooperative members. It meant that when someone became a member, he/she was obliged to invest some capital as a member; this was the form of voluntary sense and the demand to change his/her economic life. However, when a member decided to go out of Cooperative membership and could not withdraw his/her investment, the writer assumed that it had been contradictory with the familiarity foundation. The other rationale about not returning member's capital when he/she went out was identical with forcing/compulsion. This was totally a contradictory concept with Article 33 subsection (1) which based on familiarity foundation. This was, too, according to Moh. Hatta, called as realized of itself.[12] The spirit of Cooperative should have always been put forward that the voluntary sense either being a member or going out of the membership must have been based on the sense of freedom. The freedom was also based on Cooperative's sense of voluntary. This consideration concept, as according to Hadhikusuma, of the going in and out of Cooperative members had to be in accordance with the existing regulation stipulation.[13] This was the essence of Cooperative, i.e. to give and increase the society's level of prosperity who became Cooperative members, instead of diminishing their rights on the capital they first invested when entering Cooperative membership. If that happened, then it had been a compulsion and against with the basic characteristic of Cooperative membership that was voluntary. Furthermore, another opinion that became the rationale of the writer's consideration was that even though capital had no voting right, but the diverse capital investment would surely result in the discrepancy of strength and influence/authority in Cooperative governance , so it was in contradictory with the membership principle which was based on togetherness and volunteering.[14]

Besides the problems above, another one that was considered having potential to degrade Cooperative existence was the possibility of appointment of Cooperative leadership from outside the members. According to the Article 55 of Law No. 17 of 2012[15] about Cooperative,

12 This was explained in the Verdict of Constitutional Court No. 28/PUU-XI/2013 about Material Test of Law No. 17 of 2012 about Cooperative, pg. 54.

13 This was explained in the Verdict of Constitutional Court No. 28/PUU-XI/2013 about Material Test of Law No. 17 of 2012 about Cooperative, pg. 55.

14 M. Ali Safaat, this was conveyed by an expert's explanation in the trial of Material Test on the Law No. 17 of 2012, as enclosed in the Verdict of Constitutional Court No. 28/PUU-XI/2013 about Material Test of Law No. 17 of 2012 about Cooperative, pg. 248.

15 Article 55 of Law No. 17 of 2012 fully goes as follows:
The Board is appointed from individuals, either member or non-member.
The individuals meant by subsection (1) must fulfill the requirements:
Able to execute legal action;

the board of Cooperative was appointed from the members or non-members. The phrase of 'non-member' in that article was considered giving an opportunity for outsider's intervention towards Cooperative and contradictory to the Article 33 subsection (1) of 1945 Constitution. The Constitutional Court in its legal consideration had an opinion that in order to build a more professional Cooperative, it had to intensify the members to become professionals, so that it did not have to recruit the non-members to be the leader.

Discussion

Cooperative was a type of business (often interpreted as corporate) that had special characteristic compared to and placed next to other types of business.[16] The special characteristic that differed Cooperative from other types of business was the motivation that bound the members joined in Cooperative. R.M. Margono Djojohadikoesoemo concluded Cooperative as a group of individuals with their own willingness who wanted to cooperate in order to enhance their economy. Mohammad Hatta in his book *The Cooperative Movement in Indonesia*, revealed that Cooperative was an effort together to increase the economic life based on the sense of helping each other.[17] Hatta's thinking had a parallel view with what H. Calvert proposed as quoted by Hans H. Munkner in his book *Co-Operative Principles and Co-Operative Law*, that stated that Cooperative was a type of organization in which people joined voluntarily, as humans, based on the similarity to increase the economic necessity for their own.[18]

In the design of Indonesia economy system as placed by the *founding fathers*, Cooperative had a same position and next to the other business actors, i.e. State-owned Corporation (including District-owned Corporation and Private-owned Corporation). Within that parallel position, Cooperative became one of the national economy pillars. Hatta, acknowledged as the architect of Article 33 of 1945 Constitution, consciously placed Cooperative as a national economy pillar based on the thinking argumentation as follows:

a. Cooperative educated *self-helping* attitude.
b. Cooperative had social characteristic, in which the society necessity must be put forward than the private or individual necessity.

Have the ability to manage the business of Cooperative;
Have never been a Supervisor or Manager of a Cooperative or commissioner or director of a corporate which declared guilty because causing the Cooperative or the Corporate declared bankrupt; and
Have never been punished for conducting crime that damage a corporation, country's finance, and/or anything related to financial sector, within the period of 5 (five) years before the appointment.
Other requirement to be able to get appointed as Leader, as arranged in the Statutes.

16 In the legal system in Indonesia, other types of business besides Cooperative were Individual Business, Civil Federation, Firm Alliance, Limited Partnership, Incorporation Limited, State-owned Corporation that was possibly in the form of Company/Partnership or General Enterprise, or Regional/District Corporation that was possibly in the form of District Company or District General Enterprise. See further: Tri Budiyono, Non-legal Corporate Types of Business, Griya Media, Salatiga, 2011. Also: Tri Budiyono, Corporation Law: Analysis on the Law No. 40 of 2007 about Incorporation Limited, Griya Media, Salatiga, 2012.

17 Andjar Pachta W.,et al., The Law of Cooperative in Indonesia, 4th edition, Kencana, Jakarta, 2012, pg. 19.

18 Hans H. Munkner, Co-Operative Principles and Co-Operative Law, Constructing Cooperative Laws Based on Cooperative Principles, Reka Desa, Jakarta, 2011, pg.6.

c. Cooperative was dug out and developed from genuine culture of Indonesia.[19]
d. Cooperative opposed every ideology that has individualism or capitalism sense.

Based on the concept of Cooperative, then they placed and formulated the principles of Cooperative. Basically, people had agreed to cooperate because the principle included in Cooperative was helping each other through the organization. Within the principle of helping each other through the organization, it implied two principles that clearly showed Cooperative characteristics, i.e. 'principle of member's economic enhancement' and 'principle of identity'. The principle of member's economic enhancement had the meaning that Cooperative's main task was to increase the member's prosperity and based on the economy necessity itself. Meanwhile, principle of identity had the meaning that membership of Cooperative had an open characteristic, so that Cooperative was open for everyone who was willing to participate actively and being responsible for his/her work. The later one was actually the principle of identity which gave special characteristic towards Cooperative as a self-supporting organization.[20]

Cooperative principles genuinely became the source of inspiration and inspired the whole organization (governance) and the business activities, in accordance with the purpose and objective of its establishment. In Indonesia legal system, Cooperative principle was evolved based on the universality value of Cooperative and Pancasila (as the ideal foundation), plus 1945 Constitution (as the constitutional foundation). Out of the characteristic of universality in Cooperative, this institution was born to solve the member's economic problem by self-helping. Pancasila donated the characteristic of mutual cooperation as the foundation of Cooperative development and governance . The core of Pancasila was mutual cooperation. 1945 Constitution put the base of Cooperative as a mutual effort based on familiarity foundation.

The basic values that became the center of Cooperative were then systematized into Cooperative principle. We could compare the formulation of Cooperative principle, as spilled in the Laws of Cooperative, in the following table:

19 Although Cooperative as an economic institution was not developed genuinely from Indonesian society, however its existence had lived in the society far beyond Indonesia Independence Proclamation. In its development history, Cooperative was first pioneered in Indonesia (read: Netherlands East Indies) by Raden Aria Wiriaatmadja (a Vice Regent in Purwokerto) with the help from E. Sieburg (Netherlands High Functionary) in 1896. Raden Aria Wiriaatmadja at that time established *Hulf Spaarkbank* (Saving Bank) with the purpose to blockage the usurer's trap. In the beginning, *Hulf Spaarkbank* was only allowed for upper class society and civil servants, but after developing well, finally touched the indigenes, too. The development of this cooperative-characteristic bank got better due to the help from de Wolff van Westerrode, the substitute of E. Sieburg. Since then, Cooperative had become a growing economic institution-up and down- with Indonesian society development. See further Sudarsono and Edilius, Cooperative in Theory and Practice, 5th ed, Rineka Cipta, Jakarta, 2010, pg. 37-38.

20 Compare to Hans H. Munkner, Op. Cit. pg. 11-15.

Table 6.1.
Comparison of Formulation of Cooperative Principle
in the Laws of Cooperative

Law No. 25 of 1992		Law No. 17 of 2012
The membership has open and voluntary characteristics;	a.	The membership has open and voluntary characteristics; *Cooperative is a self-supporting organization with voluntary membership, open for all people who are capable and need the service utility and willing to take responsibility of the membership, without any discrimination on gender, social status, political race, and religion.*
Governance is executed democratically;	b.	Supervision by the members is held democratically; *Cooperative is a democratic organization, which is being supervised and controlled by its members. The members actively participate in determining policies and making decisions. The members appointed as Cooperative representatives are chosen and responsible for the members in the member meeting. Every member has the same voting right, one member one vote.*
The distribution of devidends is held fairly in accordance with each member's effort's service;	c.	The members actively participate in Cooperative activities; *Besides as the owner of Cooperative, the members also become the service user or the market for Cooperative. Active participation in the economic activities is a main strength of source for Cooperative progress.*
Independence	d.	Cooperative is a self-supporting corporation, autonomous and independent; *Cooperative is an autonomous and self-supporting organization, being supervised and controlled by the members. If Cooperative makes an agreement with another Cooperative, including the government, or adding up the capital from other sources, they do it on the condition that guarantees the continuity of democratic supervision and control by the members and the uphold existence of Cooperative economy.*
The Education of Cooperative	e.	Cooperative holds education and training for the members, supervisors, leaders, and employees, plus conveys information towards the society about its identity, activity and utility; *The implementation of education and training for the members, supervisors, leaders, and employees were meant to encourage them to give support effectively onto the Cooperative development. Conveying information towards the society, especially to the youngsters and society leaders, about the identity, activity, and utility of Cooperative is something principal.*
Cooperation among Cooperatives	f.	Cooperative serves the members excellently and generates Cooperative movement, by cooperation through the activity web in local, national, and international stages;
	g.	Cooperative works for continuous development for the environment and the society as the members have agreed.

If in the beginning of this writing, it was proposed that Cooperative was a type of economic business with special characteristic, but genuinely Cooperative also had universal characteristic like other types of business had. This meant that Cooperative, from the governance aspect, also followed the corporation governance principles in general, however, Cooperative governance could not merely follow the good corporate governance principle, but also had to develop a governance model which could adopt its special characteristic into the Cooperative governance differed from other business' governance . Cooperative principle was verifiably the distinguishing factor from other types of corporate. The Cooperative principles include:

1. Cooperative membership has open and voluntary characteristics,
2. Cooperative governance (conducted by Cooperative organs: Membership Meeting, leaders, and supervisors) in a democratic way,
3. The dividend distribution principle is determined on the base of Cooperative development merit,
4. The indicator of Cooperative independence is that Cooperative constitutes a self-supporting, autonomous and independent corporate,
5. Cooperative serves the members excellently and reinforces Cooperative movement, by cooperating through activity web in local, national, and international stages,
6. Education of Cooperative, and
7. Cooperative works for continuous development for the environment and the society.

Having the principle of corporate governance and Cooperative special characteristic reflected in Cooperative's principle and foundation as a starting point, we could then create a model of Cooperative governance. Cooperative governance was the framework in the form of role, rule, and relationship pattern from Cooperative organs and their subordinates in directing and controlling the business, in order to realize Cooperative purpose and objective. Cooperative governance had Pancasila as the ideal foundation with its mutual cooperation value. As for the constitutional foundation was 1945 Constitution especially Article 33 subsection (1) that put economy principle arranged as a mutual effort based on familiarity foundation. Cooperative principle or foundation was set out above the ideal and constitutional foundations; it actually had meta juridis characteristic. Cooperative principle and foundation would shelter (ius constitution) rules as the norms of Cooperative legality basis, Cooperative's vision, mission, and target, orientation of *good cooperative governance*,[21] and *best practices* of Cooperative governance . Good Cooperative Governance Code basically was the ethical code which had 3 (three) centers, i.e.:[22]

21 Good cooperative governance had 5 (five) centers, usually abbreviated as TARIF, i.e. *transparency, accountability, responsibility, independency, and fairness*. The Good Corporate Governance and Good Cooperative Governance were actually established upon the same principle, i.e. TARIF. However, the implementation would be different because in Cooperative, it should be adapted with Cooperative principle.

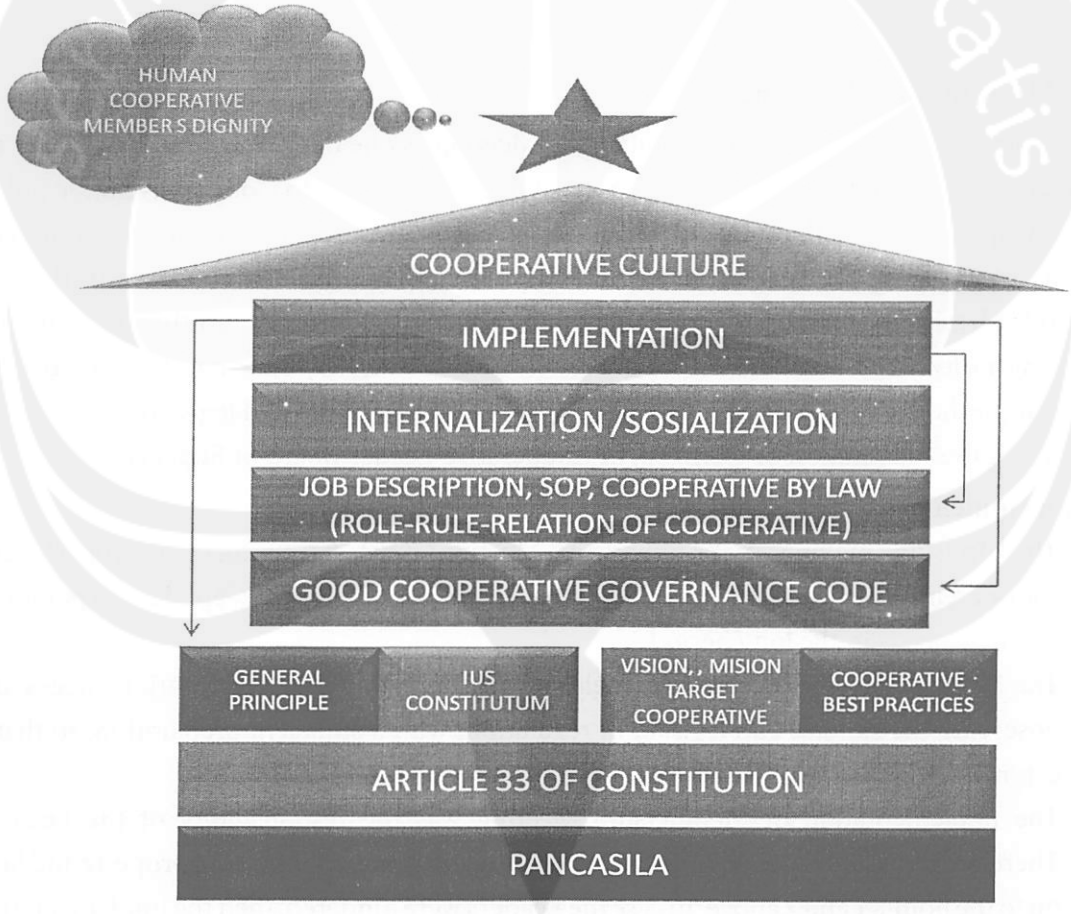
22 Compare to Per Lekvall (Editor), The Nordic Corporate Governance Model, SNS Forlag, Stockholm, 2014, p.15, that stated: '*A corporate governance model* is how this framework is set up for a certain type of company, e.g. a listed company, or a geographical region. It is determined mainly through three types of norm systems:

1. Statutory regulation in the form of cooperative law and other mandatory rules issued by the government or official authorities.
2. Self-regulation defined and enforced by the cooperative sector itself.
3. Informal norms and practices that influence how cooperative governance is carried out in practice.

Thus, the *framework of (good) cooperative governance* actually had characteristic *beyond laws*, because Cooperative governance was not merely limited on fulfilling laws regulation stipulation, but also had to accomplish the principles of good corporate governance, as the result of crystallization of business practice, carry out business ethics, and define on Cooperative principle and foundation.

Starting from the thinking, we could then draw the model of Cooperative governance in the following display:

Model of Indonesia Cooperative Governance



Statutory regulation in the form of company law and other mandatory rules issued by the government or official authorities.
Self-regulation defined and enforced by the business sector itself.
Informal norms and practices that influence how corporate governance is carried out in practice.
This type is of particular interest in the Nordic region due to the relatively strong and homogenous norms and value systems, combined with the high degree of social control typical of small communities that characterize these societies.

Job description, Standard Operating Procedure (SOP), and Statutes of Cooperative were the details of working guidelines for all Cooperative organs with their subordinates.[23] Thus, the model of Cooperative governance authentically was not only the guidelines for Cooperative organs (Membership Meeting, Leaders and Supervisors), but also became the guidelines for the subordinates of the Cooperative's organs. In KNKG language, it was stated that:

The implementation of *good corporate governance* (GCG) could be driven from two sides, i.e. ethics and rules. The *ethical driven* came from the awareness of the business actor individuals to execute business practice that gave priority to the corporate life resoluteness, *stakeholders'* needs, and avoided the methods of creating temporary profits. In the other side, the *regulatory driven* 'forced' the corporate to be obedient towards the regulation which prevailed. These two approaches had their own strengths and weaknesses and obviously completed each other to create a healthy business environment.

By adopting the guideline of corporate governance arranged by National Committee of Governance Policy (KNKG), we could conclude the tasks and responsibilities of Cooperative organs as follows:[24]

1. Membership Meeting

Basic Principle: Cooperative Membership Meeting as one of Cooperative organs was the container for the members to make important decisions related to Cooperative basic policy, by paying attention to the statutes stipulation and legislation regulation. The decision made in the Membership Meeting must be based upon Cooperative business needs in the long period. Membership Meeting and or Members could not intervene into the task, function and authority of the Supervisor and Leader Board without reducing the Membership Meeting authority to execute its right appropriate with the statutes and legislation regulation, including the substitution or dismissal of Cooperative Leader Board or Supervisor.

Main Guidelines of Implementation:

a. The decision making in Membership Meeting must be performed properly and transparently by paying attention to the important things to keep the corporation's business needs in the long period,
b. The Membership Meeting must be held in accordance with the corporation's needs and observing the statutes and legislation regulation, with a sufficient preparation, so that it can make a legitimate decision,
c. The implementation of Membership Meeting was the responsibility of the Leaders. Therefore, the Leaders must prepare and hold the Membership Meeting properly and hold on to the points 1 and 2 above. In case the Leaders were hindered, then the implementation

23 Concept of Cooperative organs' subordinates includes the element of Cooperative organization structure that is not covered in the Membership Meeting, Leaders, or Supervisors but has been appointed and works under the Cooperative organs and responsible to them. This group includes the managers and employees who work under command and are, therefore, responsible to Cooperative Leaders.

24 This guideline explained the steps to be taken in order to create *checks and balance* situation, upright the transparency and accountability, and realize social responsibility for the corporate life resoluteness.

of Membership Meeting was executed by the Supervisor Board or Cooperative Members conforming to the legislation regulation and corporation statutes.

2. Leaders

Basic Principle: Leader as a Cooperative organ had the duty and was responsible in colleague like way to govern the corporation. Each of the Leader's members could do the task and make decision according to their task distribution and authorities. However, the task implementation by each of the Leader's members was still a mutual responsibility. The position of each Leader's members, including the chairman, was equal. The task of the Leader Chairman as *primus inter pares* was to coordinate the Leaders' activities. In order to execute the Leaders' tasks effectively, they need to fulfill the following principles:

a. Leader's composition must have been arranged in such a way that enable an effective, efficient and quick decision making, and also could act independently.
b. The Leaders must be professional, i.e. having integrity, experience, and capability necessary for their performances.
c. The Leaders were responsible for Cooperative governance so that they could serve the Members excellently and ascertain the continuity of Cooperative business.
d. The Leaders accounted for their leadership in the Membership Meeting according to the legislation regulation in effect.

Main Guidelines of Implementation:

a. Leader's composition: (1) the number of leader's members had to be fitted with Cooperative complexity without ignoring the effectivity in the decision making. (2) The leader's members were elected and dismissed in the Membership Meeting through a transparent process. (3) Dismissal of the Leader's members in the Membership Meeting was based on proper rationale and beforehand, to whom it may concerned got the opportunity to defend themselves.
b. The capability and integrity of the Leader's Members: (1) leader's members had to fulfill the requirements of capability and integrity in order to execute the function of corporation governance well. (2) Leader's Members were banned to take advantage of the corporation for their personal, family, business group or other side needs. (3) Leader's Members must have comprehended and obeyed the statutes and the legislation regulation related to their tasks. (4) Leader's members had to understand and execute the Guidelines of Good Cooperative Governance.
c. Leader's function: the function of corporation's governance by the Leaders include 5 (five) main tasks, i.e. leadership, risk governance , internal control, communication, and social responsibility.
d. Communication: leaders had to make sure the communication fluency between Cooperative and the necessity functionary.
e. Social responsibility: (1) In order to maintain the corporation business continuity, the Leaders must have conformed to fulfill the corporation social responsibility; (2) Leaders

must have had clear and focus written agenda/program to implement the corporation social responsibility.

3. Board of Supervisors

Basic Principle: Board of Supervisor as one of Cooperative organs functioned and was collectively responsible to do the supervision and give advice to the Leaders and make sure that Cooperative executing the Good Cooperative Governance principle. However, Board of Supervisor could not participate in operational decision making. The position of each member in the Board of Supervisors was equal. The Chief of the Board of Supervisor functioned as *primus inter pares*, i.e. coordinating the activities of the Board of Supervisor. In order to make the task implementation of the Board of Supervisor going well, they need to fulfill the following principles:

a. The composition of the Board of Supervisor must enable an effective, efficient, and immediate decision making and could act independently.
b. The members of the Board of Supervisor must be professional, i.e. having integrity and capability so that they could implement their tasks well including conforming that the Leaders had been aware of the needs of all the necessity functionaries.
c. Function of supervision and advice giving of the Board of Supervisor includes the act of prevention and rehabilitation.

Main Guidelines of Implementation:

a. Composition, Appointment and Dismissal of the Board of Supervisor Member: (1) the number of the Board of Supervisor members must be adjusted to Cooperative complexity by still noticing the effectiveness of the decision making, (2) Board of Supervisor Members are appointed and dismissed by the Membership Meeting through a transparent process.
b. Capability and Integrity of the Board of Supervisor's Member: the members have to fulfill the requirements of capability and integrity so that they can perform the function of supervision and advice giving to the Cooperative's need well, the Board of Supervisor's Members are banned to take advantage of the corporation for their personal, family, business group or other sides, , the Board of Supervisor's Members have to comprehend and obey the statutes and legislation regulation related to their task, the Board of Supervisor's Members have to understand and perform the Guidelines of Good cooperative Governance.
c. The Supervision function of the Board of Supervisor: (1) Board of Supervisor is not allowed to participate into the operational decision making. (2) In case there is a position vacancy in the Leaders or in certain situation as regulated in the statutes and legislation regulation, the Board of Supervisor can perform the Leader's function for the time being. (3) In performing its function, the Board of Supervisor's Members, either together or individually, has the right to get punctual and complete access and information about the corporation. (4) The Board of Supervisor must own a working discipline and guidelines

(charter) so that their task performances will be aimed and effective and can be used as one of the tools of their working evaluation. (5) The Board of Supervisor in its function of supervision, conveys the report of supervision responsibility over the corporation governance by the Leaders, in the framework to acquire exemption and responsibility pay off (*acquit et decharge*) from the Membership Meeting. (6) To perform its task, the Board of Supervisor can form a committee. The committee's suggestion will be conveyed to the Board of Supervisor to acquire a decision.

CONCLUSION AND RECOMMENDATION

A. Conclusion

Cooperative genuinely was a type of corporate (as other types of business) but with special characteristic. The special characteristic must slant the framework of Cooperative governance. In designing the Cooperative governance, we need to establish a model of *good cooperative governance*, with the ethics and regulation as the centers. The ethical drive came from the Cooperative individual stakeholders' awareness to execute business practice that gave top priority to Cooperative life continuity, stakeholders' needs, and avoided the ways to create temporary profits. On the other side, the regulatory drive "forced" the corporation to obey the legislation regulation in effect. These two approaches had their own strengths and weaknesses yet completed each other to create a healthy business environment. The model of Cooperative governance was established upon the ethical base and regulatory base with the expectation that each of Cooperative stakeholders could proportionally and professionally participate to enhance Cooperative to create *(human) cooperative member dignity*.

B. Recommendation

1. The annulment of Law No. 17 of 2012 actually became a very precious experience for the regulator to design the Laws that could articulate Cooperative values derived from Pancasila and 1945 Constitution. Therefore, in designing Cooperative Laws as ius constituendum, the regulator had to pay attention to the crucial things that became the gate of judicial review that made the Law No. 17 of 2012 annulled by the Constitutional Court.
2. Re-implementation of the Law No. 25 of 1992 was actually temporary; merely to overcome the vacancy of laws. Therefore, the legislator had to arrange the laws of Cooperative immediately so that it would possess a legal-operational foundation to be developed as Indonesia economy pillar.

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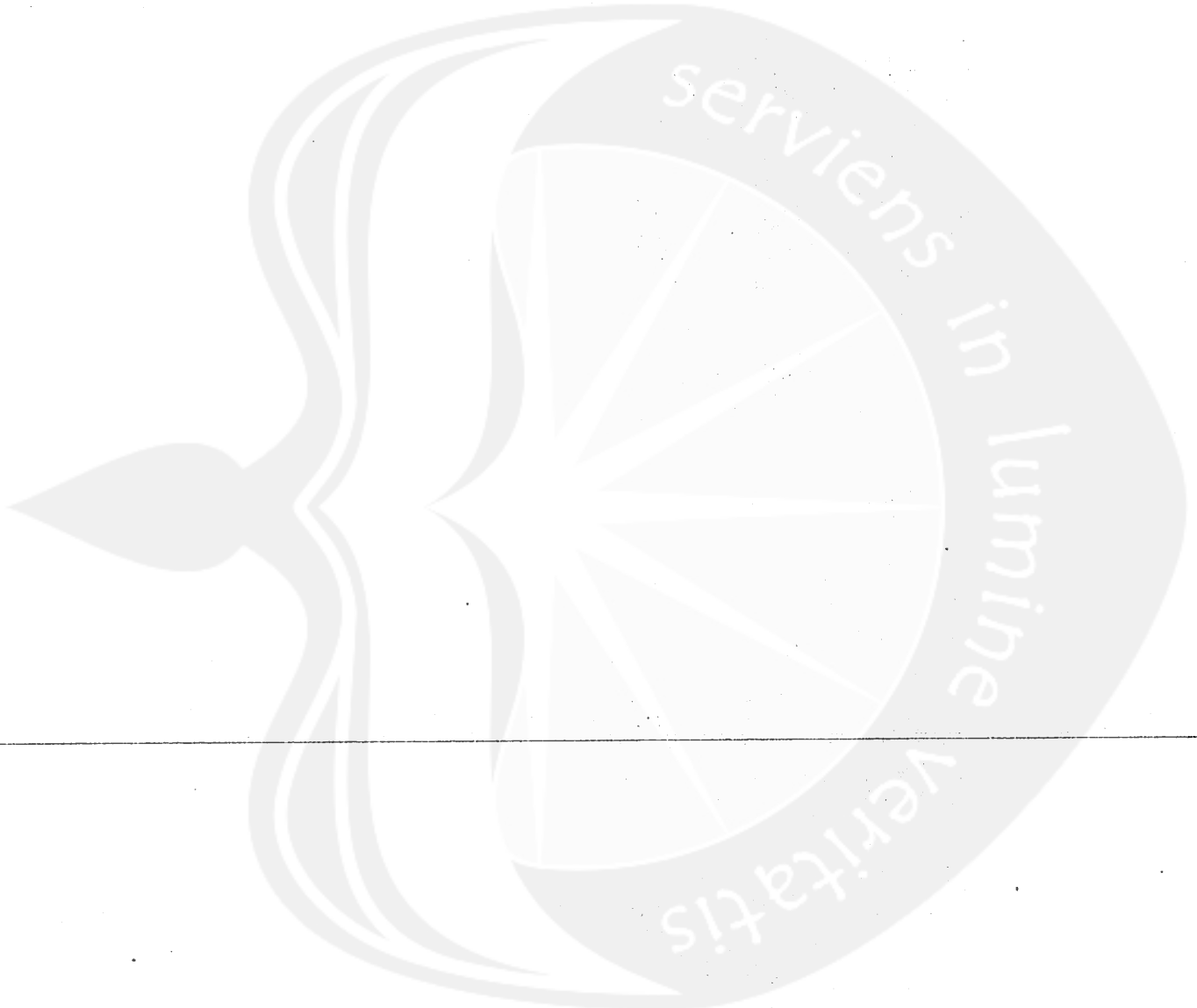
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BUSINESS: 3


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A DESCRIPTIVE STUDY ON THE RELATIONSHIPS BETWEEN WORKING CONDITION, AND JOB SATISFACTION OF MYANMAR CIVILIAN SEAFARERS: WORK MOTIVATION AS A MODERATOR

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ABSTRACT

The Study hypothesized and investigated relationships between working condition, job satisfaction and work motivation. The purpose of the study is to describe lives of Myanmar seafarers which focus on their working condition, job satisfaction and work motivation.The study made use of purposive sampling in selecting 250 Myanmar civilian seafarers who live in Yangon (business city of Myanmar).The study applied online self-completion questionnaire (SCQ) which distributed through social network.Three instruments were used to measure the constructs concerned, namely Working Condition Questionnaire, Job Satisfaction Questionnaire, and Work Motivation Questionnaire. Hierarchical Regression Analysis was explored to analyze the data. One moderator effect on the relationship between working condition and job satisfaction was also explored. Results indicated that seafarers' working condition negatively related to job satisfaction. It was also found out that working condition, and work motivation are effective predictors of seafarers' job satisfaction. The finding supports the moderator effect of work motivation on the relationship between working condition and job satisfaction. Considering the important of seafarers' satisfaction in workplace and its effect on effectiveness, shipping companies and management should take necessary actions appropriately.

Keywords: *Working Condition, Job satisfaction, Work Motivation, Myanmar seafarers*

LAW-SOCIAL JUSTICE: 3

THE RECOGNITION OF CUSTOMARY COURTS BY THE VILLAGE GOVERNMENT IN INDONESIA: Study on Liliama Village, Seram Regency

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ABSTRACT

Indigenous people is still exist in Indonesia who live in villages, far from the city, far from central government, have minimal knowledge access. They live daily with their traditional or custom law, including their customary court for their law enforcement system. In the other hand, they are also forced to comply with national law that stipulated by the central government, such as law enforcement system through the state court which sometimes indicates unfair practices, spends a long time with expensive cost, and the mechanisms which is new and not understood by most of indigenous people. This study aimed to describe and evaluate the recognition of customary courts by indigenous people in Indonesia, case study at Liliama Village, Seram Regency. This reseach are empirically based on practice at Liliama Customar Court related with the provision of law enforecement system in Indonesia. It was found that before Indonesian independence, customary court was recognized well for indigenous people by the colonial government. After geting independent in 1945, with Emergency Act No. 1 of 1951, customary court was still recognized by the central government of Indonesia. Further, the existence of customary court was removed by Judicature Act. Recently, the indigenous people with their traditional rights is protected constitutionally as stipulated at Article 18B paragraph (2) of The Constituion of Indonesia. In practice, specially at Liliama Village, most people were prefer to go to customary court than to go to the state court, as an alternative dispute resolution mechanism, since it felt close to their sense of justice. Although, in accordance with Indonesian law enforcement system, criminal cases are generally can not be resolved by the customary court. The sense of justice that is not met by the formal legal system, sometimes it can be met by traditional legal system. Considering of the important meaning of customary court for indigenous people in Indonesia, the Government should make a legal reform to recognize customary court as an alternative dispute resolution to obtain a customary justice that is believed and embraced by indigenous people who still exist in Indonesia.

Keywords: Indigenous peoples, the recognition of customary court, justice

THE ELIMINATION OF MEDIATION PROCESS IN BUSINESS DISPUTE RESOLUTION THROUGH COMMERCIAL COURT

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ABSTRACT

Business dispute indeed is a part of a civil dispute, with specific characteristics In general settlement of civil disputes in the General Court, mediation is a process that must be passed before the case go down to litigation. In business disputes resolution where the parties are tend to maintain confidentialy through ADR, mediation is elimited from the process in Commercial Court (See, the provisions of Article 4 paragraph (2) (a) first point PERMA No. 1 of 2016). Through the documentary research of procedural law, principles and theories, it was found the consideration that most of the substance of business disputes in Commercial Court are forbidden to be settled by the agreement of the party through mediation process. Indeed, the elimination of mediation process will reduce the same rights (equality before the law) for the parties to obtain dispute resolution efficiently with win-win solution, as well as to the parties in civil dispute resolution in General Court. It is better rethinking about the policy which eliminating mediation process totally in all business disputes at the Business Court, by making classification which of business disputes can be resolved through mediation, and which simply can not be resolved through mediation. It should be considered since mediation gives some benefit to the parties, such as reducing litigation process, speeding up the settlement of disputes, maintaining process and outcome confidentiality with win-win solution.

Keywords: Mediation, Commercial Court, business disputes


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APPROVAL REQUIREMENT TO CALL AND INVESTIGATE AGAINTS MEMBER OF PARLIEMENT IN CRIMINAL PROCESS AND THE INDEPENDENCE OF YUDICATURE POWER

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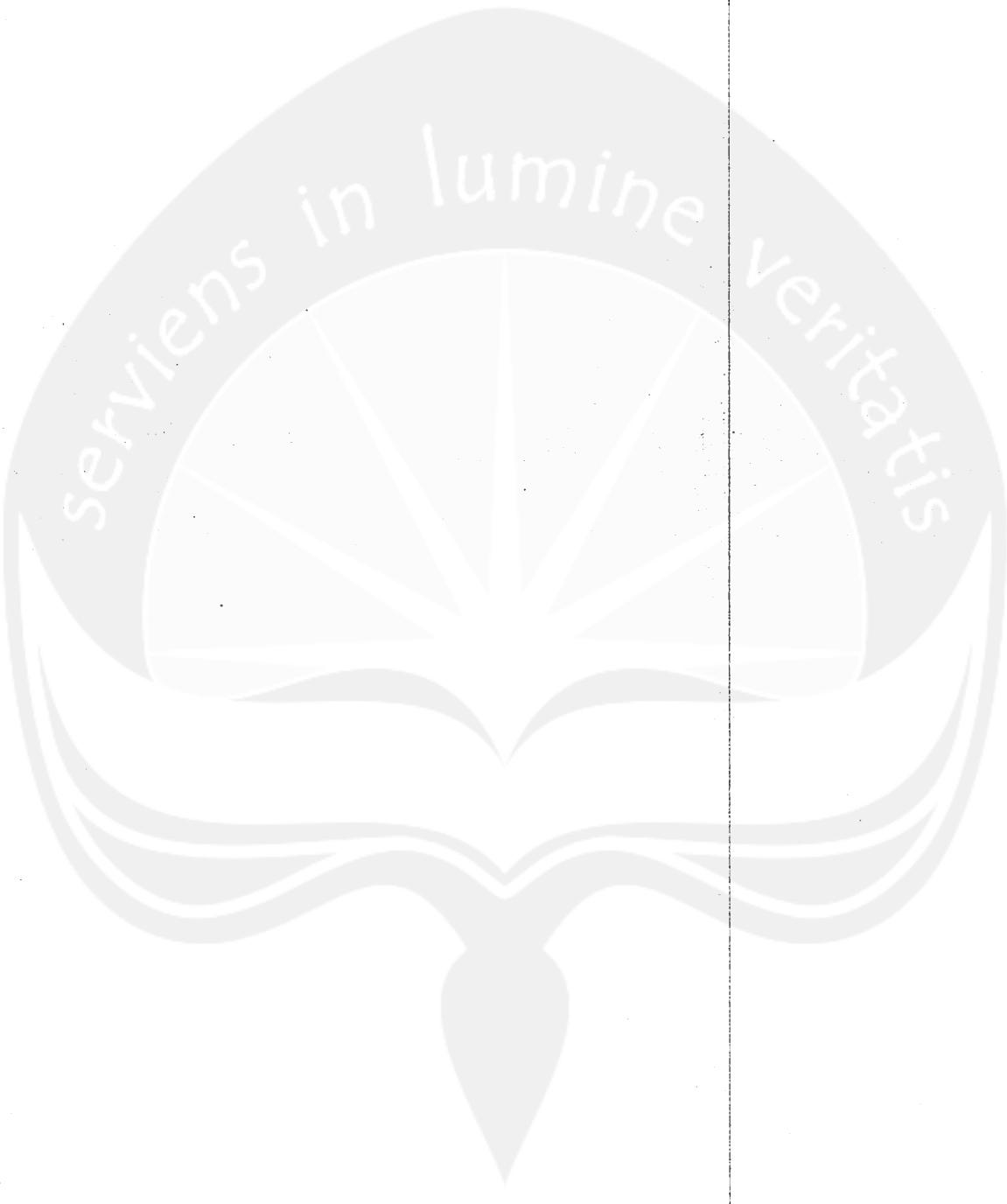
ABSTRACT

Article 245 Paragraph (1) of Law Number 17 of 2014 on the MPR, DPR, DPD and DPRD determines that calling and inquiring for investigation against a member of Parliament who is suspected of criminal offenses must obtain written approval from the Honorary Council of Parliement (MKD). The Constitutional Court in its decision Number 76/PUU XII/2014 brought back the approval requirement to the President. On one hand, the members of parliement must have approved with that legal policy. On othe side, that legal policy will hamper the work of law enforcement officers since it needs moreover time to wait and sometimes full with political interest in giving approval or not giving approval. That legal policy is needed to be criticized, wether that approval requirement should be needed or not. This research based on legal policies, human rights, and the independent of yudicature power principle. It is seen that the approval requirement to call and investigate the parliement members in criminal offenses is based on the consideration to give proportionate legal protection for parliements member so that they will not be criminalized easily when they do their constitutional function, However, such legal policy can affect human rights, particularly the right to be treated equally before the law, and independence of the judicial power principle. Protection of human rights and independent of the judicial power are part of the main elements of the rule of law state, so it should favored over the interests of certain groups, including parliements.

Key words: approval requirement, President, Parliements, Yudiciary power, independence.


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BUSINESS, LAW-SOCIAL JUSTICE: 4


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PARTICIPATORY COMMUNICATION SYSTEM IN THE MOVEMENT OF ASEAN TO MAKE A BETTER ASEAN COMMUNITY RELATIONSHIP

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ABSTRACT

ASEAN community is a community that consists of 10 ASEAN countries (Indonesia, Singapore, Malaysia, Thailand, Philippines, Myanmar, Laos, Cambodia, Brunei Darussalam and Viet Nam) that aims to realize the integration between the countries in the ASEAN region. Synergy or integration between ASEAN countries is expected to be opened between the harmonization opportunities the ASEAN countries and also embodies the cooperation between countries in the field of social, cultural or military. In a community, though in increasingly strong interactions there are values and togetherness, but nonetheless in the behavior of its members there is still based on its own interests. Competition in the meet the interests of each member with different motives will surely give rise to friction and teammate in the community, but as a community tend not to do the acts of violence as well as the military in solving existing conflicts. To reduce the presence of gaps between members, need communication system that supports. The Communication system is participatory communication system, is people discuss, gather and convey the opinions is one way to prevent the entry of injustice. With a participatory communication, increased prosperity, strengthening the institution of the law through the actualization of the re-public confidence over crucial law enforcement presented in order not to happen political mafia and other. The most important of building efforts the system is to create solidarity without relieving the specific characteristics of each country but rather on a desire to strengthen a sense of community.

Keyword: communication, community relationship

INTRODUCTION

The establishment of the ASEAN Community of the 9th ASEAN SUMMIT in Bali that produces the Bali Concord II and proclaimed the establishment of the ASEAN Community is also composed of three pillars namely the ASEAN Economic Community (AEC), the ASEAN Security Community (ASC) and the ASEAN Socio-Cultural Community (ASCC). The ASEAN socio- cultural community (ASCC) formed as one of the three pillars of the ASEAN community which aims to complement and reinforce political and economic pillars. The interdependence between the three pillars in the ASEAN community is making important be the same with the ASCC AEC or ASC. Cooperation in the field of culture is essential to achieving ASEAN's integration through "a caring and sharing community" is a public order intra ASEAN mutual caring and sharing, strengthened our sense (sense of we-ness or we feeling) and fellow citizens of ASEAN solidarity. The most important of this feeling we building efforts is to create solidarity without relieving the specific characteristics of each country but rather on a desire to strengthen a sense of community. With a strong sense of community is expected to ASCC is able to simultaneously anticipate and minimize the impacts arising as a result of economic integration in the region as well as create qualified human resources and competitive as well as a conducive environment for the success of integration and shared prosperity as well as strengthen cultural identity toward ASEAN Community based society (people centered) (Linggarwati). Therefore, special strategies are needed to maintain and strengthen good communication in favor of the continuation of good cooperation. The intended communication strategy is participatory communication system.

THE CORNERSTONE OF THE THEORY

The Definition Of Communication

Understanding communication has evolved to suit their field ranging from small communities to large communities, communication means also orders, instructions, directives, debates, solicitation, persuade, appeal and so on. Communication is no longer as notice but also implement a message between the lines (Mandafi 2015). Bernard Berelson and Gary a. Steiner (in Mandafi 2015) stated that the process of communication going on transmission of information, ideas, emotions, skills, etc. by using symbols, words, pictures, figures, or charts. Bernard argues that the process of communication that happens is a process of delivery of messages that are formed in the information using a symbol that has meaning.

The Effectiveness Of Communication

Effendi (Cahyanto, Sugihen, & Hadiyanto 2008) stated communication for can be said to be effective if the impacts are: 1) cognitive, namely increasing knowledge komunikan, 2) Affective, that changes the view of the komunikan, because his heart was moved due to communication, and 3) Behavioral change behaviors or actions that occur on komunikan.

Tubbs and Moss (in Cahyanto, Sugihen, & Hadiyanto 2008) says there are five things that make the size for effective communication, understanding, pleasure, influence on the attitude, the relationship grew well, and action.

1. Understanding

The meaning of principal understanding is a careful acceptance over the content of stimuli such as what is meant by the message sender (Communicator), is said to be effective if recipients gaining an understanding that closely over the message.

2. Pleasure

Not all communication is intended to convey specific meaning, sometimes the communication merely for the pool area was sapa and raises the happiness together.

3. Influencing attitudes

Actions affect others and trying to let others understand the speech we are part of everyday life. At the time of determining the success rate turns out to be a failure in communicating the changing attitudes of others is not necessarily because these other people do not understand what is meant. It can be said that the failure in changing one's view is not to be confused with failure in improving understanding, because it acknowledges and agrees that two things are totally different.

4. Improve relations

Communication is carried out in an atmosphere of positive psychological and full trust will be helpful to the creation of effective communication. When human relationships emerges dibayang by distrust, then the message conveyed by the most competent Communicator can only change the meaning.

5. Actions

Encourage others to undertake appropriate action with the desired results is the most difficult to communicate. Easier to animate, so the message can be understood to others than to labour so that the message is approved, the action is back on the highest communication feed expected giver a message.

Participatory Communication

Diwendi (in Muchlis 2008), participation has become a keyword for a change and become a total correction of system interaction (communication) between the Government and its people. Participatory communication thus must be grounded by a view that everyone basically has the experience that is rich enough to be processed into learning materials. Wiradhini 2015 States that this concept is a new approach in development communication strategies that look at the elements that are involved in the communication process (source-receiver) has equality in positions and roles. The participatory approach is based on the spirit of togetherness (togetherness, communality) in articulating and perceive something in the mind, attitude and action, including ways to troubleshoot with. The conception of Community objectives determine communication process so that all parties involved

have the opportunity to Exchange and negotiate the meaning of messages (exchange and negotiation of meaning) to the harmony and the harmony of the meaning together. In a participatory approach, all the problems faced was the issue of how to solve it together so that any need to be considered together. Because the communication activity occurring in public spaces (public sphere) then allows everyone can access the information and open dialogue. In addition, the participatory approach focusing on extracting and exploiting the potential of the local media (indigenous media) as an alternative to pengguanaan modern communication media for the growth of the participation of the citizens of the local community. Thus, the approach of participatory development communication as a strategy prioritizes the flow of communication that goes both ways as a distinctive social communication with the incorporation of model analysis of media content and model oriented to a wider audience. This process gives a shared roles and responsibilities of all parties involved in the communication pendistrubsian information evenly in the practice of development communication. By itself, the ways that applies on a linear model is considered irrelevant in this approach. So that the process of building on this approach is no longer a process of production of goods and services in the field of industry according to the theory of modernization, but business development strategy.

METHOD

The approach used in this qualitative descriptive writing is based on the study of librarianship. In the selection of the approach is expected to provide an overview regarding the state carefully or certain symptoms on the object of study.

Data types and methods of Data

The data collected in the writing of this is secondary data and data source writing obtained indirectly through the media middleman. Secondary data is generally in the form of evidence, record, or report is finalized in the historical archive (documenter data), whether published or not published. The data collection methods used in writing this is to the method:

a. The study of librarianship, libraries are done with the reading of literature-related literature and writing support, in the form of print and electronic library (internet data).
b. Documentary, dokumnetasi study done by the way read the previous writing reports as well as articles that are accessible from the internet, books or journals to suit the problem.

The Procedure For Preparing The Paper

The preparation of this paper has been through the stages or steps that systematically so that obtained results of the study are complete and structured. As for the measures being undertaken in the writing of this paper is follows:

a. Locate and formulate problems.

b. Searching and selecting data sources of the relevant libraries.
c. Analyze data to answer the problem.
d. Formulating alternative problem solving.
e. Draw conclusions and recommend suggestions.
f. Drafting paper.

RESULT AND DISCUSSION

In a community, it is necessary the presence of effective communication in order to build relationships between members in the community movement. Communication is said to be appropriate if it lasts the process democratic, social interaction and horizontal through the media produced, managed, and controlled by the community of its own the following objectives to be achieved. All will be realized if the members involved directly in identifying issues of development and the needs they face and apply problem-solving strategies using all the resources at their disposal. In other words learning adult learning methods is required where a Communicator could not impose the message he brought to the komunikan through any medium. Due to its function as a facilitator then invites and facilitates komunikan for able and willing to identify their own nurturing; analyze the problem (why, what mean, what do); as well as performing actions to address these problems. Margono Slamet (Riansyah 2016) stated that growing and growing participation of community members in development, largely determined by three principal elements, namely:

1. The will

Psychologically the willingness of participating appears by the intrinsic motif (from within itself) or extrinsic (due to the stimulus, encouragement or pressure from outside parties). Growing and growing willingness to participate at least required the attitudes:

a. Attitudes to leave the values that hinder development.
b. Attitude towards implementing ruler or development in general.
c. Attitude to always want to improve the quality of life and not his own complacency.
d. Attitude of togetherness to be able to solve the problem, and the achievement of development goals.
e. Independence of Attitude or confidence over its ability to improve the quality of his life

2. The ability

Some of the capabilities required to be able to participate with either among others are:

a. The ability to identify the problem.
b. The ability to grasp the opportunities that can be done to solve the problems faced by making use of the available resources.
c. The ability to carry out development in accordance with their knowledge and skills as well as other resources.

3. The opportunity

   A variety of opportunities to participate is strongly influenced by:

   a. Political will of the rulers/Government to involve communities in development.
   b. The opportunity to obtain information.
   c. An opportunity for mobilizing and utilizing resources.
   d. The opportunity to acquire and use appropriate technology.

CONCLUSION

In a community, it is necessary the presence of effective communication in order to build relationships between members in the community movement. The approach of participatory development communication as a strategy needs to be done because of the emphasis on the flow of communication that goes both ways as a distinctive social communication with the incorporation of model analysis of media content and model oriented to a wider audience. So that solidarity will appear without eliminating the specific characteristics of each country, this will effect the movement strong in the community.

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THE CONSTRAINT OF THE EXECUTION OF ADMINISTRATIVE COURT DECISION IN INDONESIA

By : Francisca Romana Harjiyatni

ABSTRACT

There is a constraint in the execution of the administratitve court decision which have permanent legal force. The execution of the decision court is handed over to volunteerism of government official to implement it. In the case the governmant official as the defendant does not comply with the judgement, then there is no power to force to the government official to comply the judgement. If the government official does not comply with the judgement, he is imposed a penalty (dwangsom) for the payment to litigant. The provision of the penalty (dwangsom) can not be implemented, due to the rules of the amount of dwangsom and procedure for the payments has not been set.In the case dwangsom which is an attempt to force also can not be excuted, so the provision of dwangsom becomes meaningless. Without equipped with provisions and institutions that can force to apply dwangsom, it is better that the provision of dwangsom is abolished.It should be given an instrument so that the administrative court decision can be forcefully implemented. In terms the provision of dwangsom is be retained, it must be equipped with the instrument to implement dwangsom, such as the instruments available in civil procedure law.

Keywords: Judgement, Administrative Court, Dwangsom.

INTRODUCTION

Based on history, the power held by a single organ will cause arbitrary power and suppression of the people, therefore the power should be separated and held by different organs, known as the separation of powers. In connection with the separation of powers, the idea is often used as a reference known as Trias Politica initiated by Montesqiueu. The core of the idea of Trias Politica is the separation of powers based on the state main functions, namely the executive, legislative, and judicial branches. Regarding the separation of powers,

Aalt Willem Heringa and Philipp Kiiver said[1]:

> *Essentially, separation of powers holds that public authority can be dissected into three different functions : a legislative power, which makes law; an executive power, which enforces them; and a judicial power, which applies them in cases of conflict. Coupled to this functional separation of powers is the institutional separation of powers, meaning that these three functions should be allocated with different organs, and a personal separation of powers, meaning that these organs should be actually staffed by different people.*
>
> *The degree to which separation of powers is implemented, the form that it is given, and the consequences that are attached to it, even the degree to which adherence to the principle is actually acknowledged, varies from one system to another.*

Based on the opinion above, the powers split into three functions that include : the power to make law (legislative power), the power to implement the law (executive power), and the power to apply the rule in the concrete case (judicial power). Each of the power is held by different institutions. The implementation of the principle of separation of powers is different in every country. Implementation of the principle of separation of powers inIndonesian legal system is different from the original principle of separation of powers. There is a relationship between the executive and legislative powers, so it can not be referred to as the principle of separation of powers but the implementation of distribution of powers. Judicial power is expressly separated with other power, so it can be said that the separation of judicial power from other powers is as the implementation of the principle of separation of powers. Separation of judicial power meants that the judicial power and its courts can objectively carry out its functions without the influence and the pressure of any powers, so they can provide legal protection to justice seeker.

The existence of the Administrative Court is not separated from the idea of the necessity of separation of the functions of the state which is based on the principle of separation of powers, the functions of powers are divided into the legislative power, executive power and judicial power. Administrative court is one of judicial institutions under the judicial power.

Administrative court has the task to resolve the dispute between individual and government official and to produce a binding decision for the parties. Based on the Act of 5 of 1986, administrative court is one of the executors in charge of judicial power, that have a task and competence to examine, decide, and resolve disputes that arise in the field of administration. The final results of dispute resolution process is a court decision.

After administrative judge give a decision, the justice seeker hope that his rights is fulfilled accordance to the claims in the lawsuit. However, there isconstraint in the execution of the decision court, if government official as the defendant does voluntary not carry out the court decision , there is no instrument to force government official to carry out it. It has been done twice changes regarding asthe provision of court decision execution on Article 116 of the Act no. 5 of 1986 by the Act of 9 of 2004 and the Act of 51 of 2009, but there are

1 Aalt Willem Heringa dan Philipp Kiiver, 2007, *Contitutions Compared-An Introduction to Comparative Constitutional Law*, Oxford : Intersentia Antwerpen.

no significant changes in the execution of the court decision.

Based on the issues described in the previous paragraphs, the article aim to review : 1) Why the execution of Administrative Court Decisions have less power to force ?; 2) What legal steps to overcome the shortcomings of the execution ofAdministrative Court Decisions?

THE METHOD OF THE RESEARCH

This research is a doctrinal research. The main data in the research was secondary data obtained from the assessment and analysis of regulations, doctrine or theory, concept, dictionaries and encyclopedias. However the research was also supported by primary data obtained from interviews with a number of informants. Secondary data and primary data were analyzed qualitatively.

ADMINISTRATIVE COURT DECISION

Administrative dispute resolution by the administrative court will be ended with the imposition of a binding decision to the parties. Through the court decision, the parties expect to get justice.

Judge's decision is a declaration by a judge as an state official who is authorized to make a decision, which is spoken at the trial and aims to terminate or settle a problem or dispute between the parties. The court decision must be stated in written form and should be pronounced by the judge in the trial. A draft decision (in written form) does not have the binding power to the parties, before it is pronounced in the open trial by the judge. Decision pronounced in the open trial (*uitspraak*) should not be different from the written form (*vonis*).[2]

The court decision is not only stated in the written form, but also must be stated orally at the open trial for the public. The principle of openness for the public is imperative. The court decision pronounced at open trial for the public is one of the integral parts of the principle of fair trial[3]. The main objective of the open trial principle is to ensure that the process of judicial can not cause misconduct (misbehaviour) of judicial officials. The principle of the open trial for the public is intended to ensure the objectivity of the court proceedings; create an atmosphere conducive to all parties; show non-discriminatory acts; directly publish the court proceedings until producing the decision for the public; give attention to the judge to be careful to examine the case and not to make some mistakes; and prevent witnesses from taking a false oath because his oath is to be heard by the other people or the community.[4]

Decision pronounced in the open trial for the public is a mandatory in the Administrative Court Proceedings. In Article 108 of the Act of no. 5 of 1986, it is stated that:

(1) The court's decision shall be stated in the open trial for the public.

(2) If one party or both parties are not present at the time of which the decision is

2 Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, Sixth Edition, Yogyakarta : Liberty, 212.

3 M. Yahya Harahap, *Hukum Acara Perdata*, Jakarta : Sinar Grafika, 2005, 803.

4 Abdullah, 2008, *Pertimbangan Hukum Putusan Pengadilan*, Sidoarjo : Program Pascasarjana Universitas Sunan Giri, 49.

pronounced, by order of the trial presiding judge a copy of the decision is delivered by registered mail to the person concerned.

(3) Non-compliance of the provisions referred to in paragraph (1) cause that the decision is notunauthorized and has no legal force.

Court decision pronounced atthe open trial for the public is an absolute requirement. The public will be able to know the the examination process and the content of the decision directly, so it can directly control the judicial process and assess whether the judge examine and decide the case fairly.

Relating to the content of the decision, the law has been set things what should be contained in a court decision. Article 109 paragraph (1) of the Act no. 5 of 1986 states that:

Court decision must contain:

a. *Head of the court decisionthat says: "For the sake of Justice Based on God";*
b. *Name, position, nationality, place of residence, or domicile of the parties of the dispute;*
c. *Summary of the lawsuit and the defendant answers the obviously;*
d. *Consideration and assessment of all the submitted evidence and the happened things in the trial during the dispute is examined;*
e. *Legal reasons of the decision;*
f. *Ruling on the dispute and the cost of the case;*
g. *Day, the date of the decision, the deciding judge name, the name of the clerk, as well as the information on the presence or absence of the parties.*

The formality ofthe judgement consist of: the head of the judgement, the consideration of the judgment, and judicial verdict. All the three are inseparable unity. Among the three part, there is the core part of the decision, namely the consideration of decision. The consideration of decision consists of two parts, namely the consideration of the facts and the consideration of law. The consideration of the facts is obtained by examining the empirical evidence at the trial. The facts revealed at the trial is tested by using the theory of correspondent truth to obtain legal facts and clues. The legal consideration is the part of consideration which includes verification test between facts and the theories and legislations.[5]

The head of the court decision "For the sake of Justice Based on God" is inseparable from the principle that judicial power is free and independent power. The principle of judicial power evoke a consequence that the court and its judgesaredirectly responsible to the Almighty God in deciding administrative disputes. As the implementation of these principles, the administrative judge has a duty to produce an independent decision. Regarding as theindependent decision, Philip Hamburger said:

In doing their duty, judges had to exercise independent judgment.
Judges thus had an office that required them to exercise judgment, meaning a judgment independent of not merely external, royal will, but most centrally their own, internal will.[6]

5 Ibid, 50-51.

6 Hamburger, Philip, 2008, *Law And Judicial Duty*, Cambridge, Massachusetts, and London, England : Harvard University Press, 148.

Philip said that, the judge in carrying out his duties must take independent decisions. Independent judgement is the result of task execution of the free and independent judges from the influence and pressure from anywhere, the judge decide the case based on his conscience. Furthermore Philip said, independent judgement is not only from the aspect of external influences such as the will of the king or the president, but also affected by the internal will of the judge. Internal influence of the judge to have the courage to reject the external influence and decide based on his conscience, is an important factor in implementing the principles of the free and independent judiciary.

Head of the court decision "For the sake of Justice Based on God" shows an embodiment of the values of the Pancasila to the administrative court decision.Based on the ideology of Pancasila, justice to be achieved through the court decision is social justice which is contained in the fifth precept of Pancasila. Social justice based on the fifth precept of Pancasila meants that justice is balance between individual interests and social interests. Social justice in the Fifth preceptof Pancasilaimbued by the first precept of Pancasila shows that justice is imbued in truth rooted in God Almighty. Justice imbued by the values of Pancasila can be achieved through the court decision if judges have the internal independence and decide based on their conscience.

Some decisions may be issued by administrative court judges, among others:

a. Judgment or stipulation issued by the Chairman of the Administrative, before the administrative court examines the principal dispute. It is decided in the Consultative Meeting. It contains that a lawsuit is not accepted or is declared to be unfounded because: 1) the principal lawsuit is obviously not included in the administrative court competence; 2) the requirements of a lawsuit are not fulfilled despite the administrative judges have advised and warned to litigant for repairing it; 3) The lawsuit is not based on the proper reasons; 4) the claim of the lawsuit have actually been fulfilled; 5) The lawsuit was filed prematurely or overdue.
b. Judgment or stipulation issued by the administrative judges before the principal dispute is examined and decided in the preparatory examination.
c. Decisionissued at the time of the examination of principal dispute. Itis a final decision. The decisions can contain :the lawsuit is disqualified,the lawsuit is not accepted, the lawsuit is rejected, or a claim is granted.

The lawsuitis disqualified, if the litigant or his attorney was not present at the trial at the specified time, both on the first and second trial in a row without giving a justifiable reason, even though the litigant had been properly called. Against the disqualified lawsuit, the litigant or his attorney is still given the opportunity to file the lawsuit once again by payingcourt cost and obtaining a new case registration number.

The administrative court judgement declared that the lawsuit is not accepted, is based on the following reasons: the lawsuit has no legal basis, the lawsuit is inappropriate, the lawsuit

is contrary to morality or public order, the lawsuit is blurred, the lawsuit does notfulfill the requirements, the object of the lawsuit is unclear. Towards this decision, a lawsuit can be filed again after it is fixed.

The court decision declared that the lawsuit is denied, is based on the following reasons: the lawsuit is clearly not the competence of the administrative court, or the lawsuit is not proven legally and convincingly. Towards the decision the lawsuit can not be filed to the court again, it is based on the principle of "nebis in idem".

The administrative court judgement declared that the lawsuit is granted, if the arguments of the lawsuit are proven legally and convincingly. The courtcan grant all the claims of the lawsuit or a part of the claims of the lawsuit. If the lawsuit is granted, the court decision can determine the obligations that have to be carried out by the defendant which includes revocating the decision or producing a new decision.

According to Article 122 of the Act no. 5 In 1986, in terms of the litigant or the defendant feels that thejudgement does not satisfy and unjustice, against the decision can be appealed by the litigant or defendant to Pengadilan Tinggi Tata Usaha Negara (Administrative Appeal Court). According to Article 131 of the Act no. 5 In 1986, if the litigant or the defendant feels that an appeal court decision does not satisfy and unfair, it can be applied for examination of the Supreme Court. Article 45A paragraph (1) and (2) of the Act no. 5 In 2004, set the limits for applying cassasion to Supreme court towards the specified cases which include :

(1) In the level of cassation, the Supreme Court adjudicate a case which fullfil qualification for an filed appeal, unless the case is limited to be filedan appeal to the Supreme Court.

(2) The excluded cases as referred to in paragraph (1) shall consist of:

a. The judgement on pretrial;

b. The criminal caseswhich is punishable by a maximum imprisonment of 1 (one) year and / or imposed with a fine;

c. The administrative cases which have the object of the lawsuit on local official decisions that its decision reach is applicable in the territory of the concerned region.

The provision causes the case which the object of the case is a local official decision can not be filed an appeal to the Supreme Court.This case will cause adverse effects on the legal protection towards justice seekers. Despite the appellate decisions have not provided a sense of justice to the litigant, but there is no an opportunity to file an appeal to Supreme Court in the level of the cassation. In this matter the administrative appeal court is required to work more professionally so that it can produce the fairest decision to the parties.

THE WEAKNESS OF THE EXECUTION OF THE ADMINISTRATIVE COURT DECISION

Person or private legal person who feel aggrieved by the government decision , can file a lawsuit to the administrative court to get a fair judgement. After obtaining the judgement, justice seeker expects that the judgement can be executed, so that the justice seeker really

obtains a real justice. Since the Administrative Court Act was enacted in 1986, and then the Administrative Court Act was changed twice, arrangements regarding as the execution of the judgement did not produce any significant changes.

In the Act No. 5 of 1986, the execution of the judgement is set in Article 116, which basically set as follows:

1) In the case four months after the binding court decision is sent to the parties, the defendant does not carry out its obligations, the disputed government decision has not have the power of binding.
2) In the case the defendant must carry out its obligations to revoke and issue a new decision; or to issue a new decision, and to pay compensation if these obligations is accompaniedwith a punishment of compensation payment, but after three monthsthe defendant does not carry out the obligations, the litigant can file a petition to the head of the court so that the court order the defendant to carry out the court decision. If the defendant does not want to carry it out, the head of the court ask it to his superior institution according to the level of the position. Two months after receiving the notice of the head of the court, superior institution should has ordered the government official to carry out the court decision. In terms of superior institution ignores it, the head of the court files it to the President as the supreme governmental authority to instruct the government official to implement the court decision.

Based on the provisions above, it can be concluded that the court decision have less power to force. The court decision which give the obligations for the official or government institution as the defendant to revoke and issue a new decision ; or to issue a new decision; and to pay compensation, if all efforts have been done until the head of court file to the President as the supreme governmental authority to instruct the officials to implement the court decision, but the court decision still not be implemented by the defendant, the plaintiff can not enjoy his victory.

The execution of the court decision set forth in Article 116 of Law no. 5 of 1986 has been amended by Law no. 9 of 2004. The amendment is motivated by the cases that many court decision was not executed by the defendant . In the Minutes of Discussion of study processes of 5 (five) Act Draft on Legal Affairs (Integrated Justice System), January 30, 2004, the Government expressed as follows:

There was the obstacle in execution of the decision of the Administrative Court, because there was no instrument to force the official to carry out the decision, so many decisions was not executed. Although the minister or the governor order the official, but the official still does not carry out the court decision, so there is suggestion that there is sanctions for officials who do not execute the court decision.

Based on the reasons stated above, Article 116 amended by the Act No. 9 of 2004 as follows:

1) In the case four months after the binding court decision is sent to the parties, the defendant does not carry out its obligations to revoke the disputed government decision, it has not have the power of binding.

2) In the case the defendant has a obligation to issue a new decision, but after 3 (three) months the obligation is not executed, the litigant can file a petition to the head of the court so that the court order the defendant to carry out the court decision.
3) In the case the defendant does not will to executed the court decision which has permanent legal force, the official government as the defendant is imposed a penalty (dwangsom) for the payment to litigant and/or administrative sanctions.
4) The government officialwho does not execute the court decision, is announced in the local mass media by the clerk, since the defendant has not executed the court decision.

The provisions of Article 116 paragraph (3) is intended so that the execution of the court decision is more powerful to be forced. In the Minutes of the draft of the Administrative Court Act, the proposal submitted by Paul Effendie Lotulung as follows:

> *If the defendant does also still not will to execute the contents of the final and binding court decision, the official concerned shall be paida penalty (dwangsom) for the payment to litigant by not closing the possibility of administrative sanctions. So if there is a new provision regarding a penalty (dwangsom) of the payment to litigant, it is required an apparatus that can carry out the execution, for example bailiff.*[7]

Based on the proposal above, in addition there are additional provisions regarding a penalty (dwangsom) of the payment on Article 116, there is also a new provision governing the bailiff. Article 39 A the Act of 9 of 2004 stated that "There is a bailiff in every administrative court". In the Elucidation of Article 39 the Law of 9 of 2004 explained that "In terms of personel of the bailiff in every administrative court is inadequate, the tasks of execution of the bailiff is assisted by replacement clerk". In the Actof 9 of 2004 does not regulate the duties, responsibilities, and working procedures of the court bailiff, so the Supreme Court issued Implementation Guidelines No. 2 Year 2005 on Procedures for Implementation of Judiciary in the Bailiff Field in the Administrative Court. Based on the Article 2 of Implementation of Implementation Guidelines No. 2 Year 2005 , the bailiff duties are:

1) Administrating the hearing call letters and the letters of notification of the court;
2) Administrating and implementing the delivery of the copy of the court decision;
3) Administrating and implementing the delivery of the case file of the appeal, cassation, and reconsideration;
4) Administrating and based on the orders of the chair of the court implementating the forceful measures against the defendant who will not voluntarily implement the court decision which have permanent legal force and/or will not carry out the decision of the postponement of the execution of court decision;
5) Making the official report of the execution of the forceful measures that the certified copy of it is submitted to the concerned parties;
6) Administrating and based on the order of the registrar of the court executing the court decision which have a permanent legal force;
7) Carrying out other duties which had been determined by the chair of the court.

7 General Secretariat of the House of Representatives, *Discussion Process toward Draft Law on the General and Administrative court*, unpublished, 2008, 670.

Based on Supreme Court Regulation above, the task to carryout the forceful measures towards the defendantwho will not voluntarily implement the court decision especially the penalty (dwangsom) for the payment to litigantis the task of administrative court bailiff. The task has not been done by the court bailiff, because the mechanism of the payments to litigant (dwangsom) and the magnitude of the payment to litigant has not been set. The change of the provisions of the execution of court decision on the Article 116 of the Act . 9 of 2004 does not give an impact in improving the power of execution of the administrative court decision.

The provision of a penalty (dwangsom) for the payment to litigant can be compared with the arrangement in the Netherlands. The provisionof a penalty (dwangsom) for the payment to litigant is set on Article 8:72 paragraph (7) General Administrative Law Act (Algemene wet Bestuursrecht) of 4 June 1994 which states that,

> *The district court may Determine that, if or as long as the administrative authority does not comply with the judgment, the legal person designated by it is liable to the payment to a party designated by it of a penalty (dwangsom) to be fixed in the judgment. Articles 611a to 611i of the Code of Civil Procedure (Wetboek Burgerlijke Rechtsvordering) apply mutatis mutandis.*[8]

The provision stipulates that the administrative officials who do not comply the judgedecision is be liable to sanctiona penalty (dwangsom) for the payment to litigant. Against this provision, the Code of Civil Procedure apply mutatis mutandis. The provision is differentfrom the Administrative Court in Indonesian legal system, there is a provision of a penalty of the payment for litigant (dwangsom) which apply for government official who does not obey the court decision, but it is not be applied the provision of Civil Procedure Law, whereas dwangsom only exists in Civil Procedure Law, so that it cause difficulties in implementing the provisions of dwangsom.

To give more power toward the execution of the administrative court decision, the provisions of Article 116 was amended by the Act of 51 of 2009 as follows:

1) After sixty (60) working days, the court decisionwhich has permanent legal force is accepted by the defendant, but the defendant does not carry out its obligation to revoke disputed government decision, it does not have the binding force again.
2) If the defendant must carry out the obligation to revoke and issue a new decision; or issue new decision, and then after 90 (ninety) days the obligation is apparently not implemented by the defendant, the litigant can file a petition to the chair of the Court,so that the court order the defendant to carry out the court decision.
3) If the defendant does not will to implement the court decisionwhich have permanent legal force, the concerned government official is given a forceful measure[9] of a penalty (dwangsom) for the payment to litigant and / or administrative sanctions.

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8 Kiiver, Philipp & Kornet, Nicole (Ed.), 2008, *Selected National, European and International Provisions from Public and Private Law*, Groningen :Europa Law Publishing, 137.

9 Elucidation of Article 116 paragraph (4) of Law no. 51 of 2009 explained, is "subject to the relevant authorities forced money" is the imposition of a payment of a sum of money determined by the judge because of his position in the ruling that stated at the time decided in favor of the plaintiff .

4) Government officials who does not implement the court decision, is announced in the local print mass media by the registrar, since the government official has not fulfilled the obligation to implement the court decision. Besides it is announced in the local print mass media, the chair of the court must file it to the president as the supreme governmental authority holder to instruct the government official to implement the court decision, and to the House of the Representative to do the oversight function.
5) The provisions regarding as the amount of the payment to litigant, the kind of administrative sanctions, and the procedures forimplementing of the payments to litigant and/or administrative sanctions is stipulated by legislation.

Article 116 paragraph (4) of the Act of 51 of 2009 stipulates that the Chair of the Court filed a case regarding government official who does not implement the court decision to the House of Representatif as a supervisory function. In fact, the House of Representative was unable to force government official as the defendant to implement the court decision. The House of Representatif just sent a letter to the government so the court decisions is implemented. If the government officials still do not implement the court's decision, no other efforts that can be made by The House of Representative to be able to force so the court decision is implemented.

Article 116 of the Act of 51 of 2009 set that the provisions regarding as the amount of the payment to litigant, the kind of administrative sanctions, and the procedures forimplementing of the payments to litigant and/or administrative sanctions is stipulated by legislation. In fact until now the rule has not been made.

LEGAL STEPS IN OVERCOMING WEAKNESSES OF EXECUTION ADMINISTRATIVE COURT DECISION.

In the Indonesian Administrative Court, the execution of the Administrative Court is handed over to the volunteerism of government official or government institution to implement the court decision. It is happened on the court decision of the form:

1) Ordering the defendant to publish a new decision
2) Ordering the defendant to provide compensation to the litigant.
3) Ordering the defendant to rehabilitate the litigant.

In the event the defendant does not carry out the the administrative court decision as mentioned above, in this case the litigant can not fully enjoy his victory, because the rights of the litigant or justice seekers are not fulfilled as requested in the lawsuit. This is due to the absence of forceful measures against the government official or government institution as a defendant who does not carry out the adminsitrative court decision.

In the Act of 9 of 2004 in conjunction with the Act of 51 of 2009 has set about the forceful measures or dwangsom to give more power to the executionof the administartive court decision. Article 116 paragraph (4) of the Act of 9 of 2004 states :

If the defendant does not will to implement the court decisionwhich have permanent legal force, the concerned government official is given a forceful measure of a penalty (dwangsom) for the payment to litigant and / or administrative sanctions.

Further more the Elucidation of the Article 116 paragraph (4) of the Act of 9 of 2004 states that,

Referred to "the concerned government official imposed a penalty for payment to litigant (dwangsom)" in this provision is the imposition of the form of payment of a sum of money determined by the judge because of his position that is specified in the court decision which decides to grant the claims of the litigant.

The provision has not been equipped with the further implementation regulation about the amount of dwangsom and mechanism of a penalty of the payment to litigant (dwangsom). It cause that the provision of dwangsom can not be applied to the government official or government institution who does carry out the administrative court decision.

With the enactment of the Act of 51 of 2009, there were changes to Article 116 of the execution of the Administrative Court Decision.In Article 116 paragraph (4) and paragraph (7) of the Act of 51 of 2009 states that,

(4) If the defendant does not will to implement the court decision which has permanent legal force, the concerned government official is imposed a forceful measure[10] of a penalty (dwangsom) for the payment to litigant and / or administrative sanctions.

(7) The provisions regardingthe amount of the payment to litigant, the kind of administrative sanctions, and the procedures forimplementing of the payments to litigant and/or administrative sanctions is stipulated by legislation.

Up to now legislation regardingregardingthe amount of the payment to litigant, the kind of administrative sanctions, and the procedures forimplementing of the payments to litigant and/or administrative sanctions has not been made, so that the provision of a penalty (dwangsom) for the payment to litigant has not been applied toward government official or government institution who does not implement the decision of Administrative Court.

Related to the implementation of a penalty for the payment to litigant or dwangsom, Ujang Abdullah said,

In practice the administrative court judgesfrequently advise to litigant so the litigant does not includethe request of forceful measures in petitum based on the reason that the provisions of Article 116 paragraph (4) of the Act of 9 of 2004 has not been equippedwith the implementation regulation (non-executable). However,frequentlythe litigants did not want to obey the advice and still put forceful measures in the petitum of the lawsuit with the expectation that the defendant would immediately implement the contents of administrative court decision. Administrative court decisions mostly rejectthe petitum of forceful measures on the grounds that there is no implementation rule, so that forceful measures can not be applied.[11]

10 Elucidation of Article 116 paragraph (4) of Law no. 51 of 2009 explained, is "subject to the relevant authorities forced money" is the imposition of a payment of a sum of money determined by the judge because of his position in the ruling that stated at the time decided in favor of the plaintiff .

11 Ujang Abdullah, A., Year Unknown, "Penerapan Upaya Hukum Paksa Berupa Pembayaran Uang Paksa Di Pengadilan Tata Usaha Negara",Paper presented in the book Farewell to Supreme Court JudgeIbu Titi Nurmala Siagian, SH., MH, 8.

The provision of dwangson that can not be executed causes the administrative court can not provide optimal legalprotection for justice seekers. In this case justice seekers only formallywin in the court, but the court decision can not be implemented, and in fact the rights requested in the lawsuit are not fulfilled even though the claims of the litigant is granted by the adminsitrative judges.

The provisions regardingthe amount of the payment to litigant, the kind of administrative sanctions, and the procedures forimplementing of the payments to litigant and/or administrative sanctionshave not been enacted, because the government seems to be confused about the substance will be set in the regulation. It is not surprising because dwangsom is a provision taken in the civil procedure law, so it can not automatically be applied in the administrative procedure law. In civil procedure law, the basic of the implementation of dwangsom institutions in judicial practice in Indonesia is a reference to Article 606 and Article 606 b Rv, which reads as follows:

Article 606 aRv:

Throughout a judge decision containsanother thing than paying a sum of money, so it can be determined that every time the convicted did not comply with the judge decision, the condemned must hand over a sum of money that the amount of it is set out in the judge decision, and the money is called dwangsom.

Article 606 b Rv:

If the decision is not fulfilled, so the opposing party of the condemned authorize to carry out the decision of the amount of money (dwangsom) that has been determined without obtaining a new right base according to the law.

RV is no longer applicable, but the provision was still needed so dwangsom is still used in practice by law enforcers. To carry out dwangsom, Harifn A. Tumpa said,

If the convicted does also still not implement dwangsom voluntarily, so the forced execution is done. The execution of dwangsom is done by verhaal executie (foreclosure and auction).[12]

Based on the opinions, to carry out the payments of dwangsom, all provisions of civil law can be applied, including foreclosure. It can be done because the parties in civil law is responsible and act as a private person. It is difficult when dwangsom will be applied in the Administrative Court. Difficulties arise when determining that a defendant who is responsible for the payment of a sum of money is responsible as a private or as an state official, it cause difficulties whether dwangsom is applied to private wealth of government official or the state wealth.

In connection with the government official responsibilities, Supandi said,
When an government official carry out its duties,he currently carries out the role of the state. Therefore, when the implementation ofthe roles (duties)causes the loss of person (people) through the length of the implementation of the roles (duties)is based on the law, it is properly if the payment of the loss suffered by the person / people are charged to the

12 Harifin A. Tumpa, 2010, *Memahami Eksistensi Uang Paksa (Dwangsom) dan Implementasinya di Indonesia*, Cetakan Kedua, Jakarta : Kencana Prenada Media Group, 58.

State because it is classified as "official fault". It is different when an government official does not comply with the judge decision (which can be equated to not obey the law), so he was not actually perform the role of the State (ideally performing the role of the state is implementing the provisions of the law), and therefore the risk of non-compliance with the law can not be charged to the financial state but should be borne in person who is being served, because it is a "personal fault".[13]

Related to the opinion stated by Supandi, it can be concluded that if the act of the government official not implementing the court decision is the act of the government official as a person (not as an officer), so it is causes that the government official should be personally responsibletoward the obligation to pay a sum of money because the court decision is not implemented. It is different from the opinionexpressedby Irfan Fachruddin as follows:

Dwangsom is provision which is applied to government official who does not comply with the the administrative court decision. In the event the government official does not implement the administrative court decision, the government official is responsible because of his position, he is not be responsible as a person, so it is more appropriate that the concerned government official is imposed administrative sanction. It is based on the premise that an government official has a basis (a reason) why he does not implement the decision.[14]

Based on the opinion above, it shows that it is important to make provision set out the administrative sanctions, which is imposed on the government official who does not implement the court decision.

In the Dutch legalsystem, in applying the provision of dwangsom in administrative court, it is usedthe provisions which are set out in the Civil Procedure Law. It's stated by Adriaan Bedner as follows:

In acting and issuing a court decision, an government official acts as a government official and not as a person, so the government official can not be held responsible as a person but as a state official. In the case of the government official as defendant does not carry out the adminitrative court decision, so the government official is responsible as a state official. To apply the provision of dwangsom for government official who does not implement the court decision, so the provisions of civil procedure law is applied including foreclosure. In this case the seized goods is the goods which is owned by the government, because the government official is responsible for his position. In the Netherlands, it is rarely happens because the government official generally comply with the administrative court decision.[15]

If the Administrative Court Act still retains the provision of dwangsom, so that the administrative court decision is carried out by the government official or institution government, the provision of dwangsom should be fully implemented as in the Civil Procedure Law, including foreclosure, so dwangsom can actually be used as an instrument

13 Supandi, "Problematika Penerapan Eksekusi Putusan Peradilan Tata Usaha Negara Terhadap Pejabat Tata Usaha Negara Daerah", Workshop Paper, Jakarta, Agust 28th, 2004, 2-3.

14 The result of the interview with supreme court judge, Irfan Fachruddin.

15 The result of the interview with Adriaan Bedner.

to force the authorities to implement the administrative court decision, both a personal responsibility anda responsibility as a government official.

In terms the government officialis responsible as the personal, the salary of the government official can be deductible to fulfill the obligation to pay dwangsom, and in terms the salary is not sufficient, it can be continued with the confiscation of officialpersonal wealth. In such case, the government official would be afraid of the penalty,thus the government official is forced to implement the court decision so he is not exposed to the penalty.

In the case the official is responsible as government official, it will be done the seizure of the government assets to satisfy the payment of dwangsom. In the case the official will be judged to have a bad performance because it cause the loss of the state, so it will be followed by administrative sanctions. In such case the government official would beafraid toward the penalty (dwangsom), thereby the government official will obey the administrative court decision so the government official is not exposed to administrative sanctions .

The opinion is based on the premise that dwangsom is an attempt to force so that the administrative court decision can voluntary be enforceable by the government official or government institution. In the case dwangsom which is an attempt to force also can not be excuted, so the provision of dwangsom becomes meaningless. Without equipped with provisions and institutions that can force to apply dwangsom, it is better that the provisionof dwangsom is abolished.

CONCLUSION

Based on the descriptions above, it can be concluded as follows:

a. The administrative court decision could not be implemented because there is no an coercion instrument toward a defendant who does not will to voluntarily implement the decision. The provision of *dwangsom* could not be implemented because there is no regulation regarding the implementation mechanism of the penalty (*dwangsom*).
b. It should be given an instrument so that the administrative court decision can be forcefully implemented. In terms the provisionof*dwangsom*is be retained, it must be equipped with the instrument to implement dwangsom, such as the instruments available in civil procedure law.

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THE CHALLENGES ON UPHOLDING HUMAN RIGHTS TO ACHIEVE THE SOCIAL JUSTICE IN INDONESIA

(FadillahAgus)[1]

ABSTRACT

The role of the law enforcement officials in the achievement of social justice requires the implementation of the legal approach and human rights approach consecutively. Due to some mistakes within the Law on Human Rights and the Law on Human Rights Court, the law enforcement officials are misperceive on human rights which then lead to less implementation of human rights in the law enforcement measures. The latterless supportiveto the achievement of social justice in Indonesia.

Introduction

Social justice requires the fulfillment of human rights, therefore human rights is a "conditio sine quanon" of social justice. Third principle of "Pancasila" as well as some Articles on the Indonesia Constitution 1945 affirms both social justice and human rights are essential for Indonesia.

Although it has been affirmed since the establishment of Indonesia in 1945, the mainstreaming of human rights in the life of the nation emerged more prominent only after the reform order started in 1998. Therefore, the implementation and application of human rights encounterby constraints and challenges. Consequently, the later led to non-achievement of social justice which requires the application of human rights in any aspect of the life of the nation including in the field of law enforcement. The objective of Law is justice, certainty and expediency. In this regard, instead of seek for legal justice, law enforcement efforts should seek both forlegal justice and social justice.

In addition to misunderstanding and misperception, those human rights constraints and challenges are structural and fundamental in nature. Law enforcement officials, i.e. police, prosecutor and judge, are also facing the same constraints and challenges. Therefore they very rare apply human rights in performing their duties. Moreover, they rather emphasize

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on legal approach resulted to a legal justice which is not always contribute to social justice. Yet, to complement human rights approach in the execution of their duties will be resulted to legal justice and social justice in parallel.In this regard, the State should address those human rights constraints and challenges face by the law enforcement officials.

Human Rights Discourse in Indonesia

Since the beginning, the founding fathershad set Articles on human rights in the 1945 Constitution. These even drafted prior to the declaration of the Universal Declaration on Human Rights by the United Nations 1948. The Interim Constitution 1950 expanded the Articles on human rights, and by the Presidential Decree of 1959 the Constitution of 1945 is reenacted. However, during these period of times, human rights has never been a mainstream in the life of the nation.

Soeharto administration and his new order regime marked with some serious human rights violations. Therefore, when Soeharto toppled down by the social power, the human rights issues is one of important agenda for the reform order. Therefore human rights mainstreaming is started in the reform order .

The human rights mainstreaming began with the issuance of Peoples Assembly decision number XVI of 1998 on the Human Rights Charter. The year after, the Law number 39 of 1999 on Human Rights is enacted. President Habibie, who replaced President Soeharto, took some policies in favor with human rights including to open the freedom of the press which never been happened during Soehartoadministration.

The Law 39 of 1999 is the first Law on Human Rights after more than 50 years the country independence. In addition regulates substanceson human rights, the Law also stipulates a stronger legal basis for the National Commission of Human Rights. Previously the Commission was based on the Presidential Decree.

Furthermore, the year after, Law number 26 of 2000 on Human Rights Court is enacted. These Law governs the establishment of the Human Rights Court, either permanent or ad hoc, which seated in the District Court of Medan, Jakarta and Ujung Pandang. The jurisdiction of the Court is to adjudicate crimes of genocide and crimes against humanity.

Following its formation, the Human Rights Court performed its duty relatively fast. It has been adjudicated three cases i.e. the cases of East Timor, TanjungPriok and Abepura. But after those three cases, theHuman Rights Court is stagnant. Meanwhile the National Commission of Human Rights had completed the pro justicia pre-investigation ("penyelidikan pro-justicia")of some cases, among others,Talangsari case in Lampung, Wasior and Wamena cases in Papua, Forced Disappearances of Activists in 1998 case and the case of Indonesia Communist Party ("PKI"). But the Attorney General has not agreed yet to the result of pre-investigation conducted by the Commission, thus the cases could not bring before the Human Rights Court so far.

The seriousness of human rights mainstreaming also shown by the Amendment of 1945 Constitution with the insertion (new) Chapter XA on Human Rights; Article 28A up to

Article 28 J. Besides, some Convention on Human Rights ratified by Indonesia, including the ICCPR and the ICESCR which ratified in 2010. Furthermore, started in 1998 the Government launched National Plan of Action on Human Rights ("RANHAM"). RANHAM is a fiveyears working plan involving various stake holders associated with human rights issues. The administration Jokowi continues RANHAM, and even more, the human rights agenda is included within the "Nawacita" Jokowi. All five Presidents of the reform order, i.e. Habibie, Gus Dur, Megawati, SBY, and Jokowi, has their own RANHAM.

The National Commission of Human Rights ("Komnas HAM")has its own role in upholding human rights. The role become more significant as the Commission got a stronger legal basis from the Law 39/1999. In the field of monitoring, the Commission publish annual report on the human rights violations allegations received by the Commission from the society.The annual report of 2010 - 2015 revealed that the law enforcement institutions, i.e. the Police, Attorney office and the Court, are included in the institutions that receive the most complaint about human rights violation allegations.[2]

However, instead of human rights violation allegations, the report is misunderstood and misperceived by the public as the report on human rights violations committed by the respective institutions. Therefore the press publisha misleading news by quoting, for example. "annual report of Komnas HAM revealed that the Police is the most institution committed human rights violations", which never been corrected by Komnas HAM.In addition, the validity of the report is doubtful as the number of complaint received donot represent the number of cases. This happened because some cases were complaint twice or even more by different peoples and Komnas HAM registered and included them all into the annual report.

Apart from public misunderstanding and misperception of the report as well as the doubtful of its validity, it should be underlined that the law enforcement agencies are the institutions that receive the most complaint about human rights violation allegations. It means there are human rights problems in the law enforcement measures. .

The mistake of human rights discourse and its Implication to Social Justice

There are conceptual mistakes and misperception or misunderstanding of the Law 39/1999 and the Law 26/2000 which implicates to the achievement of social justice in Indonesia,

The first mistake is about the definition of human rights violation as defined in Article 1 section 6 of the Law 39 of 1999 which stipulates human rights violations can be committed by an individual or group of individuals including state apparatus.. Theterminology within the Law 39 is different with the terminology widely understood by the international community; human rights violations can be committed only by State and those imputable to the State.

2 For details see http://www.komnasham.go.id/kategori-laporan/tahunan
Besides shares a common concern, the report can be seen as positive where the society is more open in communicating human rights issues. It is therefore essential if the annual report complement with a report on the follow-up measures that have been taken by the Commission and related agencies especiallythose which are being reported.

Further mistake is about the formulation of Article 1 section 6 which seem to follow the formulation of the Articles in the Criminal Code. The term of human rights violation does not necessary same with the criminal act. According to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the human rights violation is acts and omissions (imputable to the State) that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

The common mistake in Indonesia is whenever someone committed criminal act, such as murder,subsequently he/she will automatically qualify by the people as criminals and the perpetrator of human rights violation at the same time. Or,anexample in the private law, whenever someone illegally owned or occupied the land of others then he/she will qualify by the people committed tort (or "onrechtmatigedaad" in Dutch) and the perpetrator of human rights violation.

The mistake continues when the Law number 26 of 2000 on Human Rights Court enacted. It can be said, somehow, these Law initiated by the government as the respond to the strong tendency of the international community to bring the East Timor case before an international tribunal such as the international criminal tribunal for the former Yugoslavia (ICTY) or ICTR. Instead of be tried before the international criminal tribunal, Indonesia opted to adjudicate the case before a national law enforcement mechanism, i.e. the Human Rights Court.

The Human Rights Court (permanent and ad hoc) has the jurisdiction to adjudicate the crimes of aggression and crimes against humanity which according to the Law 26 of 2000 qualify as the gross violation of human rights ("pelanggaranberat HAM").[3]e, According to the Law 26, the Human Rights is authorize to impose sentences, with minimum ten years imprisonment and maximum life sentence. In this regard, the (Indonesia) Human Rights Court is different with other human rights court or similar institutions that existed in other part of the world. The European Human Rights Court, for example, is not authorizes to impose penal sanction. By reading thoroughly the whole Articles of the Law 26 of 2000, it can be concluded that the (Indonesia) Human Rights Court is a criminal tribunal in nature. The drafter of Law 26 did a mistake by mixed up the concept of human rights court and the concept of international criminal tribunal.

3 Seems there is confusion within the Law 26/2000 on the notion of the international crimes or the most serious crimes of internationalconcern and the notion of the gross violations of human rights. The first covers genocide, crimes against humanity, war crimes and later included aggression, whereas the notion of gross violation of human rights covers more broad range of human rights abusesAccording to the conclusions of the Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, which took place between 11 and 15 March 1992, "the notion of gross violations of human rights and fundamental freedoms includes at least the following practices: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, disappearances, arbitrary and prolonged detention, and systematic discrimination". See Jennifer Zerk, Corporate liability for gross human rights abuses Towards a fairer and more effective system of domestic law remedies : report prepared for the Office of the UN High Commissioner for Human Rights, page 25.

The above mentioned mistakes of the Law 39 and 26 lead to misperception of the law enforcement officials who perceived human rights is all about criminal law and consequently it is not related to other branches of law such as the private law and the state administrative law.Moreover, they perceived all human rights matters fall under the criminal law court and therefore the judges of the private, state administrative, labor courts doesn't need to consider human rights in performing their duties.

The mistake further continues when the government launched the draft new penal code which intended to substitute the existing a more than 150 years old penal code heritage from the Dutch.[4] The chapter IX of the second book of the draft penal code regulates about human rights crimes. These chapter consists of regulations on genocide, crimes against humanity, war crimes, command responsibility and torture. The draft penal code just replicate and amplify the mistakes of the Law 39 of 1999 and the Law 26 of 2000.[5]

Those mistakes mentioned above lead to misperception among the law enforcement officials and resulted to less application of human rights in the fulfillment of their duties although the casesthat they are dealing with are closely related with human rights. Therefore most of the Court verdicts are too legalistic and less supportive to social justice.

The law enforcement officials are oblige to bring justice. At the same time, as the State apparatus they also oblige to respect, protect and fulfill the human rights. It is necessary for them to implement human rights in bringing justice to the society. In this regard, the legal approach which commonly used by the law enforcement official need to be equipped with human rights approach. By doing so, they support the achievement of social justice.

The author argue that the legal justice does not always provide positive impact to the social justice whereas within the social justice is included the legal justice. In this regard, the law enforcement officials should complement themselves with human rights approach and seek for a socio-legal justice solution rather than legal justice solution only. Furthermore, the understanding on human rights concepts and its application in their function is required. Moreover, they should have a strong human rights sense whenever they deal with the human rights related cases so it will not turn out as a social injustice which could further lead to be a security or even political problem.

There are cases where the law enforcement officialswere applying legal approach only which the led to social injustice and social unrest. One of example is about land dispute occurred in Mesuji, South Lampung, which then became social tension. In this case, Police was only applying the criminal law approach and was handling the case at the downstream as a pure criminal case. In contrary, the community were in the opinion that their basic rights violated by the State and business enterprises. The case ended up with violent and victims, both from the community and the state apparatus. The violence and victims can be avoided if the Police applying human rights approach in handling the case.

4 The draft consists of more than 700 Articles and now under the discussion between the Government and the Parliament.

5 See FadillahAgus, Milestones, flaws in draft penal code, the Jakarta Post, March 27, 2014.

The Mesuji case is rooted to the economic and social rights as enshrined in the International Covenant on Economic Social and Cultural Rights (ICECSR). The community accused that their social and economic rights violated by the State and business companies. The state agencies being accused are, at least, the ministry of forestry and environment, the local government and the land management institution. The case became complicated with the involvement of the business enterprises. The social and economic rights violations were then complemented by the civil and political rights violations as the Police was using force disproportionately.

In handling the Mesuji case, firstly, police should restraint from the use of force in their policing actsand assess the problem at the upstream as well as encourage related stakeholders to solve the problems. They should urge the companies involved appliesthe UN Guiding Principles on Business and Human Rights.Accordingly, the Police should promote the concerned government institution to solve the human rights problems. The Police may use it force, if necessary, to those who are criminals and those who take advantages from the situation. In short, the case of Mesuji is human rights problems which turn out to became legal problem. Thereforethe human rights approach should implement along with legal approach.

Land and natural resources related conflicts are growing significantly, peoples are used to read the news about mining, plantation and forestry related conflicts occurred between business companies and locals or indigenous people. Many of those conflicts ended-up with the violence and social tension, some of them went to the Court. There is no proper data available but it can be assumed that human rights approach was not implemented in such conflicts. To underlined, in handling such cases, the legal approach should complement with the human rights approach so both legal justice and social justice can be achieved.

The lesson learnt of Aceh situation that the failure on the fulfillment of economic and social rights led to social injustice which further led to growing unrest and later resistance from the locals which then ended up with claim for the State's secession. So far the peace achieved in Aceh by the signing of Helsinki Memorandum of Understanding between the Government of Indonesia (GoI) and the Free Aceh Movement ("GAM"). However, there is no guarantee that the fragile peace endeavored will be eternal as there are disputes between GoI and GAM on the implementation of Helsinki MoU, among others, in the field of economic and social rights.

The fulfillment of human rights will impact to social justice. Gramme& Diamondargue, social justice is the relative distribution of rights, opportunities and resources within a given society, and it deserves tobe regarded as fair and just.[6] Furthermore, according to Mathew Robinson, social justice exist if all people share a common humanity and therefore have a right to equitable treatment, reviews their support for human rights, and a fair allocation of community resources.

6 See, DoutjeLettinga& Lars van Troos (editors), "Can Human Rights Bring Social Justice? :Twelve Essays", Amnesty International Netherlands, October 2015, p.9

Both opinions reflects the core issue of the International Covenant on Economic Social and Cultural Rights (ICESCR) where Article 2, paragraph 1 governs: Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, Including particularly the adoption of legislative measures.

Furthermore, Ignacio Saiz and Alicia Ely Yamin are in the opinion that human rights and social justice aspirations are inseparable or indivisible[7]. They argue human rights is not only about civil and political rights but also included economic, social and cultural rights. The lesson learnt from Aceh confirmed the opinion of Ignacio Saiz and Alicia Ely Yamin.

In contrary, AryehNeierarguethathuman rights is concerned with restraints on the exercise of power whereas social justice is concerned with the redistribution of wealth and resources.[8]Therefore AryehNeierin the opinion that human rights and social justice is distinct each other.

The author disagree with AryehNeier and support to the views of Ignacio Saiz and Alicia Ely Yamin accordingly. State is oblige to respect, protect and fulfill the all human rights as enshrined in international human rights constitution. Article 71 and 72 of the Law 39 of 1999 affirms the obligation of the government covers all rang of human rights.Article 71stipulates the government shall respect, protect, uphold and promote human rights as laid down in this Act, other legislation, and international law concerning human rights ratified by the Republic of Indonesia. Furthermore Article 72 governs the duties and responsibilities of the government as referred to in Article 71, include measures towards effective implementation in law, politics, economics, social and cultural aspects, state security, and other areas. Thus, Articles 71 and 72 affirms the equal importance of all human rights, i.e. civil, political, economic, social and cultural rights.

The following example shows that human rights approach does works, The court case is between the Government of Indonesia and the Holcim Indonesia Corporation versus the Community (826 households) in Blitar, East Java.[9]Despite the Supreme Court verdict stated that the community doesn't has the legal standing over the case, but, through a National Contact Point mechanism under OECD Guidelines for Multinational Enterprises, based in Switzerland, the community (represented by NGOs) managed to bring Holcim Indonesia to a mediation process and seeks for a win-win solution. The Blitar local government is now mediating the community and Holcim enterprise. In this case, the Court applied legal approach while the National Contact Point mechanism applied human rights approach.

7 Ignacio Saiz and Alicia Ely Yamin, "Human rights and social justice: the in(di)visible link",See http://www.opendemocracy.net/openglobalrights/ignacio-saiz-alicia-ely-yamin/human-rights-and-social-justice-indivisible-link

8 Ignacio Saizand Alicia Ely Yamin, ibid. For further details opinion, see Aryeh, "Human Rights and Social Justice:SeparateCauses", in DoutjeLettinga& Lars van Troos (editors),op.cit., p. 47 – 51.

9 For details of the case see http://elsam.or.id/2015/04/demanding-responsibility-of-holcim-ltd-on-taking-over-ringinrejo-village-communitys-right-to-manage/

National Contact Point mechanism under the Organization for Economic and Cooperation Development (OECD)[10] is one of mechanism to settle problems on business and human rights. OECD consists of 35 member States, most of them are developed countries including Switzerland where the Holcim Headquarters based. Since 1990's the international community introduce a remedy mechanism to settle the human rights problems caused by the business enterprises activities. In this regard, the United Nations launched the United Nations Guiding Principles on Business and Human Rights. Most of multinational enterprises committed to implementthose mechanism.

Conclusion

The law enforcement could contribute better to the achievement of the social justice if they implement both legal approach and human rights approach. Those two approaches needed because the achievement of the legal justice does not always positively impact to the social justice. In this regard, too legalistic approach might led to social injustice and even social unrest and tension.Therefore, a comprehensive understanding and the capability to implement human rights of the law enforcement officials is required.

Some mistakes within the the Law 39 of 1999 and the Law 26 of 2000 caused the misunderstanding and misperception of the law enforcement officials on human rights. They perceive human rights are all about penal law and less related with other branches of law accordingly. Those lead to the situation where there is less implementation on human rights in the law enforcement measures. The latter is less supportive to the achievement of social justice. Therefore the State should address such mistakes to promote the achievement of the social justice. .

10 OECD consists of 35 member States, most of them are developed countries including Switzerland where the Holcim Headquarters based

THE POLICY OF WATER RESOURCES MANAGEMENT BASED ON SYNCHRONIZATION OF AUTHORITY OF WATER RESOURCES MANAGEMENT IN ORDER TO ACHIEVE SOVEREIGNTY OF WATER RESOURCES

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ABSTRACT

The Basic right to water is a part of human right. Therefore, any concession on the water should not interfere and negate the people's right to water. With the entry into force of the ASEAN Economic Community (AEC), water resources management policy in Indonesia is directed to achieve the sovereignty of water resources under the principle of sustainability development. The cancellation of Law No. 7 in year 2004 on Water Resources by the Constitutional Court of Republic Indonesia on Court Verdict Number: 85 / PUU-X / 2013 also have legal consequences for the cancellation of six government regulations as the implementing of Law No. 7 of 2004 on Water Resources. Furthermore, re-enacting Law No. 11 of 1974 concerning on Irrigation to avoid any legal vacuum (rechtvacuum). However, the paradigm of this regulation is irrelevant applicable at the present. This article aimed to find the synchronization of authority of water resources management and to minimize conflicts of authority between the central government and the local government. This article method is a legal research that *the first* the statute approach involved the regulations and *the second* the conceptual approach includes opinion of scholars. As conclusions, the synchronization of authority of water resources management by the Government and Local Government can be assessed based on the concept of right to control State, the concept of authority on the management of water resources and the concept of basic rights to water, as well as some of the laws and regulations related in order embody the sovereignty of the water resources.

Keywords: *the Government Policy, The Synchronization of authority, the management of Water Resources*

1. Introduction

The right to obtain clean water is a basic human right that is bestowed by the Almighty God so that water become public (res commune), which is a right held by the community together as stipulated in the International Covenant on Economic, Social and Cultural as diratifkasi in Act 11 of 2005 on ratification of the International Covenant On Economic, Social And Cultural Rights (International Covenant On Economic Rights, Social and Cultural).

Water is as one of **the potential of natural resources** owned by a region is an integral part of human life. Water scarcity is a major issue in the world today. Water is **blue gold** which became a bone of contention between the people in many countries by transnational corporations owned by developed countries.[1]

> *Indonesia has the ranks of fifth in the world regarding on the potential water resources that means Indonesia has water resources with a number of around 3,200 billion cubic meters were obtained from 7.956 rivers and 521 lakes. New water resources can be utilized about 25 percent for the supply of raw water, irrigation water and the needs of urban households and industry.*[2]

There are a lot of problems regarding the basic right to water, *firsty,* it is difficult to get clean water worth nearly faced by all countries in the world due to the drying up of sources of spring water caused **massive damage to the environment by human activity.** *Secondly,* **privatization of water management by private sector** who caused the price of water more expensive This brings the impact of discrimination on the ability to access the need for water. That is, there is the principle responsibility of the state is being violated in terms of environmental management, especially with regard to water resources here, and that the principle of fairness intra-generation.

> *Surabaya faces serious problems specially on clean water, both in terms of quantity and quality. In terms of* **quantity**, *Perum Jasa Tirta Surabaya predict 2025 will be a deficit of clean water. In terms of* **quality**, *although the production of water of PDAM has meet drinking water quality standards, but the same quality is not up to the customer marked by numerous complaints received during this time.*[3]

The portrait of private sector involvement in water resource management increased the length problem of people's access to clean water. It is described as follows,

> *According to Gleick at all., the shape of privatization have various types, from which it is only partially transferred to the private sector, to the form of privatization where the roles, responsibilities, and even government ownership be eliminated entirely. How to break it also vary, depending on how the arrangements, contract forms and models. By definition, the privatization of water is defined as a form of transfer of part or all of*

1 Tim Kruha, *Kemelut Sumber Daya Air Menggugat Privatisasi Air Di Indonesia,* LAPERA Pustaka Utama bekerjasama dengan KruHa, Yogyakarta, Maret 2005, v.

2 Mohammad Hasan, makalah dalam kegiatan seminar Pembangunan dan Pengelolaan Bendungan Tahun 2012 dengan tema Pengembangan Infrastruktur Bendungan yang Berkelanjutan yang diselenggarakan oleh Komite Nasional Indonesia untuk Bendungan Besar (KNI-BB), 5 September 2012), di Jakarta.

3 Deni Kusumawardhani, *Valuasi Ekonomi Air Bersih Dl Surabaya (Studi Kasus Pada Air PDAM)*, Laporan Akhir Kegiatan Penelitian Hibah Disertasi Doktor, Lembaga Penelitian Dan Pengabdian Kepada Masyarakat Universitas Gadjah Mada, Yogyakarta, 2010, hal . iii

the assets of public companies that manage the water resources in the hands of private parties. It also includes the notion of private management even though ownership of assets still on government.[4]

The privatization of water management started since the Order Baru. At least three foreign private company got the concession to manage water. In 1998, for example, PAM Jaya to give concession for 25 (twenty five) years to Lyonna-Ise and Thames to manage water in Jakarta, starting from the operation, maintenance and withdrawal until the determination of the price. Water management concession awarded to Biwater Batam PDAM and PDAM Sidoarjo to United Water.[5]

The privatization of water as stated in Law No. 7 of 2004 on Water Resources largely due to "interference" in the World Bank's water sector reform, which aims to encourage private sector involvement in the management and commercialization of water resources. According to the World Bank in his paper entitled "Improving Water Management Reosurces (1992) the availability of cheap and free water is very uneconomical and inefficient. Therefore, people have to pay for the water used. Moreover, especially poor citizens who need a variety of options in order to get the service according to their ability to pay.[6]

Furthermore, management of water by a number of Badan Usaha Milik Daerah that cooperation with the private sector also has not been able to demonstrate the relevance of basic services improved access to clean water for the community. By raising water tariffs have not proven capable of providing good quality clean water for the community. The other hand, the problem of overlapping authority to manage water resources in several regencies in Indonesia between the General Company (Perum) Jasa Tirta and Regional Water Company (PDAM). In the end it is the people who will be the victim to the increasingly high cost of production of drinking water held by Perum Jasa Tirta and PDAM, but the quality is very far from expectations.

The next problem that arises is where the role and responsibilities of the state in the fulfillment of basic needs on the water, when all the affairs and the implementation of management authority over water resources is delegated to the BUMN, BUMD, private, entity, or individual. Whereas the right to water is the most basic needs that must be guaranteed the state, and not solely with respect to the goals of prosperity in the economic sense, but in terms of conditions that determine the fundamental human dignity, the right to life, and the quality of health.

The state must facilitate access and sustainable resources, non-discriminatory, and secure in accordance with national legislation and international as well as protect the assets that are important for the survival of the community, the state is also obliged to respect and protect over resources such as land, water, forests, fisheries and livestock without discrimination.[7]

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4 Tim Koalisi Rakyat Untuk Hak atas Air, *Kemelut Sumber Daya Air,* Lapera Pustaka Utama, Yogyakarta, 2004, h. 4.

5 Suhardi Suryadi, *Hak Atas Air Pasca Putusan MK,* Kompas, Selasa, 24 Maret 2015.

6 *Ibid.*

7 Alfredo Sfeir-Younis et. al., *Pangan Dan Hak Asasi Manusia Dalam Pembangunan*, Terjemahan dari Buku *Food And Human Rights In Development* Penerjemah Henry Thomas Simarmata, Terbitan Indonesia Human Rigrhts Committee for Social Justice, Jakarta 2011. Hal. 826-827.

Based on explanation above, a number of representatives of community groups filed judicial review of Law No. 7 Year 2004 that is considered contrary to the Constitution NRI 1945. Furthermore, on February 18, 2015 Decision of the Constitutional Court in the Case Number 85 / PUU-X / 2013 canceled the overall enforcement of Law No. 7 of 2004 on Water Resources and setting water rights through government regulation, namely :

1. Government Regulation No. 20 in year 2006 on Irrigation;
2. Government Regulation No. 42 in year 2008 on Management of Water Resources;
3. Government Regulation No. 43 in year 2008 on Groundwater;
4. Government Regulation No. 38 in year 2011 on the River
5. Government Regulation No. 73 in year 2013 on Swamp,
6. Government Regulation No. 16 in year 2005 on the development of Drinking Water Supply System;

Furthermore, the fulfillment of basic needs on the water is the most basic needs that determine human dignity, right to life, and the quality of health, so it must be guaranteed by the state as stailated in the constitution NRI 1945 The existence of Act No. 7 Year 2004 stipulated more water than the strengthening of the economic value and social function. That condition has the potential to create conflicts of interest between sectors, regions and the various parties concerned with water resources and overlapping authority to manage water resources. Constitutional Court Decision No. 85 / PUU-X / 2013 provide new hope in the regulation of water resources management, especially regarding the synchronization of water resources management authority with justice and legal certainty in order to achieve soverignty water resources.

2. Legal issues

Based on this description above that the legal issues of this article is the authority government in managing water resources in Indonesia as an effort to meet the basic needs of society and realize the sovereignty of water resources.

3. Methodology

This article is using a normative juridical approach that involves statute approach and conceptual approach. The statute approach is the approach that taken to examine all laws and regulations relevant to the legal issues that are being addressed.[8] The scope of the statute approach described that the primary legal materials collected is regulations relevant to the legal issues raised. While the conceptual approach that is the approach derived from the views and doctrines that developed in the jurisprudence. By studying the views and doctrines of jurisprudence, researchers will find the ideas that gave birth to notions of law, legal concepts, and principles of law relevant to the issues faced.[9]

8 Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana Prenada Media Group, Jakarta, 2005, p. 93.
9 Ibid, pp. 95.

4. The Analyses of Legal Issues

Law No. 7 in year 2004 on Water Resources have not been able to strengthen the role of the state in order to meet the basic needs of the water based on the principle of water resource management functions, that align social, environmental, and economic opening up the possibility of privatization of water resources management in Indonesia.

In this case the privatization of water gives impact discrimination on the ability to access the need for water. Privatization would drive most people can get quality drinking water, while most of the others are difficult to access and reach out appropriately. That has meaning that is the principle state responsibility is being violated in terms of environmental management, especially with regard to water resources here, and that the principle of fairness intra generations.

The State's Right to Control the Water

In essence, the concept of the state's right to control refers to the state responsibility for the basic rights of its citizens are aligned with state goals to achieve public welfare. It is considering Indonesia as a welfare state as stipulated in the Constitution NRI 1945.

The Concept of Welfare State in Indonesia

According Espring-Andersen, the welfare state refers to the active role of the state in managing and organizing the economy which also includes the state's responsibility to ensure the availability of basic welfare services in a certain level for its citizens.[10] In line with the basic welfare services, Ross Cranton was quoted is as saying by Safri Nugraha define the welfare state as a country that determines a minimum standard of social welfare. In many countries, the essence of the welfare state burden on the minimum standards guaranteed by the state, namely: income, food, health, housing and education.[11]

There is a belief of the Indonesian nation stated in the Constitution NRI 1945 that Indonesia is a welfare state . One of them mentioned in the preamble of the Constitution NRI Year 1945 which clearly determines that one of the states idee State of Indonesia is to promote the general welfare.[12]

Linkages to social welfare provision above, Article 33 paragraph (2) Constitution NRI 1945 provides the control and provision of public goods, the "branches of production that are important for the state and dominate the life of many dominated by the state."[13] The phrase of "production branches which are important for the country and dominate the life" was in line with the notion of public goods that segmentation of consumers is all the people in the sense together. The problem, as presented by E.S. Savas, the market can not provide these public

10 Darmawan Tribowo et all, *Mimpi Negara Kesejahteraan*, Pustaka LP3ES Indonesia, Jakarta, 2006, h. 9.
11 Safri Nuhgraha, *Privatisation of State Enterprises in the 20 th Century : A Step Forwards or Backwards?*, Institutte of Law and Economic Studies Fakulty of Law University of Indonesia, Jakarta, 2004, h. 45
12 Ibid, h. 67
13 Ibid.

goods, because of the nature of these public goods are used in a sustainable manner by the public and that is no one can forbid the public to not use it.[14]

The concept of the State's Rights to Control

The state is essentially an organization that collects community to achieve certain goals, supported by an instrument of power available to him. [15] According to Roger H. Soltau, generally the objective of the country is none other than to allow people to develop freely, including creativity (Freest possible the development and creative self-expression of its members.[16] As Harold J. Laski argued the purpose of the state, which is to create a situation where people can achieve the fullest creation of those condition under which the members of the state may attain the maximum satisfaction of their desires.[17] According to Aristotle's view that suggests the purpose of the state is none to organize a better life for all its citizens.[18] The same argued is expressed by John Locke that the state's goal is none other than the good of mankind (the end of government is the good mankind).[19]

Based on the views of the state's goal is to provide for the welfare of its people, so theoretically it can be argued that all countries in principle have the same goal namely, providing welfare for its citizens although with a different emphasis both on the past, present and future come[20]

In essence the state's right to control on production branches which are important for the state and who dominate the lives of many people is basically the logical consequence of the purpose of the state who want incarnated. The purpose of the state which are the basis of the achievement of the country will require not only equipment in the state alone, but also no less important is the use of means of power.[21]

Mastery of the State according to the Constitution

Based on the historical perspective on the formulation and preparation of constitution NRI 1945, Mohammad Hatta (1967) explicitly argued that the business entities should have had a central place in the economic system of Indonesia is cooperative. Mohammad Hatta assumed that Indonesia had weak economic position, so that Indonesia can be strong only by the cooperative. The presence of state enterprises in the economic system only in the provision of public services, such as electricity, water, and gas or called by public utilities which is field work on the state, coupled with production branches which are important for

14 E.S. Savas, *Privatization and Public Private Partnership,* Clatham House Publishers, New York, 2002, h. 53.
15 F. Isjwara, hal. 162
16 Miriam Budiardjo, *Dasar-dasar Ilmu Politik, Op.cit,* h. 45
17 F. Isjwara, *Op.cit.,* hal. 165
18 Risalah Sidang BPUPKI-PPKI tanggal 28 Mei - 22 Agustus 1945, Sekretariat Negara, Republik Indonesia, jakarta, 1195, h. 418. Lihat juga dalam Miriam Budiardjo, *Op.cit.,* h. 45.
19 Robert Moss, *The Collapse of Democracy,* Temple Smith, London, 1975, h. 225.
20 Aminuddin Ilmar, *Hak Menguasai Negara Dalam Privatisasi BUMN,* Kencana Prenada Media Group, Jakarta, 2012, h. 11.
21 *Ibid,* h. 43

other countries such as basic industrial and mine, so it needs controlled by the state.[22]

The state's rights of control **are not in the sense of having production branches** which are important for the country and dominate the life of many. However, the state's rights of control **was limited as the charge d'affaires of the organizers of the branches of the production for the welfare of the masses.**[23]

Relating to the right to master of the state in the management of water resources, it is very clear concept of the welfare state that is stipulated in the Constitution NRI 1945 affirms NRI state's responsibility for the basic rights of its citizens in line with the purpose of the state to achieve the welfare of the community. Given the state functions undertaken by the Government, based on the power of the state.

Without the power of the state, the implementation of state functions at the same time fulfilling the state's goal will be obstacles, so that state power is inherent to the achievement of the state's goal. In essence the right to control the state on production branches which are important for the country and who dominate the lives of many people is basically the logical consequence of the purpose of the state that want incarnated. The state's goal which are the basis achievement of the will of the state requires not only equipment in the state alone, but also no less important is the use of means of power using the basic system of democratic economy in which the economy must be structured as a joint venture based on family principles and rely on basic principles economic values espoused is the principle of harmonization, namely the creation of a harmony, balance and harmony.

Constitutional Court Decision No. 85 / PUU-X / 2013 on Judicial Review of Law No. 7 of 2004 on Water Resources against the Constitution NRI 1945

On February 18, 2015 the Constitutional Court canceled the overall the implementation of Law No. 7 of 2004 on Water Resources. This legislation since the early drafting process has been sued by civil society because it is considered detrimental to society as a socio-economic life. This is not out of the paradigm underlying the substance of the legislation is loaded with market approach to the management of water resources is a basic requirement for human life.[24]

There is the judgment of the Constitutional Court on Case Decision of the Constitutional Court Number 85 / PUU-X / 2013 which is as follows: in the business of water there must be severe restrictions in an effort to preserve and continuous availability of water for the life of

22 Yusril Ihza Mahendra, *Dinamika Tata Negara Indonesia : Komplikasi Aktual Masalah Konstitusi Dewan Perwakilan dan Sistem Kepartaian,* Gema Insani Press, Jakarta, 1996, h. 4. Yusril Ihza Mahendra, *Dinamika Tata Negara Indonesia : Komplikasi Aktual Masalah Konstitusi Dewan Perwakilan dan Sistem Kepartaian,* Gema Insani Press, Jakarta, 1996, h. 4.
Aminuddin Ilmar, *Op.cit,* h. 52-53.
Ibid, h. 58.
Andriani Wahyuningtyas Novitasari, *Inkonstitusionalitas Privatisasi Pengelolaan Sumber Daya Air Ikhtisar Putusan Perkara Nomor 85/PUU-IX/2013,* Majalah Konstitusi No. 97, Maret 2015, h. 28-32.

23 Aminuddin Ilmar, *Op.cit,* h. 58.

24 Suhardi Suryadi, *Op.cit.*

the nation (Vide Article 33 paragraph (4) NRI Constitution of 1945). The restrictions are as follows:[25]

1. Each concession on the water should not interfere, override, let alone negate the people's right to water as earth and water and natural resources contained therein other than to be controlled by the state, as well as the designation is for the greater prosperity of the people.
2. The State shall fulfill people's right to water.
3. It must considering environmental sustainability.
4. As an important branch of production which affects the livelihood of the people, then the water should be controlled by the state and utilized for the benefit of the people, as well as supervision and control by the state over its water absolute.
5. As a continuation rights of control by the state, and because water is something very dominate the life of many, the top priority given to water exploitation is **Badan Usaha Milik Negara or Badan Usaha Milik Daerah**; and
6. After all the restrictions mentioned above are met and that there is still water availability, the Government is possible to give permission to the private sector to make concessions on the water with certain conditions and tight.

A guarantee that the state still holds the right of tenure of the water was a requirement that can not be eliminated in assessing the constitutionality of Act No. 7 of 2004 as affirmed in the Constitutional Court Decision No. 058-059-060-063 / PUU-II / 2004 and No. 008 / PUU-III / 2005 can be realized, namely:[26]

1. Using of Water Resources to meet the daily basic needs people and for agriculture do not bear the cost of water resource management services, throughout the fulfillment of daily basic needs people and for this agriculture is obtained directly from the water source. But as demand for water to meet the daily basic needs of everyday people is not enough anymore obtained directly from water sources managed by the public, then the state must guarantee the right of every person to obtain water for the fulfillment of their basic needs, including those which rely on it to the distribution network. In this regard, the Government and local governments have to responsible for the development of water supply system and it must be a priority program of the Government and Local Government.
2. The concept of rights in water use rights must be distinguished from the concept of rights in a general sense. The concept of the Right to water use rights should be in line with the concept of res communes that can not be the object of prices in the economy. Right to water has two characteristics: first, the right in persona which is a reflection of human rights and therefore inherent in human subjects who are inseparable. Embodiments of the nature of the first Right to Water is on the Right to Use Water.

25 *Ibid*
26 *Ibid.*

Second, the rights arising solely from a license granted by the Government or Local Government. Right to Water embodiment of this second is on leasehold Air.

3. The concept of Right to Use Water in Law No. 7 Year 2004 should be interpreted as a derivative of the right to life guaranteed by the Constitution NRI 1945. Therefore, the water cultivation Rights outside the Right to Use Water, in this case the leasehold water, must request license from the Government through the publication must be based on a pattern prepared by involving the public participation. Therefore the water cultivation Rights should not be intended to confer any rights of control over water resources, rivers, lakes, or swamps. the water cultivation Rights is an instrument of control, not the instruments of power ruling. Thus the private sector should not be controlling the water sources or water resources, but can only do a concession in the amount or allocation of certain correspond to allocations specified in the permit granted by the state strictly.
4. The principle beneficiaries of water resource management services required to bear the cost of management that should be interpreted as a principle that does not put the water as an object to be charged the price economically. Thus there is no price of water as a component of calculating the amount to be paid by the beneficiaries. In addition, these principles should be implemented flexibly by not wearing the same calculation without considering the wide utilization of water resources. Therefore, farmer's water users, water users for agricultural purposes the people released from the obligation to finance water resource management services.
5. The right of indigenous customary law communities surviving on a recognized source of resources, in accordance with Article 18B paragraph (2) Constitution NRI 1945. The rule of customary law community unit inaugural surviving through Local regulations should be interpreted not constitutive but rather declarative.
6. Based o the principle, water utilization for other countries is not allowed. The government can only provide water exploitation permit for another country if the water supply to the various needs of their own have been met. Needs meant, among others, basic necessities, sanitation, agriculture, energy, industry, mining, transportation, forestry and biodiversity, sport, recreation and tourism, ecosystems, aesthetic and other needs.

With regard to setting water rights through government regulation, the Constitutional Court held although the Government has adopted six regulations to implement Law No. 7 In 2004, namely,[27]

1. Government Regulation No. 20 in year 2006 on Irrigation;
2. Government Regulation No. 42 in year 2008 on Management of Water Resources;
3. Government Regulation No. 43 in year 2008 on Groundwater;
4. Government Regulation No. 38 in year 2011 on the River

27 *Ibid.*

5. Government Regulation No. 73 in year 2013 on Swamp,
6. Government Regulation No. 16 in year 2005 on the development of Drinking Water Supply System;

according to the Constitutional Court, there are six government regulations that do not meet the six basic principles of water resources management restrictions.

Furthermore, the Constitutional Court found the applicants' petition entirely legal grounds and therefore the Act No. 7 In 2004, declared contrary to the Constitution NRI 1945. To prevent a vacuum in the regulation concerning water resources, then while waiting for the formation of a new law by the legslative, the Act No. 11 Year 1974 regarding declared Watering reinstated.

In this case the cancellation of Law No. 7 Year 2004 by the Constitutional Court has the legal implications, all kinds of laws and regulations that have been issued as the implementation of Law No. 7 Year 2004 and Government Regulation that has been canceled (eg: regulation or local laws) becomes legally do not have binding force throughout contrary to the basic principles of water resources management restrictions.

Based on the explanation above, the re-enactment of Law No. 11 of 1974 on Water Resources by the Constitutional Court is to avoid any legal vacuum (rechtvacuum) which may result in legal chaos (rechtsverwarring). However, the decision of the Constitutional Court there is no legal consideraons as the basis of the re-enactment of Law No. 11 of 1974 concerning Irrigation. Furthermore, the problematic is the existence of Act No. 11 of 1974 on Water Resources has not complied with the basic principles of restriction of water resource management and have not been comprehensive enough to manage and resolve cases (will) arise, so it is reasonable to put in place back without making a decision that is transitional. Mainly related to the organization / institution created by Law No. 7 of 2004 and its derivatives. From this aspect, it seems there is no guarantee the implementation of Law No. 11 of 1974 concerning Watering can avoid a legal vacuum and chaos law.[28]

Based on the above description, constituional Court decision remains final and binding since spoken and there is no legal effort that can be taken. The enactment of Law No. 11 Year 1974 on Water fills a legal vacuum is "wise" is understood for a while (transitory law). Act No. 11 of 1974 concerning Irrigation is not comprehensive enough to manage everything related to water. Therefore, legislative should immediately create new legislation that accords with the Constitution NRI 1945 to achieve legal certainty in the fulfillment of basic rights to water.

The Authority of Management of Water Resources In Order to Achieve Sovereignty of Water Resources

Basically the founders of our country has laid out a basic concept that Indonesia is the rule of law, where is one of the goals the country to form a good government which emphasizes the use of his power to protect the people and give prosperity, justice, and prosperity evenly as stipulated in the Pancasila and Constitution NRI 1945.

28 Zairin Harahap, *Op.cit.*

The cancellation of Act No. 7 Year 2004 by the Constitutional Court in its Decision Number 85 / PUU-X / 2013 brought new hope to the people in the fulfillment of basic rights to water and the realization of the purpose of the state to promote the welfare of society as stipulated in the Constitution NRI 1945.

Furthermore, the problems that arise over water resources management authority. In this case the regulations concerning the authority of water resources management which refers to the provisions of Law No. 11 Year 1974 on irrigation are not very relevant when it enacted today, because the paradism of management of water resources is different. While on the other side of the basic right to water for the community can not be ignored and delayed again. Therefore, the discussion on water resources management authority examined from theoretical concept of the authority of the Central Government and Local Government and regulations concerned.

Based on the concept of the theory, principles of water controlled by the state as defined in Article 33 paragraph (3) NRI Constitution of 1945 in order to achieve the welfare of the people. Air controlled by the state through the management of water resources as public domain. Such a provision is the Delegation of the management of water resources to local governments in order to include the role of local governments to help public service. The provisions of Article 33 paragraph (3) Constitution NRI 1945 is the formal legal basis for Indonesia related to the delivery of some government affairs field of water resources management of the central government to local governments based on deconcentration. Overall Article 33 paragraph (3) NRI Constitution of 1945 which adheres to a set of principles, the principle of centralization, deconcentration and medebewind.[29]

Related synchronization pattern of distribution of water resources management authority directed at institutional and authority owned institution. This is confirmed by the regulations derived from the Constitution NRI 1945. According to Philip M. Hadjon it is a consequence of the state of law and the principles espoused principles that put their instrumental division of the executive authority (central and local) about the importance of implementation of all government affairs at the government norms. The government Norm is required because it serves as a guidance for the legality of government action.[30]

There is the synchronous correlation based on the settings of the authority of the central government and local government in Article 33 paragraph (3) Constitution NRI 1945 and Article 18 paragraph (5) of the Constitution NRI 1945 in the system of governance specifically in the field of executive ,

Article 33 paragraph (3) Constitution NRI 1945 contains several meanings related to water resources management authority, as follows[31]

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29 Jimmy Pello, *Pengaturan Pembagian Wewenang Pengelolaan Sumber Daya Air antara Pemerintah Pusat dana Daerah,* Yuridika, Vol. 21 No. , September - Oktober, 2006, h. 471.

30 Philipus M . Hadjon, *Fungsi Normatif Hukum Administrasi dalam Mewujudkan Pemerintahan yang Bersih,* Pidato Pengukuhan Jabatan Guru Besar dalam Ilmu Hukum pada Fakultas Hukum Universitas Airlangga,1994, h. 10.

31 *Ibid,* h. 475.

1. The Government guarantees the participation of all components of society related to water resource management in Indonesia (fairness).
2. Management of water resources by the government (the state) are transparent and provide accessibility for the public to obtain information relevant to and non-discriminatory (Transparency principle).
3. The government (state) in terms of managing natural resources must be accountable to the people (the principle of accountability).
4. The government manages water resources on the basis of low costs to achieve maximum results (efficiency principle and the principle of effectiveness).
5. Government control of water resources has intent to give benefit for the state, society and economic actors equally and have the added value related to water resources management (principle of benefit).
6. The government (state) observes obsustainability of water resources.
7. The government (state) manages water resources aimed at improving the welfare of all people in Indonesia today and the future.
8. The government (state) through water resources management ensures the integrity of Indonesia (the principle of national security).

Based on the overall meaning in principle "water controlled by the state", appears to Article 33 paragraph (3) Constitution NRI 1945 is the legal basis of state asset management authority (public domain) for the welfare of the people. Setting legislation governing authority of the central government related to water resources management in Indonesia to achieve the welfare of the people based on the principle of the unitary state as stipulated in Article 1 paragraph 1 of the Constitution NRI 1945 NRI is closely related to Article 18 of the Constitution NRI 1945.[32]

Management of water resources as a wealth of Indonesian state is the state authority. Philip M. Hadjon explained the state' authority linkage to the wealth of the state differentiated into two parts, namely:[33]

1. The Government has the right to have a wealth of the country as a private domain. Lega basis in the Constitution Article 23 of the Constitution NRI 1945.
2. The right of the government to the public domain of the country's wealth.the basic constitutional provision of Article 33 paragraph (3) Constitution NRI Year 1945

In this case the terminology of a private domain is property owned by a state consisting of separated state property and state property not separated. The government used the country's wealth belongs to the Government to expedite the activities of public administration is also used for public welfare Example irrigation system to irrigate the farmers used the system of Subak. While the definition of the public domain is a potential wealth of the country controlled by the state for the welfare of the people (Article 33 paragraph (3) NRI Constitution of 1945). Examples of water resources

32 *Ibid,* h. 476.

33 Philipus M. Hadjon, et all, *Pengantar Hukum Administrasi Indonesia,* Gadjah Mada University Press, 2002, Yogyakarta, h. 180-209.

management in the rivers as a source of surface water as stipulated in Law No. 7 of 2004 on Water Resources. Understanding the management of water resources as public domain include the establishment and achievement of results through specific activities and to use certain means.[34]

In connection with the management of water resources as the domains of public, the provision of Article 33 paragraph (3) Constitution NRI of 1945 requires "the right to control the wealth of the country by the Central Government in order to regulate supply, allocation, and the related use of water resources that could involve local governments and state-owned enterprises / regions.[35]

Regarding controlling of natural resources as the wealth of the country, Michael Decleris in his book The Law of Sustainable Development General Principles, explaining that: Common natural assets as the common natural heritage. The state had recognised that the water, the sea, coasts, rivers, lakes etc were the common property of all. The state must preserve them and Facilitate access to restricted or them.[36] Mastery of state assets in this case natural resources (Resources Water) by the Central Government in order to set up associated with a few things namely, the provision of the rules on the management of water resources in the form of legislation or regulations with respect to the parties involved in the management and the objectives to be achieved through the use of water resources is the people's welfare.[37]

Based on this view, the involvement of the role of government to manage public agencies / public domain. For Indonesia, the state control over state assets associated with setting water resources management authority for the welfare of the people. State' right to control is a right (authority) granted forming the constitution in Article 33 paragraph (3) NRI Constitution of 1945. On it is obvious role as the central government authority over the country's wealth. Moving in terms of water resource management includes the central government and the economic actors of Water Resources, user of water resources involve elements of regional governments, the components of society as a form of economic democracy thinking.[38]

The involvement of local governments in the management of water resources, according to Mohammad Hatta in accordance with the ideals of Article 33 paragraph (3) Constitution NRI 1945, economic development is closely related to the management of state assets should include all components in the country and still ensure the preservation of the environment component.[39]

In connection with the will of the Article 33 paragraph (3) Constitution NRI Tahun1945, C.F. Strong gave his view that the sovereignty of the state (authority) sovereign in unitary

34 Draft Naskah akademik Rancangan Undang-Undang tentang Pengelolaan Kekayaan Negara, 2005, h. 17.
35 Jimmy Pello, *Op.cit*, h. 476-477.
36 Michael Decleris, *The Law of Sustainable Development General Principles, European Communities,* Belgium, 2000, p. 99.
37 Jimmy Pello, *Op.cit*, h. 476-477.
38 Ibid.
39 Mohammad Hatta dkk, *Penjabaran Pasal 33 Undang-Undang Dasar 1945,* Mutiara, Jakarta, 1977, h. 28.

states recognize only one government, central government[40]

Regulations Concerning On Water Resources Management Authority

Associated with the formation of the new law concerning on water resources management authority, government and legislative must be based on several regulations related to harminsasi and synchronization regulation. There are the legislation governing water resources management authority is as follows,

a. Constitution NRI 1945

In this case the provisions of Article 28C paragraph (2), Article 28D (1), Article 28H paragraph (1), and Article 28 paragraph (4) Constitution NRI of 1945 regulates the right of citizens to gain access to clean water as part of the fulfillment human rights and the state is responsible for the fulfillment of these rights.

Moving on from the concept of state responsibility as defined in Article 33 paragraph (3) NRI Constitution of 1945 in order to achieve the welfare of the people that the water is controlled by the state through the management of water resources as public domain. In line with above if the provisions of Article 33 paragraph (3) Constitution NRI of 1945 related to the Article 33 paragraph (2) and Article 33 paragraph (4) Constitution NRI 1945 in this respect the rights of control (control of) the country does not have the state participate directly organizing production branches are concerned with shaping the state effort, but he could be in making regulatory or economic policy whose primary purpose is to safeguard the interests of the state and the interests of the people

In other words, the rights of control (control of) the country is not in the sense of having production branches which are important for the country and dominate the life of many. However, the rights of control (control of) the state was limited as the charge d'affaires of the organizers of the branches of the production for the welfare of the people. The existence of state enterprises in the system of economic democracy only in the provision of public services, such as electricity, water and gas, or the so-called public utilities under the authority of the state. Above it is the responsibility of the state in realizing national development, especially in the management of water resources should contain the principle of sustainable and environmentally friendly.

b. Law No. 23 in year 2014 on Local Government

Under the provisions of Law No. 23 Year 2014 on Regional Government, it is cleary that government affairs division divided into absolute government affairs, concuent government affairs and the generally government affairs. In this case the water resources management authority is concurrent administration affairs relating to the selection of mandatory basic services including general job categories and spatial planning. Basically the concurrent administration affairs is shared between the Central Government and the Provincial and

40 C.F. Strong, *Konstitusi-konstitusi Politik Modern : Kajian tentang Sejarah dan Bentuk-bentuk Konstitusi Dunia,* Nuansa dan Nusamedia, Bandung, 2004, h. 87.

District / City is based on the principles of accountability, efficiency, and externalities, as well as national strategic interests. Provisions of concurrent governmental affairs division of authority between the Central Government and the Provincial and District / Municipal very clear arrangement as set forth in Article 13 paragraph (2), (3) and (4) of Law No. 23 Year 2014 on Regional Government.

c. Law No. No. 30 in year 2014 on Government administration

Related to water resources management authority as stipulated in Law No. 30 of 2014 on Government Administration, the authorized agency in any decision by the authority that belongs should base on legislation and AUPB (General Principles of Good Governance). Besides the absence of Law on Natural Resources as the basis for the exercise of authority or vagueness of the legislation does not preclude the Agency and / or Government Officials authorized to establish and / or make decisions and / or actions throughout provide public benefit and in accordance with AUPB as stipulated Article 9 paragraph (4) of Law No. 30 of 2014 on Government Administration. In addition the authorized agency must also consider limits its authority to prevent abuse of power and conflicts of authority.

d. Law No. No. 25 in year 2009 on Pubic Services

Provisions of Law No. 25 of 2009 on Public Service firmly set on the responsibility of the state in meeting the needs of the service in accordance with the laws of every citizen and resident of public goods, one of which includes natural resources (water resources). In this case the procurement and distribution of public goods can be done through 3 (three) as stipulated in Article 5 (1), paragraph (2), and paragraph (3) of Law No. 25 of 2009 on Public Services to be based on the principle of public service.

e. Law No. No. 32 in year 2009 on Protection and Management of the Environment

Provisions of Law No. 32 of 2009 clearly set the authority and responsibility of the government, provincial governments, and the Government of Regency / City in the management of water resources as stipulated in Law No. 32 in year 2009 was established a policy regarding the protection and management of water resources based on the principles of environmental protection and management.

Based on the above the cancellation of Law No. 7 Year 2004 by the Constitutional Court in its Decision Number 85 / PUU-X / 2013 carries juridical consequences to all kinds of laws and regulations that have been issued as the implementation of Law No. 7 in 2004 and 6 (six) of Government Regulation mentioned above which becomes legally do not have binding force and confirms the re-enactment of Law No. 11 of 1974 concerning Irrigation to avoid a legal vacuum (rechtvacuum). Above it is a regulation of water resources management authority when referring to the provisions of Law No. 11 Year 1974 on Water are not very relevant that enacted today because the management of the water resources is different.

Therefore synchronization authority to manage water resources by the Government and Local Government can be realized with studied based on the concept of the state' right to control, the concept of authority, and the concept of basic rights to water that are all

concerning on the management of water resources, as well as some of the legislation that related. One of them Law No. 30 of 2014 on Government Administration stated that the absence of the Act's natural resources as the basis for the exercise of authority or vagueness of the legislation does not preclude the Agency and / or Government Officials authorized to establish and / or make decisions and / or actions throughout provide public benefit and in accordance with AUPB, and with due regard to the basic principle of limitation of water resources management and environmental management principles in order to realize the sovereignty of the water resources.

5. Conclusion:

Cancellation Act No. 7 Year 2004 by the Constitutional Court in its Decision Number 85 / PUU-X / 2013 carries juridical consequences reimposition of Act No. 11 of 1974 concerning Irrigation to avoid any legal vacuum (rechtvacuum). Above it is a regulation of water resources management authority when referring to the provisions of Law No. 11 Year 1974 on irrigation are not very relevant that enacted today because the management of water resources is different. Therefore synchronization authority to manage water resources by the Government and Local Government can be realized with studied based on the concept of the right to control the State in the management of water resources, the concept of authority in the management of water resources and the concept of basic rights to water, as well as some of the legislation that related.

6. Suggestion :

a. the cancellation of Law No. 7 of 2004 on Water Resources by the Constitutional Court in its Decision Case Number: 85 / PUU-X / 2013 that has the legal consequences for the cancellation of a number six Government Regulations implementing the Act No. 7 of 2004 on Water Resources and re-enact the Act No. 11 of 1974 concerning Irrigation course this raises legal vacuum. Due to the paradigm of management of water resources as stipulated in Law No. 11 of 1974 is irrelevant especially applied in the present. Therefore the government (executive) and Parliament (legislative) should immediately draw up a legal product that regulate the management of water resources based on the fulfillment of access to clean water services to the community in order to realize development with environmental sustainability

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9. Undang-Undang Nomor 23 Tahun 2014 tentang Pemerintahan Daerah;
10. Undang-Undang No. 30 Tahun 2014 tentang Administrasi Pemerintahan

FINANCIAL MANAGEMENT OF THE VILLAGE FROM THE PERSPECTIVE OF STATE FINANCIAL MANAGEMENT AFTER PROMULGATION OF LAW NUMBER 6 TAHUN 2014 REGARDING VILLAGE

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INDRAWATI

ABSTRACT

Different with other Local Government authority concept in Indonesia, the authority that owned by the village is not given solely by the laws, but it is already tights with the existence of the village called original autonomy. By this original autonomy, the Village has the origin rights (hak asal usul) to control and manage the local people needs as well as take an essential part to escalate their prosperity. Looking from historical background and the development regulations, the village has been transformed in several forms which dedicated to empower the village itself into strong, independent and democratic. One mechanism to support this empowerment is the concept of financial autonomy that be given to the village.

The promulgation of Law Number 6 year 2014 has brought new concept in terms of financial autonomy for the village government which has change the substance of previous regulation, the Government Regulation Number 72 year 2005 regarding Village. With the enactment of Law number 6 Year 2014, the Village has the autonomy in terms of financial management in the Village. Such financial management has follow certain procedure that already stated by the regulations. With this law, the Village has various financial sources as it stated in article 72, namely local income, allocation from state budgeting, sharing form local taxes and levies, allocation village fund, financial support from Provincial and Municipal budget, grants, and other legitimate village fund sources. The village financial management is closely related to the state budgeting system, therefore it raised the legal issue on financial desentralisation model in the village government include the procedure of allocation of state budgeting, the legal responsibility of the Head of the Village. This paper will elaborate financial decentralization for the village government as well as legal consequences that could be burdened form such authority. It will also address on the issue of transparency in the financial management in the village. This paper will be followed by the recommendation on the policy that should be taken in order to implement good village financial government.

Keyword : Village, Financial sources, Financial Decentralisation.

INTRODUCTION

As authonomous entity, Village has origin rights (hak asal usul) in regulating and managing the local people's need and has the role to perform the value of Indonesian independence as has promulgated in Indonesian constitution 1945. The form of village has been developed in line with the development of Indonesian Government, the purpose of which for the empowerment of the village into stringer, independent and democratic. In the new orde era, the village matters had regulated in Law Number 5 year 1979 regarding Village. In President Susilo Yudhoyono's time, the village regulate under the Governmet Regulation number 72 year 2005 regarding Village (PP No. 72/2005). The PP No.72/2005 brough new mechanism related to village management and also changed the Government Regulation Number 76 year 2001 regarding the Village Management.

Uphold the position of the village as part of the Unitary State of Indonesia and achieve the purpose to escales the propriety of Village community, then in 2014 the Government issued Law Number 6 year 2014 related Village (Village law) which give legitimation for the village position as authonomous entity in the framework of Unitary state of Indonesia. There are many policy changes that brought by the Village law, on of which is the Village Financial Management. Article 71 paragraph (1) Village law clearly stated that Village financial is the rights and obligation of the Village that can be counted by the money (money and goods) that related to the implementation of such rights and obligation. The village financial includes income, and expenditure. The village financial income can be achived from sources as regulated in article 72 Village Law, namely:

a. The original income;
b. Allocation from State Budgeting (Alokasi APBN);
c. Procentage from the result of taxes and levies municipal/city;
d. Procentage of Allocation Village Fund (Alokasi dana desa)
e. The financial support from the Provinsial budgeting and municipal/city budgeting;
f. Grant and financial contribution from third parties and others legitimate village income.

Such income sources in Village law different with which promulgated in PP No. 72/2005, that regulated types of village income, namely:

a. Original income;
b. Procentage of local taxes municipal/city;
c. Procentage from the sharing fund from municipal/city
d. Financial support from the Government, Provincial Government and municipal/city government for implementing government business;
e. Grant and and financial contribution from third parties and others legitimate village income

Therefore, with the implementation of Village law, the village get new financial source from State budgeting allocation (state allocation). Such allocation came from the central

government spending. The purpose of this allocation is giving more support to the Village, so the village can maximize their potention in order to escalates the local community prosperiety. However, the explanation for the implementation and management of state allocation still limited, it can cause muti-interpretation and bring great potention the criminal action that conducted by the Head of the Village. In terms of such state allocation, there is legal problem related to rigts and obligation of the village on management the state allocation fund, along with the responsibility and liability of the Head of the Village on it.

Based on the introduction above, there are two problems that will be analyzed in this article, namely:

1. Allocation of village fund and state allocation fund procedure and responsibility
2. Financial management of the village fund based on the village law

ANALYSIS

A. The procedure of Village fund allocaton and state budget allocation.

A.1. *The Village authority*

The genuine authonomy that posses by he village in one side can be treated same as local authonomy byt in other side they has differences. Village authonomy is a genuine authonomy is not given by government, therefore such authonomy is not treated as the result of the implementation of decentralization principle. For the village, village authonomy is a "*conditio sine qua non*" (something that must be exist). Without such authonomy, then that village is not a Village. Village always poses the genuine authonomy. The lost of genuine authonomy means lost the existence of characteristic of the village. Meanwhile the local government authonomy given by the central government, as the implementation of article 18 paragraph (1) of Constitition and based on decentralization principle.. The local government authonomy is created in the same time the form of a local government.

The funding of the the village activities manages into the Village budgeting (APBDesa). The village authority regulated under the regulation of Village Minister Number 1 year 2015 (Pengaturan Kewenangan Desa diatur dalam Peraturan Menteri Desa Pembangunan Daerah Tertinggal dan Transmigrasi Nomor 1 Tahun 2015 tentang Pedoman Kewenangan Berdasarkan Hak Asal Usul dan Kewenangan Lokal Berskala Desa) (Permendes 1/2015), share the village government authority into:

1. The genuine authority
2. Local authority within village scale

Article 1 point 3 and 4 Permendes *a quo* give straight limitation about the village authority. Genuine authority of the village is the living legacy according the the development of community. Meanwhile the local authority within village scale is the authority to regulate and manage the society's need that has been implemented in the village, the village has sufficient recource to do such authority or any type of authority that comes because the development of the village.

Especially for the authority based on genuine rights, can be distinguished into the genuine rights of traditional village cover several matters namely:

a. the development of organization system;
b. traditional laws;
c. the ownership of traditional rights;
d. the management of traditional lands;
e. the management of ulayat lands;
f. the agreement on the traditional living in the village;
g. the election of head of traditional village and its structure; and
h. the period of the Head of traditional village.

Meanwhile for the local authority within the village scale is the village authority that fulfills the criteria under Article 5 Permendes 1/2015, namely:

a. The authority that uphold the service and society empowerment activities;
b. The authority that has the scope of activities within the village territory, regulate under village regulation and has the internal impact to the village;
c. The authority that related to the daily needs of the village society;
d. The authority that has been implemented by the village due to village needs;
e. Government (central, provincial and municipal/city) activities programme and third parties that has been gaven and managed by the village; and
f. The local authorities within Village scale as it regulated under the existing regulation regarding the distribution of power between the central, provincial and municipal governments.

A.2. ***Management of Village Budget***

The implementation of village authority support by the Villlage Budget or called as Anggaran Pendapatan Belanja Negara (APBDes). APBDes treated as t guidance of the village budget. APBDes created annually by the Head of the Village together with village institusion (known as Badan Permusyawaratan Desa (BPD)). APBDes consist of all the village revenue from the village income sources, and village expenditure. As part of village revenue, state allocation for the village has essential roles in making village based program effective. The state allocation for the village highly different with Village Fund allocation (known as Alokasi Dana Desa or ADD). ADD is part of the financial balance that municipal/city received. There is different meaning on the wording "dana desa" leads to PP 72/2005 and UU 6/2014. In the PP 72/2005, the definition of "dana desa" means ADD, while in the UU 6/2014 such "dana desa" definition implies as state village allocation.

Philosphically, the existence of UU 6/2014 clearly has shown the intention of law maker to escalate the village society's prosperiety through adding the village financial sources. With more financial sources, is expected to have positif benefit for enhancing the village activities that boost improvement and strengthen the village society opulence. Furthermore, compare

with UU 6/2014, PP 72/2005 give more detail regulation in terms of procedure of financial support. Article 68 PP 72/2005 stated that the financial support either from the central government, provincial government and municipal/city government must goes through cash village (kas desa). This article also provide the protection for the village revenue that already own and manage by village cannot be take over by the government of local government. This article solely gives the legal protection for the village in terms of manages their local sources. Meanwhile in UU 6/2014 such detail regulation is not found, the writer argue that this because the form of regulation. In the Law form, the substance of regulation usually contains general regulation, while the specific and detail substance can be found in Government regulation and other regulation underneath. Respon the promulgation of UU 6/2014, the Government issued the Government Regulation Number 43 year 2014 regarding Village (Peraturan Pemerintah Nomor 43 Tahun 2014 tentang peraturan Pelaksanaan Undang-Undang Nomor 6 Tahun 2014 tentang Desa). This regulation has been changed with Government Regulation Number 47 year 2015, however in those two governmet regulation still not regulated in detail the State allocation for village.

As the village budget adeministrator, UU 6/2014 place the Head of the Village as administrator of village budget. This authority gained by the Head of the Village through attribution principle. The head of the village can deliver part of his power to his aparatur in terms of financial management.

The village budget management is the comprehensive process that includes:

a. Planning;
b. implementation;
c. administration;
d. report;dan
e. responsibility

therefore in all aspect of village budget management, includes the use of state allocation fund for the village, is must be planned first based on village work plan, implemented and reported as it has regulated in the financial state responsibility regulations.

A.4. *Procedure of distribution and responsibility of Village fund allocation and state allocation for the village*

As it has discus inn previous chapter, the village fund allocation (ADD) and state allocation for the village, both are parts of village revenues. Though treated as the parts of village revenues, both it contain differences especially in distribution mechanism and responsibility. There is urgent need for all the village apparatur to understand about each of this form, so they can adjust with the related regulations about the responsibility of financial budget management.

Management of village budget specifically is arranged in the interim minister regulation number 113 year 2014 (Peraturan Menteri Dalam Negeri Nomor 113 Tahun 2014 tentang

Pengelolaan Keuangan Desa). According to the Interim minister regulation *a quo* , the village fund classified according to groups and types. The income contain all financial revenue though the cash village that becomes the village rights in one financial year and no need to re-pay by the village. Article 8 paragpraph (1) the Interim Minister regulation number 113 year 2014, stated that the village income, classify into three groups, namely:

a. Original revenes, gain from:
   i. The business result (Bumdes, "tanah kas desa");
   ii. Asset result (boat, village market, irrigation line);
   iii. Self-help, participation and mutual cooperation
b. Transfer; and
c. Other revenues.

The original income of the village is come from self-help in the form of village development program which involves the active role of the society either in supporting fund or supporting energy. Furthermore, the group of transfer fund that is received by the village, contain:

a. state allocation for the village (dana desa);
b. Procentage from the local taxes and levies;
c. village allocation (Alokasi Dana Desa/ADD);
d. Financial support from Provincial budget (APBD Provinsi); and
e. Financial support from municipal/city budget (APBD Kabupaten/Kota).

From the explation regarding village income above, ADD is the fund for the village that come from municipal/city budget (APBD Kabupaten/kota), therefore for the use of his money, the Head of the Village must reported it to the local government that gave that fund (provincial/municipal/city governments).

ADD is part of shared fund that received by the municipal/city government into their local budget from the central government, after reduce by the specific allocation fund, it must handed over to the village to be used as one of their income sources. If the ADD transer from the central givernment to the municipal/city government for finally handed over to the village, the state allocation budget for the village (Dana Desa) is given by central government direcly to the village government. Specific village that will be given this fund by centrall government has specify clearly in the nomenclature of state budgeting.

The authority in terms of village budget management is conducted by the head of the village with the help of all his aparature (Pelaksana Teknis Pengelolaan Keuangan Desa/ PTPKD) for the implementation and under the principle of mandate. Hence, all the distribution, and the responsibility of the use of thet budget goes to Head of the Village.

An **important note** that, the management of the village fund after the promulgation of UU 6/2014 has been regulated in many regulation are issued by several ministries, namely financial ministry, ad-interim ministry, village and rural area ministry. Therefore, **highly need synergy from those ministries so the regulation that been promulgated is not conflicted each others**. For example in the distribution of state budget for the village, we

can found togetherness intention to speed-up the distribution process of this fund. We can see this intention imply in the Joint decision of ad-interim minister, financial minister and village and rural areas minister Number 900/5356/SJ; Nomor 959/KMK.07/2015; Nomor 49 Tahun 2015 tentang Percepatan Penyaluran, Pengelolaan dan Penggunaan Dana Desa Tahun 2015. (Keputusan Bersama Menteri Dalam Negeri, Menteri Keuangan, dan Menteri Desa, Pembangunan daerah tertinggal dan transmigrasi Nomor 900/5356/SJ; Nomor 959/KMK.07/2015; Nomor 49 Tahun 2015 tentang Percepatan Penyaluran, Pengelolaan dan Penggunaan Dana Desa Tahun 2015). In the decision a quo, we can see regulation below:

a. The regent/mayor will distribute the village fund from the general aacount of municpal/city in a short time. The requirement of this distribution is the Hed of the Village created a village regulation regarding Village budget.
b. Village regulation regarding the village budget made by the Head of the Village to village intitution (Badan Permusyawaratan Desa (BPD)) for gain a consent and issud as Village regulation.
c. For those the head of the village that have not issued village regulation yet, obliges to issue such regulation as soon as possible. The Regent/ Mayor trough Camat must facilitate and accompaniment Head of the Village to do this.
d. In case the village fund has not stipulated under the Local Govermen regulation on Local Budgeting year 2015, then the Regent/mayor has he obligation to put this budget into stipulation of Local Government regulation about the amandemen of Local Budgeting year 2015).
e. The regent/ mayor order to Head of the village who still did not have the village account, for making village bank account for placing Village fund and other village revenue.
f. The Head of the Village make repot on realizaion the use of Village Fund semester I and II, consit of income, expendiure and the remaning funds.
g. Bagi Bupati/Walikota yang belum menetapkan Peraturan Kepala Daerah (Peraturan Bupati/ Peraturan Walikota) tentang Pengelolaan Keuangan desa sesuai dengan Permendagri Nomor 113 Tahun 2014, untuk segera memerintahkan Kepala Desa menggunakan dana desa tahun 2015 dengan berpedoman pada Permendagri Noor 113 Tahun 2014.
h. The Village governmet need to set-up the Village workplan (RPJMDesa and RKPDesa) as the basis of making Village budgeting plan (APBDes). While those village workplan still not exist, then Camat (represent of Regent/mayor) to do accompaniment for delivering such Village Regulation.

In the use of Village fund year 2015, has been priortized to support activities related to phisical development, rehabilitation, infrastructure maintenance and development of local economy based on village priority needs. Such development, made by self-help (swakelola) and use the local resources and focus on the need to absorb more work force for local

comunity. The supervison and evaluation of village funds disribution conducted by Minister of Finance. This supervision conducted by looking the distribution of village fund from the General local account to the village account within the required time in each stages along with total of the money...

B. Model of Legal Policy in the Village Financial Managemen after the Promulation of Law number 6 year 2014

B.1. *Principle of good governance in the use of Village fund allocation (ADD) and state fund allocation for the village*

The principle of good governance in terms of the use of village fund allocation and state funs allocation for the village closely related to human rights approach *(Rights Based Approach)* and functionary approach that focus on the control or supervision for the use of authority by the government. In the use of those village government power must consider the principle of good governance, namely : *legality, procedural, propriety, relevancy, reasonableness, legal certainty, participation, openness, propriety of purpose, proportionality* . Besides thos principle, the transparency, accountable, participative and budget discipline must be implet by the village government.

Transparancy principle require the openness in the procedure both accepting and responsibility in the use of village fund allocation and state budget allocation. Such transpareny will bring positive benefit for people participation. Accountable principle imply that the management of village income must able to be reported, in which such report integrated in the Village budget report. In the distribution of village fund, the government also must cnsder the fairness principle, so the funds goving by proportional based on the need of the village.

B.2. *Legal Policy in the Village Financial Management after the Promulation of Law number 6 year 2014*

As it has explained in detail above, along with the promulgation pf UU 6/2014, the Village has one more financial sources namely state budget allocation for the village (alokasi APBN), or we can called it as Village Fund. The use of all income sources includes ADD and Village Funds must be reported based on the existing regulation and integrated with the responsibility of the Village Budget. The importance of such report in the use of Village income is to guarantee the transparency and accountability as well as to protect all the village aparature (includes the Head of the Village) from the potention of misuse of power.

Regarding the use of Village Funds, specifically regulated under Government Regulation Number 60 year 2014 regarding Village Fund (Peraturan Pemerintah Nomor 60 Tahun 2014 tentang Dana Desa yang bersumber dari Anggaran Pendapatan dan Belanja Negara (next called PP 60/2014). Village fund allocated by the Central Government special for the village with use the basis of number of village. The criteria of such allocation, namely:

a. Number of people in the village;

b. The level of poverty;
c. Geographical area.

The purpose of this allocation is to support and effective the program that has village basis in well distributed and justice.

Village fund is transfered through Local Government budget for next re-transfer to Village budget. Therefore in the model of village management model, there are three stage in the allocation of this funds:

1. The proses of allocation Village Fund in the central government;
2. The budget allocation process in the Municipal/city's government.
3. The distribution process from the municipal/city government's budget to the village.

1. The process of allocation village fund in the central government

In this stages, cleary stated that Village Funds in a part of Central Government expenditure as "pos Cadangan Dana Desa". The nominal ("Pagu") of he "Cadangan dana Desa" must based on te regulation in the field of expenditure fund planning. Such nomial of fund put in the government budget plan and submitted by the Governmen to Legisative body (Dewan Perwakilan Rakyat/DPR) for permission granted. When this Village funds budget plan has get the permission from the legislative body, than it become the part of the transfer budget the the local government and the village.

In this process the government needs to consider every criterion in giving the village fund and implemented good governance principles. So, the fund that wil be transferred to the village is in line with the need of every village and distributed based on proportion principle. In order to help the government make the village fund plan, the local government (provincial/ municipal/city) must take an active part in making report about the estimated village fund that need by each village in their area. The role of the local government highly essential because local government that know the village characteristic within their area well, compare to central government.

2. The budget allocation process in the Municipal/city's government

Technicallly, the village fund transfer can be implemented by transfer from RKUN (Central government budget account) to RKUD (local government budget account) and next to Village account and conducted with these stages:

a. First stage (Stage I), giving in April, with procentage 40% (after the Regent/Mayor give their first repot about the implementation of existing local government budget, the promulgation of the regulation regarding the distribution method and settlement of nominal of the funds).
b. Second stage (Stage II), giving in Agust, with procentage 40%;
c. Thrid stage (Stage III), giving in October, with procentage 20%.

The distribution of the funds from RKUD (local government's budget account) ke RK Village (Village government's budget account), must be conducted by the Regent/mayor as least 7 working days after first stage fund is being transferred from RKUN to RKUD. Such distribution to the village can be performed if the Head of the Village has delivered the report of the budgeting implementation in last semester. This report is given to the Regent/ Major at least end of March, so it can guarantee the punctuality of villafe funds distribution. Meanwhile second stage fund, can be transferred also if the Head of the Village hass given the repot to the Regent/Major abour the implementation of Village fund that has been accepted, at least last weel of July. All the report must be handed over in the same annual budget year.

Related to the process of village fund acceptance in the Municipal/city Government, regulated under Article 11 of Governnment Regulation no 60 year 2014 (PP 60/2014) **that Village fund in every municipal/city is allocated based on the multiply between the number of village in every municipal/city and average of Village fund each province**. That average is allocated based on:

a. The number of village in the province;
b. Number of the people in the municipal/ city and the territory spacious;
c. The level of poverty and geographical difficulties in municipal/city in that province.

Classification of the number of people, territory spacious and level of powerty conducted based on the calculation (below), with regard to cost index in that area. Therefore the calculation on Village fund averages in each province follows this formula:

a. National Village Fund ceiling (Pagu anggaran nasional)
   This ceiling set up into State budgeting (APBN) x [(30% x procentage of number of people in that munical/city compare to the total of number of people in Indonesia) + (20% x procentage of territory spacious compare to the total national territory) + (50% x procentage of poor people in the municipal/city compare to the national poverty number)].
b. The multiply of Village fund in every municipal/ city with the construction cost indext in that area.
c. The result of the village fund calculation for every municipal/city, summed for every province.
d. The number of Village Fund every province shared with the number of village.

Looking form the formula to calculate to calculate the village fund, the active role of Head of the Local government to give input for the central government about the real condition and data of the village in their territory are important, to avoid the mistakes in distribution of village funds as well as uphold fairness distribution principle which based on real condition and characteristic of the village. The communication between central and local government required in this process.

3. The distribution process from the municipal/city government's budget to the village

In the process of Village fund management, especially allocating village fund for each village, **the Regent/Mayor has the authority to set up the amount of funds.** The mechanism of distribution and determination of amount of the village funds for every village **stipulated in the Regent Regulation/Mayor regulation** (the Head of Local Government regulation). Therefore, the Laws give the obligation for the Regent/Mayor to issue the Head of Local Government Regulation about Villag Fund distribution mechanism, with based on certain indicator below:

a. The number of people;
b. Poverty level;
c. Territory spacious;
d. Geographical difficulties.

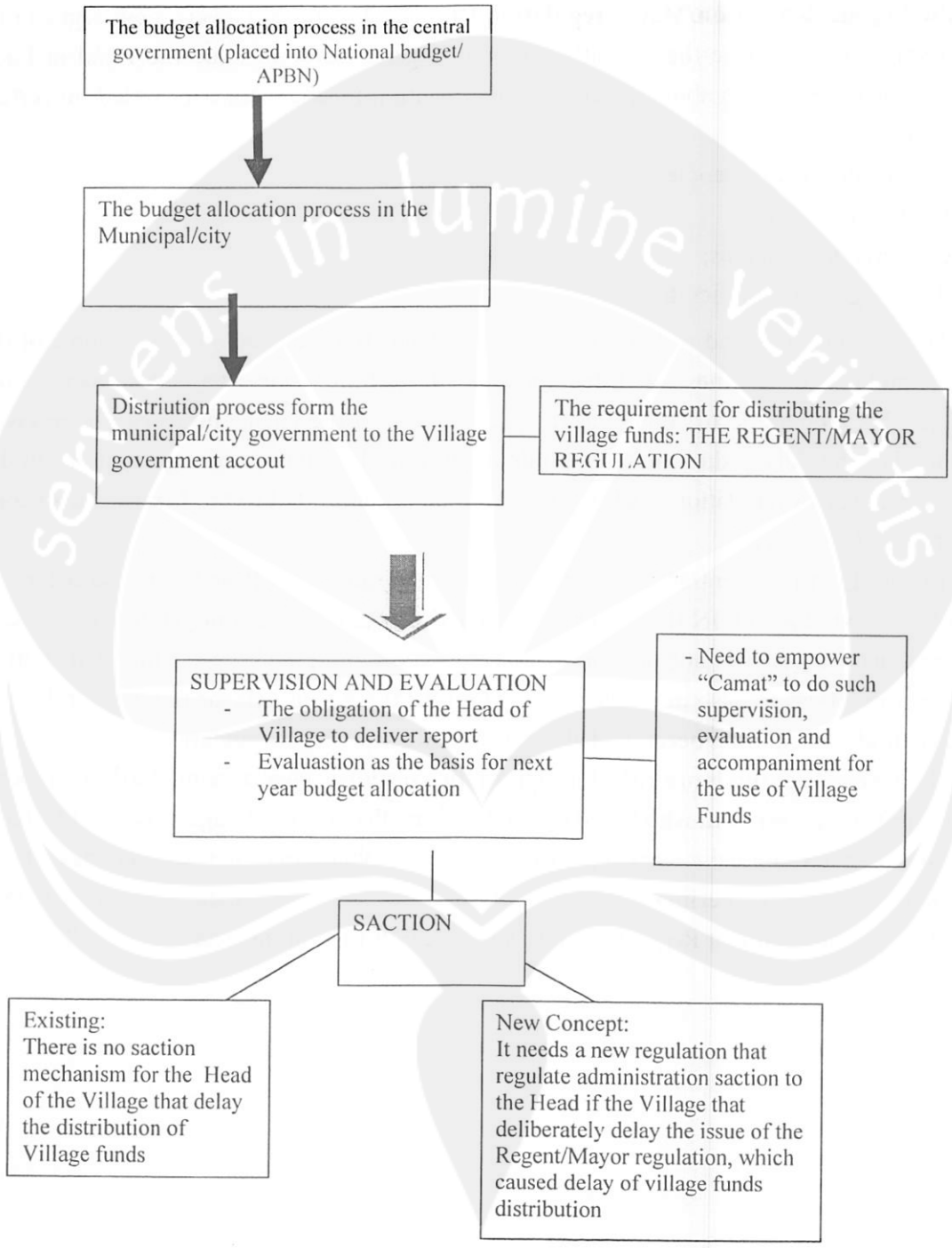
The existence of Head of Local Government Regulation has becomes the source of the recent problem of tardiness of distribution of village funds from the government to the village. This probem occurs due to as the pre-requisite of the village funds can be received and used by the Village, the amount of funds and how to share it must be regulated first under the Regent/Mayor regulation. Such regulation must be submitted to the Minister with copy of letter to the Governor.

The need of the Regent/Mayor regulation in distributing the Village fund, resulted to the problem of **NO SACTION** that regulated under the existing regulaton yet, for the Regent/Mayor that deliberately or not, does not issue a regulation about the Village Funds distribution mechanism. There are also none available saction for the Regent/Mayor in terms of delat of Village funds distribution because of absence such Regent/Mayor regulation.

The use of village funds priorities for support the exertion of government, the development, community empowerment with based on the Working Plan of the Village, both Middle term working plan and annually working plan (Rencana Pembangunan Jangka Menengah Desa dan Rencana Kerja Pemerintah Desa). Briefly the mechanism of village fund distribution based on the Government Regulation number 60 year 2014, dan me describes as follows :

Scheme :

Village Funds allocation process after the promulgation of Law Number 6 year 2014



CONCLUTION

1. The procedure of distribution and responsibility of the use of Village Fund allocation and state budget allocation for the Village (Village funds) must fulfill the legality aspect of government action, in which the management of that fund have to financially support the activities that reated to Village rights and the Head of the Village solely responsible for the use of those funds.
2. The legal policy of Village fund management after the promulgation of Law Number 6 year 2014 especially related to state budget allocation for the Village (Village funds) follow three stages, namely : (1). The proses of allocation Village Fund in the central government; (2). The budget allocation process in the Municipal/city's government; and (3). The distribution process from the municipal/city government's budget to the village.

RECOMMENDATION

1. There is a need for technical guidance in the procedure and administrative responsibility of village budget, especially related to the use of state budget allocation for the Village (Village funds), in which such regulations shold harmonized and sincronized between related ministries, namely : ad-interim, financial, village and rural areas ministries.
2. There is a need for new concept of implementation administrative sanction in the village financial management, particularly those reulat about Village fund allocation and state budget allocation for the Village (Village funds), which its have more preventif characteristic than repressive. Administrative sanction can be sufficient sanction method for that.

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5. Law Number 17 Year 2003 regarding State Budgeting (Keuangan Negara);
6. Law Number 6 Year 2014 regarding Village (Desa);
7. Law Number 23 Year 2014 regarding The Local Government (Pemerintahan Daerah);
8. The Government Regulation Number 72 Year 2005 regarding Village (Desa);
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RESPONSIBILITY OF ENVIRONMENTAL IMPACT ASSESSMENT ASSESSOR IN THE ACTIVITIES OF MINING

by
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ABSTRACT

Mining licensing issues of serious concern because of excessive mining exploration could harm the environment and future generations. In fact, foreign companies mining license holder reaches 70 percent of oil and gas, mining, coal, bauxite, nickel, and tin, 75 percent and copper and gold mining reached 85 percent. This condition illustrates that the foreign citizen enjoy more of the wealth of Indonesia than the Indonesian people.

One instrument used by the government in controlling the mining industry through the Environmental Impact Assessment instrument hereinafter abbreviated as EIA and environmental licensing. EIA is an instrument of analysis of the action plan raises major and significant impacts as a means consideration of the issuance of business license. Thus the EIA has an important role as a filter for the government to issue a mining permit, which the EIA assessment considerations should be based on technical, environmental, economic, and social culture. Besides deciding the feasibility of the action plan, the EIA Assessor has responsibility to prevent abuse of authority which could harm the environment, society and future generations.

Keywords: Responsibility, Abuse of Authority, and Parameter Ratings

I. INTRODUCTION

The area of responsibility assessment environmental impact statement is about the responsibility of the institution which has the authority to conduct an assessment of the environmental impact assessment document. Responsibility is the realization of the principle of State democracy, particularly their legal protection. Responsibility understanding is the

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use of any form of authority is always accompanied by responsibility. This is a must, because in the theory of Administrative law grants authority comes with the legal assessment, and that the fault in the use of authority, always-access to court, thus guaranteeing legal protection[3].

Environmental impact assessment is one of the environmental documents that contain study an action plan and / or businesses that can lead to major and significant impacts to the environment. The results of this study are used by the government and local governments in issuing environmental permits as a preliminary permit permissibility of an action plan. The importance of the environmental document functions as an instrument of prevention of pollution and / or destruction of the environment, so the agency has the authority to conduct an assessment of the documents required to examine and assess carefully and comprehensively.

The existence of environmental impact assessment document in the of mining business activities have an important role to determine the impact of the activities and / or business on the environment and society as well as to know the efforts made for the monitoring and management of the environment as a result of the activity and / or enterprises in the mining sector. Mining business in Indonesia is a serious problem, due to excessive mining exploration that could harm the environment and future generations. In fact, foreign companies mining license holder reaches 70 percent of oil and gas, mining, coal, bauxite, nickel, and tin, 75 percent and copper and gold mining reached 85 percent. This condition illustrates that the primary audience of the wealth of Indonesia is a foreign citizen, which should Indonesia's natural wealth enjoyed by the people.

Prior to the enactment of Law No. 4 of 2009 on Mineral and Coal, provisions on mining regulated in Law Number 11 of 1967 on the Principles of General Provisions of Mining, which is divided minerals into three, namely Class A, which is an item important for defense, security and strategic to guarantee State's economy, such as oil, uranium and plutonium, Group B is a material that can guarantee the livelihood of many people, such as gold, silver, iron and copper. Group C is a material that is not considered directly affects the lives of many people, for example, salt, sand, marble, limestone and asbestos.

Due to the classification of these materials, the class C mining to be submitted under the authority of local government and environmental document setting is not too tight, because the class C mining is mostly done with the form:

A. Artisanal mining;
B. Small-scale mining; and
C. Gold Mining without a permit (PETI)

With this dispensation, then in some mining areas in Indonesia a lot of activities and / or mining venture that does not have EIA, Environmental Management Unit and Environmental Monitoring Unit (Unit Pengelolaan Lingkungan- Unit Pemantauan Lingkungan,UKL-UPL)

3 Tatiek Sri Djatmiati, *Prinsip Izin Usaha Industri di Indonesia,* Disertasi, Universitas Airlangga, Surabaya, 2004, p. 85-86

or just have a nuisance permit. This conditions in Indonesia has occurred environmental damage due to mining operations which do not have EIA or other environmental or EIA documents which has been just arranged as the administrative requirements of the issuance of permits.

The importance of the position of the environmental impact assessment for consideration by the issuance of licenses in the field of mining operations should be accompanied by responsibility for assessors EIA, it is a risk of the authority of the Audit Commission of EIA (Komisi Penilai Amdal- KPA) in accordance with the legal principles "*geen bevoegdheid zonder verantwoordelijkeid*" (there was no authority without liability)[4]. With this legal principle, the Audit Commission of the EIA has accountability authority in the assessment of pollution and / or environmental damage due to mining operations in Indonesia.

Based on this problem, this paper will be preceded by a brief description of urgency EIA in environmental protection as a result of the activities and / or mining and responsibility in the Audit Commission of the EIA in providing recommendations for consideration feasibility issuance of permit. The goal is to legal protection for the public, which is in the Administrative Law stated that the authorization comes with the legal assessment, and that the fault in the use of authority always-access to court, thus guaranteeing legal protection[5]. Moreover, three topics will try for reviews, which philosophical, sociopolitical and practical perspective.

II. LEGAL ISSUES

Based on the background of the above mentioned problems, the legal issues to be discussed include:

A. The urgency of the EIA In publishing business license Mineral and coal; and
B. Accountability Audit Commission of the feasibility of EIA in providing recommendations.

III. DISCUSSION

A. The role of EIA as the Environmental Protection and Management Instruments in minerals and Coal Mining business

Mining the mineral and coal mining is an activity that exploits natural resources as a gift of God one, where mineral and coal as a natural resource that is not renewable (non-renewable) and has an important role to meet the needs of the national energy as the basic capital of economic development, the important role in the development of mineral and coal is reinforced in Article 4 of Law No. 4 of 2009 on Minerals and Coal, hereinafter called the Mining Law, namely: "Minerals and coal as a natural resource that is not renewable constitute national assets controlled by the state to for Indonesian wealthy ". According to Ahmad

4 H.R.B.M. Kummeling, et al, *Verkenningen van Verantwoordelijkeheid, W.E.J.* Tjeenk Willink, Deventer, 1999, p.14

5 Tatiek Sri Djatmiati, *Op. cit.*p.85-86.

Suhaimi right to control the State in the management of mineral and coal include[6]:

a. Implementation of the right to exploit the state for mineral and coal basically to be implemented by the government and local government;
b. Implementation of the right to exploit the state for minerals and coal by the government and local government entities can be submitted to the Indonesian legal entities, cooperatives, individuals, and the local community after obtaining permission by the government or local government;and
c. Implementation of the exploitation of mineral and coal must provide social and economic benefits as much as possible for the welfare of the people of Indonesia.

In addition, management of mineral and coal to economic and social should also pay attention to the environment, it is to realize the goal of sustainable development. In accordance with Article 1 paragraph 3 that sustainable development is a conscious and planned effort that combines aspects of environmental, social, and economic development strategies to ensure the environmental integrity and safety, capability, welfare, and quality of life of the present generation and future generations ,

Mining business in the aspect of economy means the ability to continue to produce goods and services continuously, maintaining the government's ability to continue to manage and avoid social gap that could disrupt industrial production and agriculture. From the social aspect of mining activities should achieve a balanced distribution, adequate arrangements for public services which include health and education, gender equality, and political accountability and public participation. While the environmental aspects of mining activities must sustain the availability of natural resources, not exploiting renewable natural resources in excess, preserving the environment and exploit the functions of the old non-renewable resources only to the expansion of investment activities while maintaining availability. Environmental sustainability also includes maintaining biodiversity, the balance of the atmosphere and ecosystem function.

Environmental assessment in mining activities is an instrument to fulfill the government's obligations to comply with Article 28 H paragraph (1) of the Constitution of the Republic of Indonesia Year 1945, namely the right of everyone to obtain a good and healthy environment. The environmental right is owned by everyone and one form of social rights as the fundamental rights specifically rights to receive[7].

The state's obligation to meet the community's right to a good environment and healthy is done through the efforts of environmental protection and management. In relation to the activities and / or mining of minerals and coal, environmental management and protection by the Government can be done by the establishment of legislation based environment, assess

6 Ahmad Suhaimi, *Pengusahaan Mineral dan Batubara Dalam Kerangka Hukum Agraria Nasional,* Disertasi, Fakultas Hukum Universitas Airlangga, Surabaya, 2016, p. 29.

7 Philipus M Hadjon, *Perlindungan Hukum Bagi Rakyat,*Peradaban, 2007, hal. 35. Sebagaimana ditulis Tatiek Sri Djatmiati, *Pelayanan Publik dan Tindak Pidana Korupsi,* dalam buku *Hukum Administrasi dan Tinak Pidana Korupsi,* Gajah Mada University Press, Yogyakarta. p. 26,

the environmental documentation, issuing of licenses, supervision and control, as well as the restoration of the environment.

In the implementation of activities and / or mining operations, licensing is one of the instruments used by the government to control mining activities in order not to cause damage/ pollute to the environment and realize sustainable development as set out in Article 3 of the Law Act Number 32 concerning environmental protection and management (UUPPLH). Based on Article 36 of Mining Law stated that a Mining Business License (IUP) consists of two stages:

1. IUP of Exploration covering general investigation, exploration and feasibility studies; and
2. Production IUP activities include construction, exploitation, smelting, transportation and sales.

In supporting sustainable development in accordance with Article 23 of Government Regulation No. 23 Year 2010 regarding Implementation of Mineral and Coal Mining stated that the requirement of Operations Exploration Permits and licenses include: administrative, technical, environmental and financial. Environmental requirements for exploration IUP included statements to comply with the provisions of the legislation in the field of environmental protection and management. Environmental requirements for Production Operation IUP include: 1) intention to comply with the provisions of the legislation in the field of environmental protection and management; and 2) the approval of environmental documents in accordance with the provisions of the legislation.

Based on the Regulation of the Minister of Environment No. 5 of 2012 on Types of Activities and / or Business That compulsory Have EIA stated that the activities and / or mining business who propose an Exploration IUP are not required to prepare the EIA, has obligation to prepare a statement in the form of Statement of Environmental Management (Surat Pernyataan Pengelolaan Lingkungan Hidup -SPPL), while IUP Production Exploitation shall have the environmental documents.

Environmental documents are the result of analysis of the action plan to be used as consideration for publish or permit decisions. Environmental documents can be the EIA (Environmental Impact Assessment), UKL-UPL (Environmental Management and Environmental Monitoring), SPPL (Statement of Environmental Management), DELH (Environmental Evaluation Document) and DPLH (Environmental Management Document).

In accordance with the type of environmental documents, the exploitation or production operation, the filing IUP production must be completed by the approval of the EIA, when activities and / or exploitation (production operation) mineral and coal have extensive permissions ≥ 200 ha and the area open for mining ≥ 50 ha (cumulative annual) is required to have EIA because the area of production operations correlated with the broad spread of the impact. As for the exploitation or production of mineral coal operation extensive licensing <200 ha and the area open for mining <50 ha (cumulative annual) is required to have UKL-UPL.

Based on the definition of EIA as stipulated in Article 1 UUPPLH and is associated with the notion of an administrative decision (KTUN) as stipulated in Article 1 of Law No. 5 of 1986 concerning the State Administrative Court amended first by Act No. 9 of 2004 and second amendment by Act No. 51 of 2009, it is stated that the EIA and UKL-UPL not permit. This analysis was based on the terms KTUN which must meet five elements, namely:

1. A written stipulation,
2. Formed by the Officials / State Administrative Agency,
3. Contains the legal actions of the state administration,
4. A concrete and individual,
5. Final and has legal consequences

Based on analysis and thought these criteria, the EIA is a study that is not final, because the form of recommendations assessment EIA requirements and only used as a consideration in the decision-making process (permit).

EIA as a review of business plans and / activities that pose a major and significant impact, an obligation that must be carried out by a business and / activities, it is stipulated in the legislation includes:

1. Article 22 paragraph (1) of Law Number 32 of 2009 on the Protection and Environmental Management (UUPPLH);
2. Article 3 (1) of Government Regulation No. 27 Year 2012 regarding the Environmental Permit; and
3. Article 2 of Regulation of the Minister of Environment No. 5 of 2012 on Types of Business Plan and / or Events That Must Have EIA.

Obligation for business and / or activities that could have an important impact based on criteria of significant impacts as set out in Article 22 paragraph (2) UUPPLH, namely:

1. The magnitude of the number of people affected by the business and / or activities;
2. The area of operations and / or activities;
3. Lasted intensity and duration of the impact;
4. Environmental components that will be affected;
5. The cumulative nature of the effects;
6. Turn and / or irreversibility of the impact; and
7. The other criteria in accordance with the development of science and technology knowledge.

Based on those criteria, document is prepared in several documents consisting of: Terms of Reference (KA); Environmental Impact Assessment (EIA); Environmental Management Plan (RKL); and the Environmental Monitoring Plan (RPL). In accordance with Article 25 UUPPLH charge EIA contains details about:

1. Study of the impact of the business and / or activities;
2. Evaluation of the activities around the location of the business and / or activities;
3. Suggestions input and the public participation to the business and / or activities;

4. The forecasts of the magnitude and nature of critical impact that occurs when a business plan and / or the activity carried out;
5. Integrated evaluation of the impact occurring to determine the eligibility or ineligibility of the environment; and
6. The management plan and environmental monitoring.

In accordance with the EIA substance containing scientific and technical studies on the action plan that can have a significant impact and important, the EIA document must be prepared by a constituent who has a certificate of competence as a constituent of EIA and involve the affected communities; environmentalists; and / or affected communities on all forms of natural decision EIA process

In achieving the purpose of the EIA as a study right in the forecast on important impacts caused by a planned business and / or activities, then document the EIA should be assessed by the Audit Commission who has the certificate and established by the Minister, the Governor and Regent / Mayor in accordance with the authority. The results of the EIA Commission assessment in examining the EIA document becomes the basis for setting feasibility decision issued by the Minister, the Governor, or the Regent / Mayor in accordance with their authority.

Government Regulation No. 27 Year 2012 on Environmental Permit referred to as PP Environmental Permit states that the activity and / or mineral and coal mining business for the acquisition of IUP Production (exploitation) must have an Environmental Permit. Applicability of this binding PP Environmental Permit for activities and / or mineral and coal mining business based on two reasons prevalence of law, namely:

a. *Lex posteriori derogat lege priori* (the newest regulations override previous regulations); and
b. *Lex specialis derogat lege generali* (specific regulations override the common rules)

Thus the Environmental Permit is a follow up of the EIA assessment or UKL-UPL. Linkage Environmental Permit to EIA or UKL-UPL is expressly stated in Article 2 paragraph (2) Regulation on Environmental Permit which regulates the acquisition phase of activity Environmental Permit includes:

a. making of Amdal (EIA) and UKL-UPL;
b. EIA assessment and examination of UKL-UPL; and
c. Application and issuance of Environmental Permit.

In accordance with these stages, the Environmental Permit is a permit issued by the competent authority after an assessment of the EIA and UKL-UPL inspection at the planning stage. After assessment and examination of published documents UKL-UPL assessment and Environmental Permit, the Environmental Permit provides approval to conduct and / or businesses in the field of mineral and coal mining to be undertaken by the proponent and used as a requirement to file a Mining Business License. Environmental Permit includes about obligation for the proponent to undertake the development and implementation of

activities and / or business, among others:

a. the obligation to have some Protection and Environmental Management permit, such as nuisance permit, Waste Water Disposal Permit, Permit Management of Hazardous Waste, Hazardous Waste stockpiling permit or other permits;
b. the obligation to perform management and environmental monitoring;

In accordance with Government Regulation No. 27 Year 2012 on Environmental Permit, the Environmental Permit is not a new permit and substitute for licensing new permit others in the field of environmental protection and management. The existence of Environmental Permit is to ensure that the obligations to be met by businesses in conducting and / or its business, making it easier for local governments and / or law enforcement officers to the fulfillment of certain obligations that must exist.

In the Mining Law stated unequivocally that the government, provincial government and district / municipality governments have the authority to issue mining area (WIUP) and mining business license (IUP). The central government is authorized to issue WIUPK, IUP and IUPK in accordance with the authority, provincial government authorities to issue IUP accordance with the authority and district / city governments issuing IUP and IUPR in accordance with their authority.

In accordance with the authority in issuing IUP and IUPR divided into local government structure, based on the data in 2014 there were 10,776 IUP that have been issued by the local government, as many as 8,000 IUP issued by the district / city, the rest in 2776 IUP issued by the provincial government. Based on data from the Ministry of Energy and Mineral Resources of that number there are 4,807 IUP problematic or non clean / clear)[8].

Upon consideration of the environmental, economic and social, the Government has done repeal of Law 32 of 2004 on local Government and replaced by Act No. 23 of 2014 on Regional Government, hereinafter called the local Government Law. Based on Government Law, particularly Article 14 paragraph (1) includes unequivocally that the Implementation of Government Affairs in forestry, marine, and energy and mineral resources are shared between central and local government of the province. Thus attribution of mining affairs has become the government's authority and the provincial government and district / city governments have not authority in the field of mining and are not authorized to issue IUP and IUPR.

B. LIABILITY EIA ASSESSMENT COMMISSION FOR MINING ACTIVITIES

EIA document is the result of analysis of an activity plan that became media integration:

a. Availability best options management (best available technology), the ability of the proponent to do the best management option (best achievable technology) and the relevance of management options available to local conditions.

8 Muhammad Yasid, *Kepala Daerah Tidak Boleh Keluarkan Izin Tambang,* Tribun Bisnis, Jum'at 17 Oktober 2014.

b. Referrals monitoring is carried out to the of the relevant environmental components to be used as an indicator to evaluate compliance, trend line and critical levels of an environmental management

Importance of EIA documents in the implementation of activities particularly in the mining, the approval or recommendation of EIA required feasibility analysis through an integrated and regional approach undertaken by the competent assessor. As stated in Article 28 UUPPLH that the EIA document should be prepared by a person who has a certificate constituent UUPPLH EIA and Article 29 stipulates that the EIA document should be assessed by the Audit Commission for EIA established by the Minister / Governor / Regent / Mayor to pick the mandatory license.

Under Article 5 of Regulation of the Minister of Environment No. 5 of 2008 on Work Procedures Audit Commission (KPA) stated that has duties include:

a. assess TOR, Environmental Impact Assessment, Environmental Management Plan and Environmental Monitoring Plan; and
b. providing input and basic consideration in decision making TOR and environmental feasibility for a business plan and / or activities to:
   1) Minister for central government review commission;
   2) The governor for review provincial commission;
   3) Regent / mayor for review districts / cities commission.

In performing its duties as set forth above, the NAC shall refer to:

a. Policy in the field of environmental management set out in the legislation;
b. Spatial plans; and
c. Security and defense

In accordance with the KPA duties as set forth above, then the position KPA has an important role position, so that the authority of KPA assess the EIA document should be based on the proven ability of the license KPA. License is proof of the fulfillment of the requirements of KPA central, provincial or district / city to be able to make an assessment Analysis document. In assessing the EIA document KPA assisted by a secretariat, the technical team of the agency dealing with mining, and KPA, KPA task which focus on assessing environmental feasibility assessment it is reflected in the image below

Figure 1. Main Duties Secretariat, the technical team and KPA[9]



The eligibility of KPA in assessing the EIA document:

a. Spatial plan in accordance with laws and regulations.
b. Policies for the protection and management of environment and natural resources set out in the legislation.
c. Security and defense.
d. Forecast carefully about the amount and nature of the impact of the important aspects of biophysical chemistry, social, economic, cultural, spatial, and public health at the stage of pre-construction, construction, operation and post-operative business and / or activity.
e. The results of a holistic evaluation of all significant impacts as a unity of interrelated and influence each other in order to know the balance of impact;
f. The ability of the initiator and / or related parties who are responsible to overcome negative impacts that will result from the business and / or planned activity with the approach of technological, social, and institutional.
g. The business plan and / or activities do not disturb the social values or views of society.
h. The business plan and / or activities will not affect and / or disrupt the ecological entities
i. The business plan and / or activities do not cause disruption to the business and / or activities that have to be around the planned location of the business and / or activities.

9 Wahyu Yun Santoso, Peraturan Terkait Penyusunan Amdal, Presentasi, Jogjakarta, 2001

j. It is no exceeded environmental capacity of the location of the business and / or activities.

In a study of administrative law, in particular the legitimacy of the government in carrying out the acts of government must meet the elements of legality (validity) that includes formal legality and the substantive legality. Legality consists of formal authority and procedures, while the legality substantial consists of substances or materials. Formal legality for KPA in assessing the EIA can be measured by:

a. KPA has authority to assess the EIA documents as stated in Article 29 paragraph (1) UUPPLH were followed up with Government Regulation No. 27 of 20012 on Environmental Permit and Regulation of the Minister of Environment No. 5 of 2008 on Work Procedures Audit Commission of Environmental Impact Assessment;
b. KPA license; and
c. Decree of the Minister / Governor / Regent / Mayor in lifting the KPA.

While the procedure parameters can be measured by the phases of the EIA assessment by the KPA as stipulated in the Regulation of the Minister of Environment No. 5 of 2008 on Work Procedures of KPA.

Substantial legality can be measured from the material or substance of KPA authority in assessing the EIA document. In accordance with Article 8 of Law No. 30 of 2014 on Government Administration stated that the agency and / or government officials in the use of compulsory powers by:

a. legislation; and
b. Principles of Good Governance.

Based on the Regulation of the Minister of Environment No. 24 of 2009 on the Guideline Assessment of Document Environmental Impact Assessment stated that the KPA in the assessment of the EIA document includes 4 (four) the following aspects:

a. EIA document assessment;
b. Project Assessment;
c. The assessment of quality EIA document includes:
    1) Consistency Test to assess the consistency of the EIA document preparation and implementation of AMDAL study, including documents Executive Summary (RE).
    2) Test requirement is considered that an EIA document fulfills the requirement, which a mandatory EIA documents contain and assessing: The significant impacts, the magnitude, the essential nature of impacts, environmental feasibility, management and monitoring of significant impacts.
    3) Test Depth is judged that the hypothetical impact assessment is important in the EIA document is already using the method of collecting and analyzing the right data, including methods of forecasting and impact evaluation. This is done by someone with expertise in specific areas.

4) Test Match, which considers that the parameters are managed and monitored as well as the efforts of management and environmental monitoring relevant to that recommended in the EIA (evaluation section). Relevancy test is focused on important impact component that raises many derivative impact, repair or modification technology by implementing the 4Rs (reduce, reuse, recycle, recovery), the prevention of the negative impact and be a positive influence on the overall management cost savings.

d. Environmental Feasibility for EIA, RKL and RPL, including RE Principles for determining the eligibility or ineligibility of a proposed business environment and / or activity are:
   1) Significant impacts its negative by the business and / or activity in question can not be solved by the available technology, or
   2) Cost reduction is important negative impact is greater than the positive benefits of the significant impacts that will be generated by the business and / or activity concerned, the business plan and / or activity concerned are disqualified from the environment.

The role of KPA in making authority to assess the EIA documents into recommendations for ministers / governors / regents / mayors to issue the environmental permit is completed by responsibility (Responsibility), it is the realization of legal protection as one of the hallmarks of a democratic State. This is in accordance with the opinion of **Tatiek Sri Djatmiati** that "any use of any form of authority is always accompanied by responsibilities; it is in accordance with the principle (" *geen bevoegheid zonder verantwoordelinjkeheid* ")[10]. Official responsibility in carrying out the authority that belongs to him is the realization of legal protection, it is based on the concept of administrative law that the granting authority equipped with testing and errors in the use of authority always-access to court, thus guaranteeing legal protection[11].

If it is associated with the principles of Good Governance, the responsibility is the realization of the principle of accountability. **Addink** states that when viewed from the aspect of accountability to whom, then divided into accountability: Political accountability, legal accountability, administration accountability, professional accountability and social accountability[12]. Aspects to whom accountability is delivered, then it is the same as to whom the responsibility for the implementation of the authority it was delivered. If the liability associated with the government and local governments in the field of mining, then the political accountability given to representatives of the people, this is in accordance with the regulatory function as representatives of the government administration. While legal accountability is a legal liability to holders of authority are carried out through the judiciary, the Administrative Court for example. Administration accountability is accountability supervisory authority to the holder of the administration, the government's internal inspector. Professional

10 Tatiek Sri Djatmiati, *Op. Cit* hlm. 85-86
11 Ibid.
12 G.H Addink, *Staats en Bestuursrecht, Principles of Good Governance part 2*, Universiteit Utrecht, p.79

accountability is accountability to the organization or association. While social accountability is accountability to the public authority holders through public information disclosure.

In relation to the KPA authority to assess the EIA document, the KPA has the authority to free (discretionary power). The free authority is the authority of KPA to consider and assess the substance of the document EIA in accordance with the eligibility criteria the environment as stipulated in the Regulation of the Minister of Environment Number 24 Year 2009 regarding Guidelines Assessment EIA, where the assessment must meet three aspects, namely the test administration, test phases of the project and test the quality of the document, namely the consistency test, test and test depth requirement.

In fulfilling the first paragraph of Article 28 (4) NRI Constitution of 1945, the government should play an active role in meeting and upholding human rights. Mining activities of mineral and coal impacts to the community and the environment alive, therefore in fulfilling the right to a good environment and healthy as stipulated in Article 28 H paragraph (1) Constitution NRI 1945, the KPA in assessing the documents EIA should be based on the principle legality, that means that any government action should be based on the prevail regulation[13].

Implementation of the principle of legality set forth in the Regulation of the Minister of Environment Number 24 Year 2009 regarding Guidelines Assessment EIA, but in the stage of testing, especially testing the quality of the documents by KPA to judge consistently, must and depth of the document in managing and monitoring of the environment as a result of activities and / or business. In addition, KPA in assessing the EIA document is also based on a study of the social and health aspects of the EIA. As we know that the social aspect has always been progressing and are very complex, so it is possible there are some problems that there is no regulation in the guide, but these problems must be solved as a service to the community. On this condition, the KPA will use discretion. The use of discretion in the assessment of the EIA is often performed by the KPA for the assessment guide they provide settings that use vague norm or open texture norm.

Based on the principle of law that every authority is always accompanied by responsibilities, and then use free for KPA authority in assessing the EIA document should also be tested as a consequence of the responsibility of the authority that has been done. The assessment on the use of authority by the government in carrying out its duties in a country with system common law carried out by the approach of *ultra vires*, whereas in the system of civil law use *rechtmatigeheid* and *doelmatigeheid*[14] with a test basis in the form of legislation and the general principles of good governance, as stated Article 10 of Law Number 30 Year 2014 on Government Administration.

The connection of testing of government actions undertaken by the KPA in using the authority of the free (discretion) to examine and assess the environmental documents in common law countries it is known there are three (3) basic types of testing used by judges, namely illegality, procedural impropriety and irrationality ,

13 Ridwan, *Diskresi dan Tanggungjawab Pejabat Dalam Penyelenggaraan Pemerintahan di Indonesia,* Disertasi, Fakultas Hukum Universitas Airlangga, 2013, p. 25.

14 *Ibid.*

Illegality is the principle which states that the decision maker (KPA) should be based on the legislation and understand the legal consequences of decisions issued, in terms of the legality of the decision. Legality can be equated with the principle of legal certainty. Based on Article 10 Law on Government Administration in elucidation specify that the definition of "legal certainty" is a principle in law that prioritizes state grounding provisions of law, decency, constancy, and fairness in every policy governance. In accordance with the principle of legal certainty, the KPA function in assessing the EIA document should consider the fairness and expediency planned activities and / or establishments, community, government and the environment.

Procedural impropriety (deviation procedures), meaning that in the procedure of issuing environmental feasibility decision, must be in accordance with the stages of the test must be carried out in accordance with the guidelines set out in Regulation of the Minister of Environment Number 24 Year 2009 regarding Guidelines Assessment EIA. In preventing the occurrence of procedural impropriety in determining the feasibility of the EIA document should be assessed in accordance with the principle, namely as accuracy (principle of carefulness)[15].

Accuracy can be defined as the careful preparation of an administration of an administrative order (or of another legal action or act)[16]. Implementation as accuracy implies that a decision should be prepared and taken carefully, so as accuracy is always required that government agencies before taking a decision sanctions should examine all relevant facts and include all relevant interests into consideration[17]. Implementation of the principle of accuracy in making decision also included in Article 10 of the Administration, which meaning as accuracy that any decisions and / or actions should be based on the information and documents are complete to support the legality of the establishment and / or implementation of decisions and / or actions that Decision and / or action in question carefully prepared before the decisions and / or actions are defined and / or do. Thus the application of the principle of precision in decision making feasibility EIA document must perform several steps, namely: a careful examination, investigations, hearings and publications[18].

Irrationality is the implementation of the principle of rational reasoning, where every decision taken in should be based on the reasoning supported by evidence and facts are correct. The principle of giving a rational reason can be attributed to proportionality, so the decision was based on the grounds of rational must be proportionate. Proportionality is a balance between the interests of the (destination) and creates awareness about the exact relationship between the cause and the final result. Proportionality can be applied in three

15 I Gusti Ngurah Wairocana, *Good Governance Dalam Penegakan Hukum,* dalam Buku *Hukum Administrasi dan Good Governance,* Universitas Trisakti, 2010, p. 111

16 Ibid, h. 115, Bandingkan Philip M Langbroek, *General Principles of Proper Administration and The General Administrative Law Act in The Netherlands,* 2003, p. 11.

17 Philipus M Hadjon, et all, *Pengantar Hukum Administrasi Indonesia,* Gajah Mada University, 1996, p. 269.

18 I Gusti Ngurah Wairocana, *Op. Cit, p. 115*

situations, namely: proportionality and right, proportionality and penalties, proportionality and exercise of administrative discretion[19]. In the Public Administration Act, rationality equivalent principle of impartiality, which is the principle of impartiality is a principle that requires the KPA in setting and / or perform a feasibility Decisions should take into consideration the whole interests of the parties and non-discriminatory.

In connection with the testing of government actions undertaken by the KPA in using the authority of the free (discretion) to examine and assess the environmental documents in civil law countries whose approach *rechmatigeheid* and *doelmatigeheid*. According to *Van Wijk / Willem Koninjnenbelt* there are four (4) basic types of testing that can be used against the actions of government organs, namely[20]:

a. contrary to the legislation;
b. abuse of authority;
c. Structure of government in considering the various interests concerned to take a decision not based on rational grounds;
d. Contrary to what was in the consciousness of the common law principles of living / effect of government it deserves.

Based on Government Administration Law, the government in using discretionary parameter is set. If the EIA document assessment, KPA must assess the use of discretion, based on Article 23 of Law Administration, the use of such discretion must meet one of the substances within the scope of discretion, namely:

a. Decisions based on the provisions of the legislation which provides a selection of decisions and / or actions;
b. Decisions and / or action because the legislation does not regulate;
c. Decisions and / or action because the legislation is incomplete or unclear; and
d. Decisions and / or measures for their government stagnation to wider interest.

Doelmatige approach is the use of free authority (discretion) in accordance with its objectives. In Article 22 paragraph (2) of the Act Administration has stated that the Government's using discretion to:

a. expedite of governance;
b. fills a legal vacuum;
c. providing legal certainty; and
d. Overcome the stagnation of government in certain circumstances in order to benefit and the public interest.

In fulfilling these objectives, the authorities will use discretion must meet the following requirements

a. Discretion in accordance with the purpose referred to in Article 22 paragraph (2);
b. not contrary to the provisions of the legislation;

19 Tatiek Sri Djatmiati, *Pelayanan Publik dan Tindak Pidana Korupsi* dalam Buku *Hukum Administrasi dan Tindak Pidanan Korupsi,* 2011, p. 48. Baca P.P. Craig, Administrative Law, 2003, p. 621-622.

20 Ridwan, *Op. cit,* p. 27.

c. in accordance with AUPB;
d. based on objective reasons;
e. do not give rise to a Conflict of Interest; and
f. Carried out in good faith.

If the KPA in the assessment document and issued a recommendation on the environmental feasibility is not fit for purpose, based on Article 31 of Governmental Administration and consequently categorized mix authority decision or recommendation be canceled. Official actions categorized as acts mix authority is against the principle of not abusing authority as one of the Principles of Good Governance (AUPB). As stated in the explanation of Article 10 of the Administration that the "Principle of not abusing authority" is a principle that requires each agency and / or Government officials did not use his authority for personal benefit or the benefit of others and not in accordance with the purpose of granting such authority, not surpass, not abuse, and / or do not confuse authority.

With the testing grounds of the decision and / or acts of government in carrying out its authority, then every officer should be accountable for its actions. In the perspective of Administrative Law, the implementation of the follow-governance can be seen from the aspect of government norms and norms of behavior of the government, where it is to be shot with functional approach / behavior. In accordance with the behavioral approach, the responsibility and accountability of government in implementing the actions can be distinguished between personal responsibilities and the responsibilities of office.

The government's responsibility in holding the government's task is the implementation of a component of administrative law, the legal component of the government, which according to **Philipus M Hadjon** three basic components of administrative law includes[21]:

a. **Law for governance** (*het recht voor het besturen door overheid; voor het recht bestuur: normering van het bestuursoptreden*);
b. **Law by the government** (*het recht uit dat dit bestuur onstaat; van het recht bestuur: nadere regelgeving, beleidsregels, concrete bestuursbesluiten*); and
c. **Laws against the government** that is the law concerning the protection of the law for people to acts of government (*het tegen het recht bestuur*).

Components of administrative law are a law against the government on legal protection for people against acts of government. Legal protection in this context distinguishes between the legal protection that is preventive and repressive legal protection. Preventive legal protection regard to people's participation in the issuance of the decision. Protection of repressive laws concerns to liability and remedy. Responsibilities are divided between job responsibilities and personal responsibility[22].

Arrangement of the EIA documents in the mining sector is one of the legal instruments that are used to prevent environmental damage and losses caused by the activities and / or mining operations, therefore the aspect of legal protection for the public on the impact of

21 Philipus M Hadjon, *Op. Cit,* p. 19
22 *Ibid.*

mining going to be implemented. The legal protection that is preventive in the preparation of the document EIA is implemented with the involvement of the community who will be affected and representatives or environmental organizations related to the proposed activities and / or operations as a non-permanent member in the review commission EIA (KPA) which is set in the Regulation of the Minister of State for the Environment life Number 5 Year 2008 on Working Procedures Audit Commission of the EIA. Implementation of preventive legal protection is also set out in Article 9 of Government Regulation No. 27 Year 2012 on Environmental Permit, which the EIA preparation each proponent shall involve the public community through an announcement about the planned activities and / or business as well as conduct public consultations. While the legal protections that are repressive provisions are specifically not regulated in legislation in the field of preparation of the EIA document. Protection arrangements that are repressive refer UUPPLH dispute settlement, both disputes regarding indemnity and administrative disputes.

In the stipulation of any government (KPA) which harms or violate the rights of the people is the responsibility of office or personal responsibility is the concept of personal mistakes and errors in the implementation of the follow-government positions or decisions. The concept of personal error and error positions were originally developed in French country with regard to the use of authority. The use of authority by the government according to the French law concept of moving from two (2) main principles lay down by *Conseil d'etat* as the basis of public service, namely: (1) *legalitë* and (2) *responsabilitë*[23]. *Legalitë* (legality) means that the government must act in accordance with the law, therefore, its decisions are risky to be canceled by the court administration. *Responsabilitë* identify that the government will be accountable for compensation for habitants who lost by decision or government action[24]. In the French legal system, the government accountable in some situations, even when there are no mistakes made but losses afflicts individuals in the public service.

Based on the *Conseil d'etat* and consideration Tribunal de Conflicts developed measurement error for accountability for the harm that in two elements: (1) personal fault (*faute personelle*) and (2) the error positions (*faute de service*)[25]. Personal error is a mistake made is not related to public service but it shows the weakness of people (actors) because of negligence or inadvertent. In relation to state accountability elements of personal fault (*faute personelle*), the employee may be sued by someone who harmed in the general court. Fault positions (*faute de service*) are an error that occurs because of an error in the use of authority and only related to public service. With the separation of power is based on the general court may not accept complaints of government are perverted, so that the injured/ aggrieved party can apply to the administration of justice.

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23 Tatiek Sri Djatmiati , *Maladministrasi dalam Konteks Kesalahan Pribadi dan Kesalahan Jabatan, Tanggungjawab Pribadi dan Tanggung Jawab Jabatan.* Dalam buku Hukum Administrasi dan Good Governance. Universitas Trisakti, Jakarta, 2010, h. 89 dikutip dari L. Neville Brown and John S Bell, *French Administrative Law,* Clarendon Press Oxford, 1998, p. 182)

24

25 *Ibid,* p. 90.

In relation to the state accountability, which emphasizes the element of validity (*faute*) is also visible balance such protection. If there is a personal fault (*faute personelle*), the action cannot brought to trial administration court. Settlement of the dispute is resolved by referring to the civil code (*droit civil*)[26]. While accountability state based on the elements of the error positions (*faute de service*), then the lawsuit filed with the Judicial Administration by adhering to the basic principles of governance called Les *Pricipes Generaux Du Droit*, which include: *Violation de la loi*, Incompetence, *Vide de forme*, *L'inexistance*, *Detournement de pouvoir*. Violations of this principle are categorized fifth contrary to the principles of legality (*legalitē*)[27].

Personal responsibility regards to the approach functionaries or behavioral approaches. From the standpoint of administrative law, personal responsibility concern to maladministration in the use of authority in the public service (public service)[28]. In Personal responsibility is not known principle of "*Superior Respondeat*" that the boss does not responsible for the actions of subordinates[29]. Thus the act of governance parameters consists of:

a. Legislation;
b. Norms of good governance; and
c. Norms of good behavior.

In Indonesia, the government norms of behavior related to maladministration, regulated in Law Number 37 Year 2008 on the Ombudsman of the Republic of Indonesia and Law Number 30 Year 2016 on Government Administration.

Job/ office responsibilities relates to the validity of the (legal) acts or decisions of government. In administrative law issues relating to the validity of the acts of government approach to the power of government, where the size of government acts or decisions of the authority given by law based on the principle of legality or *rechtmatigheid*[30]. The principle of legality divided into:

1) The principle of formal legality,
   Formal legality principle relating to the powers and procedures
2) The principle of legality substantial
   The principle of legality substantially related purposes.

Every act of government authority requires the validity or legality, procedure and substance, in accordance with the principle of "*rechtmatigheid van bestuur*". Legality substantially relies on the principle of interest in Dutch literature known as "*specialiteit beginsel*". Substantially "*specialiteit beginsel*" implies that every authority containing a particular purpose. Administrative law in the literatures is also known principle of "*zuiverheid van oogmerk*"

26 *Ibid,* , p. 91.
27 *Ibid,* Lihat H.B. Jacobini, *An Introduction to Comparative Law,* Oceana Publication Ins, New York, 1991, p. 108
28 *Ibid,* p. 94.
29 *Ibid.*
30 Philipus M Hadjon, et all, *Pengantar Hukum Administrasi Indonesia,* Gajah Mada University, 1996. p. 320.

(sharpness of direction and purpose). Violate the principle of purpose resulst to an act of an act "*detournement de pouvoir*"[31].

Acts of government that does not meet the principle of legality lead to defects in the act of governance. In relation to the validity of the acts of government applies the principle of *praesumptio iustae causa* which implies that every action (decision) government should be considered valid until cancellation. This principle became legal reasoning of Article 67 paragraph (1) of Law No. 5 of 1986 in conjunction with Law No. 9 of 2004 and Law No. 51 Year 2009 on State Administrative Court which states:

> *"The lawsuit does not delay or impede the implementation of the decision of the Board or the Administrative Officers as well as the body or official action being sued."*

The appropriate provisions should be set on the changes, revocation and cancellation of the decision. The difference between void, may be canceled and void must be see on a provision.Based approach to government power, the responsibility of this position is the supervision or control of the use of authority in the administration of governmental duty not to violate or harm the rights of society. Comparison of job responsibilities and personal responsibility can be seen in table 2 below[32]:

Table 2. Comparison of Position/ Job Responsibility and Personal Responsibility

	Tanggung Jawab Jabatan	Tanggung Jawab Pribadi
Focus	- The legality of the action	- Maladministration
Sanction	- Administrative, Civil	- Administrative,Civil, Criminal

Based on the concept of fault in committing the government, especially in the assessment of the EIA document, the accountability of government then carry out acts of government in Indonesia can be divided as follows as follows:

Civil liability with positions of responsibility to do based Unlawful Acts by the KPA that the submission made by the General Court that its claim is based Article 1365 BW, when a fault in the administration acts is wrong positions. If the KPA in assessing the EIA document that was material when inflict harm on society is based on maladministration, it is a personal error suit was filed to the perpetrator (personal) through the General Courts.

a. Administrative Accountability. This is an accountability office that conducted feasibility KPA issued a recommendation in the environment as the basis of the issuance of environmental permit may cause harm to society. Liability based on the fault position is measured with the legality / validity of government action. Filing a lawsuit is done through the State Administrative Court with the Environmental Permit disputed that claim was the cancellation of Environmental Permit. KTUN in accordance with the criteria as stipulated in Article 3 of Law No. 1 number 5 1986, that one of the criteria KTUN must be final, then the environmental feasibility recommendation cannot

31 Philipus M Hadjon, *Hukum Administrasi dan Good Governance,* Universitas Trisakti, Jakarta, 2010, p.95
32 Ibid, p. 32.

be termed as KTUN so it can not be the object in his lawsuit. With the issuance of Government Administration Law, particularly Article 1 paragraph 7, which states that the Administration's decision is also called an administrative decision or decree of the State Administration hereinafter called Decree written issued by the Agency and / or Government officials in governance. Decision or KTUN definition does not include the final word, so that all such decisions be used for governance, then the decision referred KTUN and can be disputed TUN. Thus if the administrative court judges use KTUN concepts contained in the Government Administration Act, the decision on environmental feasibility as KPA may be filed as the object of his lawsuit.

b. Criminal liability which is based on a personal fault in relation to the action KPA assessment EIA document misuse of authority resulting in loss of public and individual responsibility measured by a KPA relating to maladministration.

IV. CONCLUSION

Based on the legal analysis of the importance of the KPA in the assessment document and the need for responsibility on the recommendation issued KPA associated with environmental damage we conclude that

1. Activities in the field of mineral and coal mining are activities that can have a significant impact and importance, so that mining activities must have a permit. At every production stage mining operations must have production license (exploitation) which requirements must be equipped with an Environmental Impact Analysis (EIA). In the process of acquisition of the EIA, each proponent shall prepare EIA documents must be assessed by KPA as a commission with authority to assess the environmental feasibility of an action plan. Thus the existence of the KPA in assessing the EIA document is an early and important instrument as prevention against environmental damage, impact on health and other negative impacts to the community.
2. Position KPA very important in assessing the environmental documents and their discretion to the KPA for assessment, the authority must be completed by responsibility KPA as a legal safeguard for the people. This is in accordance with the legal principle that "*bevoegdheid zonder geen verantwoordelijkeid*" (there is no authority without accountability). KPA authority valuation parameters are based on the validity of the measures and their assessment EIA document maladministration in the implementation of assessment EIA document. This accountability effort can be done by testing the action through the Administrative Court relating to the validity of the action and General Court related to maladministration.

V. RECOMMENDATION

1. With KTUN conceptual differences between Article 1 paragraph 3 of Law No. 5 of 1986 concerning the State Administrative Court and Article 1 paragraph 5 of Law No. 30 of 2014 on Government Administration to bring a difference in perception for the public,

officials and judges in settlement TUN dispute. Thus the Supreme Court Circular needs to provide guidance to judges in determining the absolute competencies.

2. With the provision that the concept KTUN accordance with Article 1 paragraph 5 of Law No. 30 of 2014 on Government Administration, the Environmental feasibility Recommendations can be submitted as KTUN and be the object of TUN dispute. Hence the need for understanding the KPA that authority to assess the EIA document has consequences for the responsibility for the feasibility recommendation given. This can lead to the revocation recommendation to the filing on abuse of authority categorized as an act of maladministration.

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CORPORATE INTEGRATED RESPONSIBILITY ON MINING MANAGEMENT IN INDONESIA

By
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ABSTRACT

Mining is an important sector in order to boost country and local government revenue on the economy sector. In the process, the process of mining has a positive impact not only in economic sector, but also the social and environmental area. As one corporate responsibility and reduce the impact of mining activities, the mining industry has to apply corporate responsibility action.

Recently, we are familiar with social responsibility or known as corporate social responsibility (CSR), which is has not still meet the expectations of society, the government and the mining industry itself. This paper will try to see another perspective, which is not only in social perspective or CSR, but the economic and environmental aspects become an integral part of integrated corporate mining responsibility framework in a legal perspective.

Keyword: Mining industry, corporate responsibility, integrated responsibility

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DILEMMA'S OF USE OF LEASING AGREEMENT OBJECT AS FIDUCIARY GUARANTEE OBJECT

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ABSTRACT

Fiduciary guarantee on lease agreements, usually use the object of *lease* object fiduciary guarantee of the us too. It is not in accordance with the principles of fiduciary, because the giver of the fiduciary, fiduciary (the lessee) should be the owner of the object which is the object of fiduciary guarantee, and ownership rights that exist on the giver of fiduciary is delivered to the recipient of fiduciary (lessor), while in a leasing agreement, leasing object shall belong to the lessee if at the end of the agreement the lessee choose the option to purchase the lease object.

This study uses legal pluralism approach which focuses on the study of philosophical, juridical and sociological.

In the lease agreement should have ownership rights of lease object remains with the lessor, the lessee is yet. Practice fiduciary guarantee in such a lease agreement can actually be detrimental to the lessor, the lessee because the actual has become giver of fiduciary exposure of the ownership rights to her yet, so in such cases it should not have happened fiduciary guarantee. Nonetheless such practices carried out by finance companies, because they do not know clearly how the fiduciary concept when applied to the lease agreement. In general, they only know that the fiduciary is a guarantee that in this case the objects still controlled by the guarantor. In fiduciary only parties who have ownership rights of objects that can be givers, fiduciary as a prerequisite the fiduciary is the transfer of ownership rights of the giver to the recipient of fiduciary fiduciary.

Key words: leasing agreements, ownwership rights, guarantee object, transfer of ownership rights

A. INTRODUCTION

The capital is an important requirement for the company is good at the beginning of its business activities as well as for further business development. In line with the technological developments and the more distant specializes in companies as well as the increasing number of companies that became great, then capital has the meaning as the main factors of

production[1]. Capital is not only limited to money but rather leads to the whole collectivity or accumulation of capital goods by Jackson and Mc Connell called as investment[2]. There are various ways that can be reached by the company for fulfillment of capital goods, one of which is through*leasing*. According to Beckman and Joosen (1980), *leasing* is actually a symptom of the economy, because the incidence of effected by various economic considerations that must be decided by a business entity that requires a capital goods/means of production. When the capital goods required that the price is very expensive so that businesses faced with two choices[3], namely:

1. Buy yourself a capital goods is concerned, so that business entity that may use such items at once obtain ownership rights over it; or
2. Use the capital goods belonging to others without obtaining the property rights over the goods.

*Leasing*it is the institution that originated from the improvised rent (*lease)* developed in Sumer since 4500 years Bc. *Leasing* in the modern sense was first developed in the United States with the railway in 1850, and its development was very rapid. During the 1980s *leasing* increased an average of about 15%, and a third of new business equipment procurement there done with *leasing.* Subsequent *Leasing* spreads to Europe, even to the rest of the world. [4]In Indonesia, *leasing* is a relatively new institution compared with other financing institutions and practices in other countries.

In the regulation of the Minister of finance Number 84/FMD. 012/2006 Concerning the financing of the company mentioned that the lease (*leasing*) is financing activities in the form of provision of capital goods both in the lease with the right options (*finance lease*) nor the lease without the right options (*operating lease*) for use by Tenants in order to attempt (*the lessee*) for a certain period based on payment at regular intervals.

In fact *leasing* is one of the ways of financing similar to bank credit, only the difference between *leasing* provides assistance in the form of capital goods, while providing assistance in the form of bank capital. [5]*Leasing* capital equipment procurement Process relatively faster and does not require any collateral material, the procedure is simple and there is no necessity of doing a feasibility study takes a long time; The procurement of capital needs heavy equipment and expensive high-tech is very ease to the needs of *cash flow* given the long-term installment payment system; The position of the *cash flow* of the company will be better and the costs of capital are becoming cheaper and more attractive; Financial planning firm providing opportunities of interest to entrepreneurs, as it has the advantage-advantage as an alternative of financing outside the banking system, for example,[6]easier and simpler.

Legal relations in the *leasing* agreement is essentially. *Leasing* agreements are not recognized in the books of civil law Act. The entry of *leasing* agreement to Indonesia, because of the principle of freedom of contracts (article 1338 of the books of civil law Act.). This agreement is subject to the books of civil law Act, under article 1319, which determine that all of the good that agreement has a specific name, famous or not with a specific name, subject to the General rules contained in this chapter or chapter ago.

*Leasing*Agreements, has similarities to the lease, lease purchase, sale and purchase by installments, consumer finance, however, has certain characteristics that differentiate it from the treaties. Thus a treaty *leasing* represents a new kind of independent (*sui generis*). This agreement including agreements *innominaat*, because it is not regulated specifically in the books of civil law Act..The settings regarding *leasing* that exist, only administrative and taxation only. About the civil aspects, in particular the Covenant, among others, govern the rights and obligations of the parties are still very less, so the parties can decide on its own.

In general *leasing* agreement made in standard form (raw). In this case the rights and obligations of the parties had been determined by *the lessor*. As the maker of the agreement, *the lessor* is easier to anticipate the possibility of losses on its side, while *the lessee* lives accept or reject the agreement, so that *the lessee* can be said to be on the weak side. As a result, often in a treaty *leasing* are various deviations against the legal principles of the agreement, as well as a diversion against the principles of *leasing that is* in practice there is a confusion between provision of capital goods and consumer goods, the existence of confusion in regard to its object fiduciary guarantee corresponding to *leasing*. This is not in accordance with the principles of fiduciary guarantee, due to the occurrence of the fiduciary, fiduciary guarantee of the giver must have property rights over objects into objects fiduciary guarantee. In *leasing*, property rights over goods that became the object of *leasing* a new switch from *the lessor* to *the lessee* when at the end of the agreement, *the lessee* to use the right of option to purchase the object of *leasing* is concerned. Thus, if the goods become the object of *leasing* object becomes a guarantee of *fiduciary,* to guarantee the payment of the obligations of *the lessee* to *the lessor,* then the fiduciary guarantee does not occur, because the property rights over the objects remained on the part of *the lessor* should be the recipient of the fiduciary the absolute terms, while the occurrence of fiduciary guarantee is the existence of property rights over objects object fiduciary guarantee on the part of the giver of the fiduciary.

II. RESEARCH METHODS

This research use approach *triangular concept of legal pluralism* Werner Menski expressed as,[7]whichperfect integration is to understand and enforce the law in a society plural (plural), i.e. between the docking between *state law* (*positive law*), the civic aspect (*socio legal approach)*[8], and *natural law* (*moral/ethic/religion*). A philosophical approach to do the understanding of legal consistency between the values, morals and ethics (*natural* law) that developed in the community. The normative approach is done with the inventory of various legal regulations, rules, norms and principles of existing law relating to the use of the object of *leasing* agreement goods as fiduciary guarantee object that developed within the community. The sociological approach is done by doing research on social reality, namely the reality of being part of the awareness and knowledge of the community, which is done by holding the interaction among researchers with a problem is examined through the speakers and informants who have been determined to see the facts while simultaneously capturing the

aspirations that appear in community practice with fiduciary guarantee of the same object with the object of leasing that developed in the community. Location of research in Jakarta and Semarang.

III. PROBLEMS

1. how the legal consequences jaminanan fiduciary with object object that becomes the object of leasing that is guaranteed?
2. how the legal protection of the parties in respect of the object of leasing object fiduciary guarantee as well as a guaranteed?

IV. DISCUSSION

1. A Legal Fiduciary Jaminanankibat with object object that Becomes the object of the agreement L*easing*

a. Fiduciary Guarantee of the implementation of the agreement on *Leasing*

Term *lease* language comes from the United Kingdom *lease*. In Black's Law Dictionary[9] mentioned that the *lease as a contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usually Rent. The lease term can be for life, for a fixed period, or for a period terminable at will.*

*The Financial Accounting Standards Board, Statement of Financial Accounting Standard No. 13 Accounting for Leases, November 1976, par. 1. International Accounting Standard Committee*mendefenisikan*leasing*are as follows:

> *"Lease: An agreement where by the lessor conveys to the lessee in return for rent the right to use an asset for an agreed period of time. The definition of a lease includes contracts for the hire of an asset which contain of provision giving the hirer an option to acquire the title of the asset upon the fulfilment of the toofgreed conditions. These contracts are described the us hire puchase contracts In some countries, different names are used for agreement which have the last of a lease (e. g. bareboat characters).*

Based on the definitions above, it can be concluded some elements that should be contained in the *lease* are:

a) *The Lessor*i.e. parties who provide capital goods for *the lessee,* is financing the company received permission from the Ministry of finance;
b) *The Lessee*IE the get the party financing of *lessor* or the parties who need/wear capital goods.
c) Object *leasing* i.e. goods that become the object of *leasing* agreement which covers all sorts of capital goods ranging from high-tech to the medium or technology needs of the Office.
d) The payment of the rent that is periodically within a certain period to do every month, every quarter, or every half year.
e) The value of the remaining (*residual value)* specified before the contract begins.

f) The existence of a right of option for *the lessee* at the end of their *lease*, which in this case *the lessee* has the right to decide whether he wants to buy the item with a price of residual value or return on *the lessor.*

g) *Lease Term*is a period of *leasing*agreement.

In the regulation of the Minister of finance Number 84/FMD. 012/2006 about the company financing the jo. Article 1 point 5 presidential Regulation No. 9 in 2009 About Financing Institutions mentioned that "the lease (*leasing*) is financing activities in the form of provision of capital goods both in the lease with the right options (*finance lease*) nor the lease without the right options (*operating lease*) for use by Tenants in order to attempt (*the lessee*) for a certain period based on payment at regular intervals.

In fact *leasing* is one of the ways of financing similar to bank credit. Only the difference between *leasing* provides assistance in the form of capital goods, while providing assistance in the form of bank capital. [10]the system of *leasing* provides opportunities of interest to entrepreneurs, as it has the advantage-advantage as an alternative of financing outside the banking system, for example:[11]

a) *capital equipment procurement Process relatively faster and does not require any collateral material, the procedure is simple and there is no necessity of doing a feasibility study takes a long time;*
b) *The procurement of capital needs heavy equipment and expensive high-tech is very ease to the needs of cash flow given the long-term installment payment system;*
c) *The position of the cash flow of the company will be better and the costs of capital are becoming cheaper and more attractive;*
d) *Corporate Financial Planning easier and simpler.*

To provide ease for *the lessee,* in *leasing* should be no collateral material, but in practice generally *leasing* is always accompanied by a guarantee. One of the agencies the guarantee that is widely used in the practice of *leasing* i.e. fiduciary guarantee. Fiduciary according to origin derives from the Latin *fides,* meaning trust. The word is a noun that means confidence in someone or something. In addition there is the word *fido,* which is a verb which means to trust someone or something. [12]Subekti said that in a fiduciary are contained the words "*fides*", means a trust, parties 2 parties believe that the debtor has goods it just for guarantee. [13]in accordance with the meaning of these words, then the legal relationship between the debtor and creditor Fudusia as the giver as the recipient of the Fiduciary is a legal relationship based on trust. The giver of the Fiduciary believes that the recipient of the Fiduciary will return the property rights over the objects that have been submitted after the debt repaid. Instead, the recipient of the Fiduciary believes that the Giver will not misuse the Fiduciary guarantee of the goods that are in his power. [14]

According to a. Hamzah and SerjunManulang, a fiduciary is a new blend of property from its owner (the debtor), based on the existence of a principal agreement (Treaty of debts receivable) to creditors, but only submitted its due course in *yuridische-levering* and only owned by creditors in the belief (as a guarantee of the debts of the debtor), while the

goods remain controlled by the debtor, but not anymore as *eigenaar*nor *bezitter*, but only as a *detentor*or *houder* for and on behalf of the creditor-*eigenaar*.[15]in this case the figure used is the *fiduciaireeigendomsoverdracht*(NATURAL OCCURRING FEO), which translates to the "surrender of property rights on the basis of trust". Popularized here is kedinamisannya, i.e. their surrender or *overdracht*, which in this case meant is a proprietary submission from difidusiakan objects but limited to just trust that is to guarantee the debt. [16]in other words in the fiduciary guarantee transfer of ownership took place on the basis of trust with promises of ownership rights transferred objects remain in the mastery of the owner of the object. Transfer of proprietary rights is done in a *possessoriumconstitutum*, means a transfer of the right of ownership over an object with a far-flung objects could continue for the benefit of the recipient of the Fiduciary. [17]

In article 1 point 1 Act No. 42 of 1999 regarding Fiduciary Guarantee, mentioned that "a fiduciary is the transfer of the possession of an object on the basis of trust on the condition that the objects transferred ownership rights remain in the mastery of the owner of the object".

Article 1 point 2 of the Act mentions the Fiduciary Guarantee

Fiduciary guarantee is a guarantee of rights over moving objects either tangible or intangible, and not moving especially buildings that cannot be burdened with the rights of a dependent who remain in the mastery of the giver of the Fiduciary, as collateral for the repayment of certain debt, which gives precedence to the Receiver position against other creditors of Fiduciary.

The elements of Fiduciary guarantee, i.e.[18]:

1) *Fiduciary guarantee of the Subject is the Giver and recipient Fiduciary Fiduciary*
2) *Fiduciary Guarantee is the Object moving objects and the objects do not move that cannot be burdened with the rights of a dependent*
3) *The existence of a transfer of ownership rights over an object from the giver of the Fiduciary to recipients on the basis of Fiduciary Trust*
4) *Objects object fiduciary guarantee remains in the mastery of the giver of the Fiduciary.*
5) *Transfer of proprietary rights is only as a guarantee for the repayment of certain debt*
6) *Gives the position of the preferred (droit de preference) to the recipient against other creditors of Fiduciary.*

b. the subject and object of Fiduciary Guarantee

Fiduciary guarantee of the subject is the Giver and recipient Fiduciary Fiduciary. The giver of the Fiduciary is a person an individual or Corporation owners of objects that become the object of a fiduciary Guarantee. Recipient of the Fiduciary is a person, the individual or corporation who has accounts receivable the payment secured by Fiduciary Guarantee.

The giver of the Fiduciary must be the owner of the object into the object Fiduciary Guarantee (article 1 point 5 Fiduciary Guarantee law), because in the Fiduciary Guarantee submitted to the recipient of the Fiduciary is property rights over objects, whereas his remains on the giver of fiduciary relationships (article 1 point 2 of the Act Fiduciary Guarantee). Fiduciary guarantee can not be separated from the delivery of the property in the trust of the

giver of the Fiduciary to the Fiduciary Recipients. Therefore the giver of the Fiduciary shall have authority against a fiduciary guarantee object objects to be able to overload the objects with the fiduciary guarantee. This is because the authority is one of the conditions to be met in the transition of ownership rights over a material. The requirement that must be met for the beralihnya property of a material is the following.

1. the authority of the person who submitted;
2. the legitimate rights of the pedestal, which require a person to submit a material;
3. submission.

Recipient of the Fiduciary is a person, the individual or corporation who has accounts receivable the payment secured by fiduciary guarantee (article 1 point 6 Fiduciary Guarantee legislation).

Objects become objects of Fiduciary Guarantee are objects that can be owned and transferred the right of ownership, whether tangible or intangible objects, registered or not registered, move or not move that cannot be burdened with the right mortgage or mortgages (section 1 number 4 Fiduciary Guarantee legislation).

Fiduciary guarantee process is done through a two-stage, i.e. the stage of loading and Fiduciary Guarantee registration stage [25].

1) The Imposition Of Fiduciary Guarantee

In article 5 paragraph (1) the Fiduciary Guarantee law mentioned that the imposition of a fiduciary Guarantee of objects made by deed of notary public in the language of Indonesia and it is the Fiduciary Guarantee deed.

2) Fiduciary Guarantee Registration

The purpose of the registration is Warranties Fiduciary fiduciary guarantee, is giving birth to give legal certainty to the parties concerned, entitles the precedence (*preferred*) to the recipient of the Fiduciary against creditors other creditors-and of the principle of publicity because of the Fiduciary registry offices open to the public. Registration Fiduciary Warranties set forth in section 11-18 Fiduciary Guarantee legislation. Objects that are burdened with mandatory Fiduciary Guarantee are listed, as well as items that are burdened with Fiduciary Guarantee is outside the territory of the Republic of Indonesia. Fiduciary Guarantee registration is done at the registration office of the Fiduciary. Fiduciary Registration Office is a section in the Justice Department's environment and not an independent agency or unit technical implementers.

Fiduciary guarantee is often used in practice agreement *lease,* to guarantee the party *lessor* in providing finance to *the lessee.* At issue is a fiduciary guarantee in general object is the object of *leasing* agreement yang question. In *leasing,* property rights over objects recently switched to *the lessee* when at the end of the agreement *the lessee* to use the option to buy the *leasing* object, whereas the absolute requirement is the existence of fiduciary guarantee of the inception of the surrender of the right of ownership of the objects from *the giver of fiduciary*

*relationships (*in this case *the lessee* to *the lessor).* Thus, it should be done at the time of the surrender of property rights, the giver of fiduciary already have ownership rights over objects that become the object of a fiduciary guarantee.

Should the legal construction in the fiduciary guarantee on *leasing* agreement is when *the lessee* as the owner of the goods, then *the lessee* surrendered the rights of ownership of the goods to the juridical *lessor* in order to secure the trust accounts *of the lessor.* However, When seen from a practical concept of fiduciary guarantee object, is at once the object of *leasing.* In this case the object ownership legally in *leasing* is fixed on *the lessor,* whereas in the fiduciary guarantee should the giver of the fiduciary is the owner of objects into objects, fiduciary guarantee in construction guarantees the ideal fiduciary is that the giver of the fiduciary rights ownership of objects to the recipient in fiduciary trust. So there is a mismatch between the practice with ideally.

2. Legal protection of the parties in respect of the object of Leasing Object Fiduciary Guarantee as well as a guaranteed

The right of option is a right of *the lessee* in a treaty *leasing the kind of financial lease* to choose whether to buy capital goods that became the object of *leasing* or will extend the *leasing* or return goods *leasing* at the end of the agreement. In practice it turns out that there is a financing company in which case the right of option to purchase capital goods thus already in use at the beginning of the making of the agreement, especially the *leasing* of motor vehicles. Even *the lessee* had already signed a letter of agreement is also selling capital goods. This is not in accordance with the principle of *leasing.*

In general the *leasing* in practice determined that *the lessor* has the right to set bail *leasing* or rental *lease* in advance. In such case, then guarantee *leasing* or rental *lease* in advance is a guarantee of top obedience and willingness to perform the *lessee* agreement *lease,* as well as any changes and updates. Guarantees of *lease* or rental *lease* in advance not flowering and can not be taken into account as a *leasing* or lease a portion of it and is the purchase price of the goods *leasing* when *the lessee* to use the right options to purchase goods *leasing,* or refunded to *the lessee* at the end of the period of *lease* if *the lessee* cannot use the option to purchase goods *leasing* , having reduced by the amount of money that may be indebted to *the lessor.*

If in *leasing* agreements set out the other form of guarantee in addition to the guarantee of the *leasing* and/or tenancy *lease* in advance, then the guarantee is considered guaranteeing all the claims *of the lessor* in the order the use of guarantees established by *the lessor.*

Usually in the *lease, the lessor* requires other additional guarantees as guarantees, either material or guarantee individual guarantee (*borgtocht*). One of the collateral material that is widely used is the fiduciary guarantee, that in fact there are problematic in the execution of this fiduciary guarantee. Fiduciary guarantee as additional agreement (*accessoir*) that follows the agreement *lease,*its object is usually the object of *leasing* itself. It is thus not in accordance with the principle of fiduciary guarantee, as collateral in a fiduciary, fiduciary giver (*the lessee*) should own the objects into objects, fiduciary guarantee and proprietary rights on the giver of

this fiduciary delivered to recipients of fiduciary relationships (*the lessor*). In the agreement , *the leasing* of goods that become the object of *leasing* a new switch on the part of *the lessee* if at the end of the agreement *the lessee* to use the right of option to purchase goods *leasing.* On the *leasing* agreement should have ownership rights over objects of the object *of leasing* remains in *the lessor.* Fiduciary assurance practice in *leasing* agreements of the sort can actually be detrimental to *the lessor, the lessee* because in fact has become the giver of the fiduciary guarantee against the rights of ownership of the object has not been there for him, so that in such a thing should not happen guarantee fiduciary. In spite of such practices by finance companies, for not knowing clearly how the concept of fiduciary guarantee when applied on a treaty *leasing.* In general they only know that the fiduciary guarantee is a guarantee that in this case the objects are still controlled by the party giver guarantee.

In the event *the lessee* to use the right option at the beginning of the agreement, which was later continued with the sale and purchase agreement between *lessor* and *lessee*, the agreement anyway, i.e. *leasing* agreement does not comply with the principle of *leasing,* so that agreements such as the Treaty of selling in installments. With the agreement of that sort, then since the surrender of property objects already on *the lessee,* so agreement *accessoir*-guarantee agreement, fiduciary relationships with objects of the same Treaty with the *leasing* agreement can be made, because in the fiduciary guarantee of the only party that has the right of ownership over objects that can become givers fiduciary the absolute terms, because of the occurrence of the fiduciary guarantee is the delivery of the possession of the giver of the fiduciary fiduciary to the recipient. The practice of the use of the fiduciary guarantee with the same object with the object of *leasing* a lot done on the *leasing* object with a motor vehicle. For *leasing* agreement with the object of heavy equipment is usually *the lessee* also requested additional guarantees, but its object is not the object of *leasing.* To guarantee repayment of the financing granted by finance companies, usually *the lessee* requested submit additional guarantees. The object of this additional warranty is not the same as the object of *leasing,* because on the *leasing* agreement the ownership rights over the objects still exist on *the lessor,* so there might be financing undertaken by *the lessor* is secured with its own objects. Although the option is actually used by *the lessor* at the beginning of the agreement, but property rights over an object the object of *leasing* remains in *the lessor.*[19]

Just as in bank credit agreement, agreement on the *lease,the lessor* requires in order to guarantee *the lessee* responsilities to pay installments on time. The main guarantee of the bank credit in the form of the belief that the debtor will be able to pay in installments, unequivocally determined in law number 7 of 1992 About banking, which has been amended by Act No. 10 of 1998, in article 8 that "in providing credit, public bank is obligated to have confidence over the ability and willingness to pay off the debt the debtor is exchanged. This principle is also applied generally in the *leasing.*

In the practice of financing undertaken by finance companies, in this case there are also provisions on the principle of know your customer, which is set in the FMD No. 30/ FMD. 010/2010 On the application of the principle of know your Customer For a Non Bank

financial institutions. In the FMD is mentioned on how to recognize the customer to acquire beliefs in conducting the legal relationship with the customer in question.

The guarantee can be one of the things that can be used to convince creditors in providing financing. However, if the return on the principle of financing by *leasing the* wrongone goal is to help small and medium entrepreneurs to obtain financing in an easy way and should by no special warranties, as this can be an obstacle for businessmen who do not have enough objects to be used as a guarantee. It turns out that in the practice of *leasing,* although the material guarantee agreement is referred to as an additional guarantee, but usually always required the existence of a guarantee for *the lessee* who get financing by *leasing* .

Article 3 paragraph (3) the number 84/FMD FMD. 012/2006, which mentions that all lease agreements, property rights over capital goods object of the lease transactions are on Company financing.

Fiduciary assurance practice in *leasing* agreements with the same assurance object with the object of *leasing* that is secured by fiduciary guarantee in questionasposed above can actually be detrimental to *the lessor, the lessee* because in fact has become the giver of the fiduciary guarantee against the rights of ownership of the object has not been there for him, so that in such a thing should not happen guarantee fiduciary.

Leasing agreements secured by fiduciary guarantee with the same object with the object of *leasing* agreement by finance companies, due to not knowing clearly how the concept of fiduciary guarantee when applied on a treaty *leasing.* In general they only know that the fiduciary guarantee is a guarantee that in this case the objects are still controlled by the party giver guarantee.

In the event *the lessee* to use the right option at the beginning of the agreement, which was later continued with the sale and purchase agreement between *lessor* and *lessee*, the agreement anyway, i.e. *leasing* agreement does not comply with the principle of *leasing,* so that agreements such as the Treaty of selling in installments. With the agreement of that sort, then since the surrender of property objects already on *the lessee,* so agreement *accessoir*-guarantee agreement, fiduciary relationships with objects of the same Treaty with the *leasing* agreement can be made, because in the fiduciary guarantee of the only party that has the right of ownership over objects that can become givers fiduciary the absolute terms, because of the occurrence of the fiduciary guarantee is the delivery of the possession of the giver of the fiduciary fiduciary to the recipient.

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[1] to this day among economists there are also not yet in common opinions about what constitutes capital. If seen from its history, then the notion of capital was *physical oriented.* In terms of the capital classic, "the meaning of capital itself is as a result of production that was used to produce more". In the process it turns capital began to sense are *non-physical oriented*, more emphasis on value, buying power or power wear or use, contained in capital goods. Jackson and Mc Connell in http//www. forumbebas.com, June 9, 2015, stated capital or investment goods related to the overall material and tools involved in the production process as a tool (utensil), machinery, equipment, plant, warehouse, transportation, and distribution facilities that produce goods and services used for the end consumer.

Mansfield argued similar statements, capital associated with buildings, equipment, supplies, and other production resources which contribute to the activities of production, marketing, and distribution of goods.

[2] http//URwww.wikipedia.org, 4 November 2015

[3] See Beckman and Joosen in SitiIsmijatiJenie, *the position of Leasing Agreements in the Legal Alliance Indonesia, as well as the prospect of its legal aspects of the setting in the future*, dissertation, University of GadjahMada in Yogyakarta, 1998, pp. 14.

[4] MunirFuadi's, *Law on Financing in theory and practice,* PT Citra AdityaBakti, Bandung, 1995, pp. 14-15.

[5] Richard Burton Simatupang, *legal aspects in business*, a second Mold, Rineka Copyright Jakarta, 2003, pp. 102.

[6] *Ibid*, pp. 103

[7] Werner Menski, *Comparative Law in A Global Context, The Legal Systems of Asia and Africa,* Second Edition, United Kingdom: Cambridge University Press, 2006, PG. 24. 187.

[8] In this case, there are two aspects of the research, namely the aspects of *legal research,* i.e. Research object still exists in the form of law within the meaning of the "*norm*", and *socio research*, namely the use of the methods and theories of social science of law to help researchers in conducting the analysis. This approach remains in the realm of law, just a different perspective. See Zamroni, *the development of social theory, introduction to* Yoga, Tiara, 1992, pp. 80-81. Authors disagree with Peter Mahmud Marzuki who suggested that *socio legal research* (research socio legal) instead of legal research. See Peter Mahmud Marzuki, *legal research,* Kencana, Jakarta, 2005, pp. 87-91. Isn't science development has now been experiencing a shift towards a holistic approach. The method of science began to leave the ways atomisasi the subject, i.e. works by memecah-mecah, separated, menggolong-golongkan (*fragmented*). The underlying philosophy is the Cartesian and Newtonian. SatjiptoRahardjo, see *legal science: search, liberation and enlightenment* (Editor KhudzaifahDimyati), Muhammadiyah Surakarta University Press, 2004, pp. 42-48. See also in Ahmad Gunawan and Mu'amar Ramadan (Editor), *initiated a Progressive Law Indonesia,* Yogyakarta, Student Library-IAIN WaliSanga, Semarang, 2006, pp. 13. Compare also with Terry Hutchinson opinion which recognizes that *socio legal research* as part of legal research with the term *Fundamental Research.* View Terry Hutchinson, *Last and Writing in Law,* Piramont-NSW, 2002, pp. 9

[9] Bryan a. Gardner, *Black's Law Dictionary*, eighth edition, Thomson West, United States of America, 2004.

[10] Richard Burton Simatupang, *legal aspects in business*, a second Mold, Rineka Copyright Jakarta, 2003, pp. 102.

[11] *Ibid*, pp. 103

[12] see the Tan Kamello, *the law of Fiduciary Guarantee a need the coveted*, Alumni, Bandung, 2006, pp. 39.

[13] r. Subekti, *issues of civil law,* Intermasa, London, 1982, pp. 82.

[14] GunawanWidjaja and Ahmad Yani, *a series on business law, Fiduciary Guarantee,* King GrafindoPersada, Jakarta, 2000, pp. 115.

[3] a. Hamzah and Serjun M, *Fiduciary Institution and its application in Indonesia* , Jakarta, Indhill, 1987, pp. 34

[16] a. Hamzah and Serjun M, *loc. cit.*

[17] GunawanWidjaja and Ahmad Yani, *Op. Cit*. PG. 129.

[23] SitiMalikhatunBadriyah, *Fiduciary Guarantee in Indonesia (after the enactment of Act No. 42 of 1999)*, the Publisher UniversitasDiponegoro, Semarang, 2005, pp. 28.

25 Kashadi, *op. Cit,* p. 173

[19] personal interview with Anwar Ali, PT. Clemont Finance in Jakarta on January 28, 2010.

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Original

It is not in accordance with the principles of fiduciary, because the fiduciary, the giver of fiduciary (lessee) should be the owner of the object which is the object of fiduciary guarantee, and ownership rights that exist on the giver of fiduciary is delivered to the recipient of fiduciary (lessor), while in leasing agreement, leasing object shall belong to the lessee if at the end of the agreement lessee choose the option to purchase the lease object.

PRISON SANCTIONS INCONSISTENCIES BETWEEN ACT NO. 28 OF 2014 ON COPYRIGHT AND PENAL CODE

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ABSTRACT

The formation legislation process consist of planning, making, discussion, approval or determination and enactment. In making process often occurs any disperacies between of the established legislation that have been set one another, one of them was the inconsistences was contained in the substance of Act No. 28 of 2014 on Copyright with Penal Code. The aims of the research is to answer the issues with elaborate and analyze the inconsistencies of Act No. 28 of 2014 on Copyright with Penal Code. The research method used juridical normative with interpretation analysis and law construction. The results showed the prison sanctions inconsistences. Juridical impact that would result due to the inconsistency of establishment Act No. 28 of 2014 on Copyright with Penal Code was the lack of legal ability to achieve preventively legal protection and represively legal protection as the law aims are fairness, expediency and legal certainty.

Key words: *Prison Sanctions, Inconsistence, Act, Copyright, Penal Code*

A. BACKGROUND

Human as individual and social beings have a number of dynamic potential. In encouraging there was always changes in human society where human gather with other human called society. In fact, society changes took place so rapidly affected the development of sciences, technologies, needs and life challenges. Science and technology development as an effort to improve the effectiveness and efficiency of human activities in order to improve their welfare. This is consistent with the aim of the Republic of Indonesia as it was echoed by The Preamble of the Constitution of the Republic of Indonesia 1945 (Constitution 1945) paragraph IV.

That statement was a political supreme of law for every Indonesia citizen basic rights in order to achieve the prosperity. Then the provision of Aricle 28C paragraph (1) of the

Constitution 1945 completely mentioned:

> *"Everyone had the rights to develop themselves through the fulfillment of their basic rights, entitled for education and to feel the benefit of science and technology, art, culture and to improve the quality of life for mankind welfare".*

Rights in getting the benefit of science and technology, art and culture were the manifestation of Intellectual Property Rights (IPR), meant that the benefit of science and technology, art and culture were part of the Human Rights. Further more, political law was elaborated in a various development policy and law related to science and technology called IPR Law. The issuance of Act No. 7 of 1994 regarding Ratification of the Agreement Establishing the World Trade Organization became the first step of IPR law arrangement improved from time to time in Indonesia.

From seventh fields of IPR, copyright got a very important position in Indonesia IPR as:

> *"Copyright was very important becaused of the substance in it was directly related to national culture which including science, technology, art, literature and other cultural form. It was understood caused of these areas were very importance and influence Indonesia life development and progress. Becaused of reservationed of TRIPs Agreement was impossible, so Indonesia government had to make some adjustments and provisions implementation related to copyright as stipulated in the TRIPs Agreement into national legal systems in the field of IPR totally".*[1]

Becaused of the copyright scope was widespread enough, so the copyright act was formulated comprehensively in order to maximize of the using of copyright itself in the right corridor. The fact that occur in society was not just a few people took the advantage of the development in science and technology as a way to obtain economic value by copyright provision violation.

There were a number of violations, such ploughing and even manifolding of other person creation without any permission of thecreation owner for commercial purposes:

> *"An incident illustrated this situation occurred in May 2000 when police raided a market in Glodok. Thousands VCDs and software ploughing was seized. Police raid had resulted in a great major riots which later became the topic of debate in the media. This has led to polemics on the subject of justice for making ploughing goods sellers were trying to increase business opportunities amid the economic crisis as the target. Some of observers and practitioners on this issue were sympathetic to the insignificant traders in Glodok market. More over, some people said that provided these ploughing products at a reasonable prices was not a big mistake. Law enforcement of this has made the counterfeit goods were untouched by most of Indonesian people".*[2]

The logical of copyright function in order to encourage the creation of creativity was very hard to ignore. Overseas investment and economic confidence on the country was highly dependent on the effectiveness of the enforcement of IPR. The advantages over the enforcement effort should need to be considered becaused it would provide protection to the creators, artists and other actors in Indonesia. It was just a few copyright cases in Indonesia

1 Airlangga Surya Nagara, *Thesis: Copyright in Indonesia (Study of Politics Copyright Law in Indonesia)* (Semarang: Diponegoro University, 2013), pg. 6-7.

2 IKAPI Member, *Intellectual Property Rights An Introduction* (Bandung: PT Alumni, 2011), pg. 92.

resolved through the satified judicial process.

Recognizing these deficiencies, then Indonesia Government and House of Representative as the agency considered the legislation necessary in order to provide the effective and efficient copyright legal protection. It was indispensable in order to realize a more conducive climate for creative growth development spirit in the fields of science, art, literature were needed for Indonesia goal implementation at the creation of Indonesia society were fair, prosperous, advanced and independent by Constitution 1945.

That was why, in order to provide protection of the economic rights and moral rights owned by creator/related rights to his creation, the institution of legislation reformed the copyright act. The legitimation of Act No. 28 of 2014 on Copyright in October 2014 as well as replaced the Copyright Act previously, namely Act No. 19 of 2002 on Copyright.

The interesting manner of Act No. 28 of 2014 on Copyright was the copyright protection offered was automatically valid when a creation was made as wrote in Article 1 paragraph 1 Copyright Act declared that "Copyright was an exclusive rights of the creator that legitimate automatically based on the declarative principle after a creation embodied in a tangible form without reducing restrictions in accordance with the provision of the legislation".

Given the substance of the Copyright Act was very important, so that raised the question of how was the consistency of Act No. 28 of 2014 on Copyright with other law? Or did Act No. 28 of 2014 on Copyright was not fully consistent leading to inconsistency of Act No. 28 of 2014 on Copyright with other law? Answering this question required further monitoring and analysing of Act No. 28 of 2014 on Copyright as a positive law in Indonesia.

The positive law had to be consistent with the exist legislation. A legal norm was said to be applied philosophically in these countries contained moral values and ethics as a reference in law arrangement to influence the nation life. Hans Kelsen pointed the groundnorm or Hans Nawiasky viewed about staatsfundamentalnorm that in every country used to define their basic values or the highest philosophical values as the sourceof all sources of noble values in the state concerned life.[3]

In addition, the need for consistency between the legal arrangements with the legislation on it, then the consistency of positive law with other parallel law also need to be considered in order to describe the synchronization and harmonization to avoid overlapping regulation and law clarity as stated by Danrivanto Budhijanto with his argument:

> *"Harmonization of law[4] was a scientific activity towards harmonization process of written law referred to philosophical values, sociological, economical and juridicial. In practiced, harmonization was a comprehensive assesment of a legislation draft in order to determine whether the newly law design in the various aspects had reflected a harmony or conformity with the other legitimate rules, with unwritten laws that lived in the community or with the conventions and international agreements, both bilateral and multilateral had been ratified by Indonesia government".*

3 Jilmy Asshiddiqie, *Subject Law* Act, Cet. 2. (Jakarta: Rajawali Press, 2011), pg. 166.
4 Danrivanto Budhijanto, *Law Theory, Convergence* (PT Refika Aditama: Bandung, 2014) , pg. 110.

Inconsistency was not impossible could be found in the substance of Act No. 28 of 2014 on Copyright with other act. Some researchers had been carried out about it, but no one of them examined the inconsistency of Act No. 28 of 2014 on Copyright with other parallel act. More over this act was relatively new becaused it was just passed in October 2014 ago as followed.

First, the article titled Copyright inIndonesia (Study of Politics Copyright Law in Indonesia).[5] *In this paper, the author only compared the substances of Copyright Act No. 6 of 1982, Act No. 7 of 1987, Act No. 12 of 1997 and Act No. 19 of 2002. In addition, the result of this research did not talk about inconsictency Copyright Act.*

Second, Sophar Hutagalung[6] *through his book "Copyright (Position and Role in Development" published in 2012. Overall his book loaded the history of the development of copyright law development in Indonesia progress. In addition, the reviewing act was limited to a comparison of Act No. 12 of 1997 regarding Copyright and Act No. 19 of 2002 on Copyright.*

Third, the book entitled "Copyright's Law" by Rehmi Jened. The discussion in this book was not much different from the discussion in the previous Sophar Hutagalung book and still used the Copyright Act previously.

Thus, before it could be seen that no one a comprehensive study yet examined the inconsistency of Act No. 28 of 2014 regarding Copyright with other parallel act. It was the point of author viewed to examine about the inconsistency of Act No. 28 of 2014 regarding

Copyright with other parallel act, devoted to the rules relating to Act No. 28 of 2014 on Copyright in a parallel position (horizontal).

Finally, through research, the author took up the title "Prison Sanctions Inconsistencies between Act No. 28 of 2014 on Copyright with with Penal Code".

B. METHOD OF RESEARCH

The research method used dogmatic legal research with descriptived analysis to describe the object by interpretation, analysis and law construction. Data of this research was collected by library research, especially rules about the prison sanction inconsistencies between Act No. 28 of 2014 on Copyright with Penal Code then analyzed by qualiative method.

C. RESULTSANDDISCUSSION

1. Act Inconsistency

Indonesia as a state law in every state life implementation had to be based on legal regulations were formed into a single legal system. According to Hans Kelsen, the law effectiveness meant that people actions in accordanced with the norms of the law as it should be done, so those norms were implemented and adhered actually. The measureness of effectiveness was put on the people actually not on law quality itself.[7]

5 Airlangga Surya Nagara, *Thesis: Right ... Ibid* .
6 Sophar Hutagalung, *Copyright (Position and Role in Development*) (Jakarta: Sinar Grafika, 2012).
7 Hans Kelsen, *Pure Theory of Law* , Translation Somadi, Rimdi Press, 1973) , pg. 38.

Law effectiveness became so important becaused of the of law forming purposes in law making their energy had to be achieved by each party to implement or to enforce the law. Generally, law energy aimed to encourage parties to create the peace in any human social life in order to achieve a balance between certainty law proportionality.

Then, law poured in a more concrete form, viz rules. One of the main pillars in the governance of a country was the establishment of good, harmonious and easy to implement rules in the community. As a discourse to implement the establishment of rules needed the existence of a rule that could be used as a guideline and conduct for the parties in the formation of rules.[8] Rules establishment was the making of rules covering the stages of planning, preparation, discussion, endorsement or establishment and appointment. Among the series of the process, there was a process which not mentioned explicitly, but had an important role, it was harmonization process. Harmonization was an attempt to align a rule with other rule, well higher, aline or lower, and other matters beyond the rules for the systematically arrangement, not conflicting or overlapping (overlapping).[9]

This was a consequence of the hierarchy of Indonesian rules. Harmonization was expected to be an integral part of the overall law making system. In addition, the provision needed compatible between the rules arrangements with the higher law even with other parallel rules. This became so important in order to describe synchronization, law harmonization, a clear and unequivocal law status.

Copyright law making dispersed to various laws, including the Penal Code. Neither Penal Code and Act No. 28 of 2014 on Copyrights had balance accrued in the hierarchy of rules, so the substances in both act would demonstrate their consistency nor inconsistency.

Literally, the term "inconsistency" was opposed to the word "consistent. The word "inconsistency" was derived from the "inconsistent"[10] (to be inconsistent/were not consistent) meant: 1) did not match, did not fit, did not match; 2) contradictory, conflicting, have parts that did not conform; 3) did not remain. Quoted from Black's Law Dictionary,[11] inconsistent: mutually repugnant or conradictory. Contrary the one to other, so that both cannot stand, but the acceptance or esablishment of the one implies the abrogation or abandonment of the other, as in speaking of "inconsistent defences" or the repeal by a statute of "all laws consistent herewith". Then, inconsistency: the expression "inconsistency" meant in compatible, dissonant, in harmonious, inaccordant, inconsonant, discrepant, contrary, contradictory, not in agreement, incongruous or irreconcilable.[12] Thus, act inconsistency meant the disharmony between one and the other provisions that had been recognized as positive law in a country.

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8 Maria Farida Indrati, *Science Legislation: Formation Processes and Techniques,* vol 2 (Jakarta: Doubleday, 2007), pg. 1.

9 Bagir Manan, *Basics of Legislation* (Jakarta: Graphic, 1992), pg. 25.

10 Compiler Team, *Indonesia Dictionary* (Jakarta: Language Centre Department of Education, 2008), pg. 556.

11 Hendry Campbell Black, *Deluxe Black's Law Dicionary*, 6 th ed (United States of America: West Publishing Co., 1992), pg. 766.

12 Justice LP Singh and Majumdar Pk, *Judicial Dictionary,* 2 nd ed (New Delhi: Orient Publishing Company, 1998), pg. 765.

In practice, the activities of harmonization was a comprehensive assessment of a legislation draft in order to determine whether the newly design in various aspects had been reflected a harmony or conformity with other national act, with unwritten laws lived in the community, conventions and international agreements, both bilateral and multilateral ratified by Indonesian Government. Harmonization was important to solve any existing problems, so lawmakers in making the decision should look back to the purpose of the exist law. Sunaryati Hartono said that one of the functions of law in development was "Law as a preserver of order and security".[13] Different regulation for the same thing would not achieve the order and security.

Harmonization would indicate whether arrangements had been consistent or inconsistent with other established act. Thus, based on research related to inconsistencies in Act No. 28 of 2014 on Copyright with other legislation found consistency and inconsistency.

Therefore, through the harmonization between Act No. 28 of 2014 on Copyright with the Penal Code found any inconsistencies contained in Act No. 28 of 2014 on Copyright with the Penal Code.

2. Prison SanctionsInconsistenciesBetween Act No. 28 of 2014 on Copyright with the Penal Code

Article 120 of Act No. 28 of 2014 regarding Copyright considered that "criminal offenses referred to this legislation was to a "delik aduan". The offenses stipulated in Act No. 28 of 2014 on Copyright was mentioned as a violation. In contrast to copyright-related criminal offenses in the Penal Code is not referred to as a violation, but a crime that was also mentioned as an "delik" (without the "aduan" as well as regulated in Act No. 28 of 2014 on Copyright) as specified in Book II Crimes, especially Chapter XXV on Deeds Fraudulent and Chapter XXX about Edition and Printing.

Based on the research, inconsistencies of the provisions contained in Act No. 28 of 2014 on Copyright with Penal Code as shown in the table below:

13 Octavianus Hartono, *inconsistency of legislation and Akibtnya the Purpose of State,* Vol. 1 Number October 2, 2011 on the official website Leimena Institute http://www.leimena.org, accessed on October 23, 2015.

Table Prison Sanctions Inconsistencies Provisions between Copyright Act and Penal Code

Act No. 28 of 2014 on Copyright	Penal Code
Article 113 determined: 1. Any person who unlawfully in violation of economic rights referred to Article 9 paragraph (1) point i for commercial use should be punished ***with a period of 1 (one) year imprisonment*** and/or a maximum fined of 100,000,000 (one hundred million rupiah), 2. Any person who without authority and/ or without permission of the creator or copyright holder rights violations economy creator referred to in Article 9 paragraph (1) point c, d, f and/or hcommercial use should be ***punishedof 3 (three) years imprisonment*** and /or a fined of not more Rp500,000,000 (five hundreds million rupiah). 3. Any person who without authority and / or permit the creator or copyright holder rights violations economy creator referred to in Article 9 paragraph (1) point a, b, e and / or point g for commercial use should be punished ***with maximum of 4 (four) years imprisonment*** and/or a maximum fined of Rp1,000,000,000 (one billion rupiah). 4. Everyone who met the elements referred to paragraph (3) was conducted in the form of ploughing should be punished with 10 (ten) years imprisonment and/or maximum fined of Rp4.000.000.000 (four billions). Article 9 paragraph (1) "The creator or copyright holder as referred to in Article 8 had an economic rights to do: a. creation publishing; b. creation manifolding in all its forms; Explanation: Manifolding actions including recorded by using a video camera (camcorder) in the theater and lived performances. c. creation translation; d. adaptation, composing, or transformation creation; e. distribution of creation and its copies. f. creation exhibition; g. announcement of the creation; h. communication creation; and creation leasing".	Article 380 paragraph (1) "Threatened ***up to two years and eight monthsimprisonment*** or a maximum fined of seventy-five thousand rupiahs 1. whoever put a name or mark falsely above or in a result of literature, science, art or craft, or a fake name or the original sign, intentionally that people thought that it was really the fruit of the person whose name or mark placed by him in on or in it earlier; 2. Whoever knowingly sold, offered, submitted, had inventories to be sold or put to Indonesia, the results of literature, scientific, artistic or craft, which in or on top of it had put a name or mark falsely, or the name or mark of the original had been false , as if it was really the result of the person's name or mark has been placed artificially earlier. Article 483 of the Penal Code stated that "Whoever published something in writing or drawing something which by its characteristic was a crime, punishable by a ***maximum one year and four months imprisonment, or one year detention*** or a maximum fined of four thousand five hundred rupiahs, if: 1. The offender was not known his name and his name were not informed by the publisher on the first exhortation after the prosecution went against him; 2. Publishers already knew or reasonably suspected that at the time of writing or drawing was published, the offender could not be prosecuted or be settled out of Indonesia. Article 484 of the Criminal Code "Whoever printed texts or images that constitute offense, punishable by a maximum one year and four months imprisonment, or a maximum of oneyear detention, or a maximum fined of four thousand five hundred rupiahs, if: 1. People who asked for printing the unknown goods and after the prosecution determined, the first strike was not notified by it; 2. The person who printed had known or would had been guessed that the person who ordered printing at the time of publication, could not be prosecuted or settled out of Indonesia ".

The table above clearly illustrated the inconsistency of criminal sanctions provisions stipulated in the Copyright Act and the Penal Code related to creation in the form of a criminal act and imprisonment period imposed as followed:

The classification of criminal acts between the two legislations illustrated the inconsistency. Criminal act stipulated in Act No. 28 of 2014 on Copyright was a violation of economic rights be classified in a variety of actions, including the publishing; manifolding in all its forms; translation; adaptation, composing, or transformation; disribution the creation and its copies; the creation exhibition; announcement of the creation; communication creation; and creation leasing. While the criminal act related to the creation stipulated in the Penal Code more generally could be categorized as followed:

1. put a name or mark was counterfeit or falsify a name or the original sign
2. intentionally sold, offerred, submitted, had inventories for sale were in or on top of it had put a false name or mark, or the name or mark of the original had been false
3. published something in writing or drawing something which by its characterictic was a crime
4. printed texts or images that constituted offense

Of all the actions contained in the Copyright Act, only a few were clicking directions on the similarity of meaning as act in the Penal Code, namely publishing; manifolding in all its forms; translation; adaptation, composing, or transformation; disribution the creation and its copies; the creation exhibition; announcement of the creation; communication creation; and creation leasing.

Then, inconsistencies imprisonment period on criminal acts specified in the Copyright Act as followed:

a. creation leasing got a maximum of 1 (one) year imprisonment.
b. creation translation, adaptation, composing, or transformation creation, creation exhibition and/or creation communication got maximum of 3 (three) years imprisonment.
c. creation publication, creation duplication or creation distribution and its copies and/or the announcement of the creation got (four) years imprisonment. However, in the Penal Code was only punishable with a period of 1 (one) year 4 (four) months imprisonment, or maximum of 1 (one) year detential.
d. if creation publication, creation duplication or creation distribution and its copies in the form of ploughing should be punished by maximum 10 (ten) years imprisonment.

While imprisonment period for a criminal offense in the form of put a name or mark was counterfeit or falsify a name or the original sign or intentionally sold, offerred, submitted, had inventories for sale were in or on top of it had put a name or mark which was false, or the name or mark of the original was false by Penal Code only punishable by a maximum 2 (two) years and 8 (eight) months detention. Imprisonment inconsistency certainly led to the implications namley lack of law objective achievement of the juridical form through

obscurity provisions which would be used in case of criminal offenses in the future. Legal protection and ultimately led the lack of legal certainty.

3. The Lack of Protection and Law Achievement

Legal protection was an attempt to deliver justice as well as a meant to achieve prosperity for all people. In addition, it also served to create order and regularity.[14] One of those opportunities to realize the regularity, order, justice and well-being was through the creation of positive law, which could give legal protection as aspired. The legal protection provided by Act No. 28 of 2014 on Copyright at least should be based on the ideals of a just and prosperous society based on Pancasila as set forth in Paragraph IV of the Constitution 1945 within the framework of achieving a fair society, prosperous and equitable, both materially and sprituil.

Phillipus M. Hadjon stated that legal protection for the people as an act of preventive and repressive governments.[15] The characterictic of legal protection is also mentioned Maria Alfons in summary dissertation:

> *"Protection of preventive law aimed to prevent disputes directing the actions of the government to be cautious in making decisions based on discretion and repressive protection for the purposed of completing the dispute, including its handling in the judiciary".*

Preventively legal protection and represively legal protection were not intended to present circumstances, but rather focus on how to provide legal protection in some were approximate legal dispute that would occur in the future. Ratification of Act No. 28 of 2014 regarding Copyright expected to give legal protection preventive and repressive. However, the inconsistency provisions of criminal sanctions as stipulated in Act No. 28 of 2014 and Penal Code Copyright would be difficult to reach preventively legal protection and represively legal protection. Becaused of inconsistencies substances of these two provisions would make the difficulty of making decisions that provided legal certainty on a dispute that may occur in the future.

So the purposes of law as well as the establishment of Act No. 28 of 2014 regarding Copyright was not be achieved as Gustav Radburch argued that there are 3 (three) basic values legal purposes. This theory was also called the "principle of priority", the first should prioritize justice, followed by expediency, and last for legal certainty. Ideally, the thirth basic aims of the law must be cultivated within every legal decision, by judges, prosecutors, lawyers and other officials. These three basic values aim of the law was expected to be realized together, but when not possible, it should be prioritized justice first, then the expedience and then the last legal certainty. Only by applied the principle of priority, we could keep moving the legal system and avoid internal conflicts that could destroy it.

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14 Maria Alfons, *Summary of Doctoral Dissertation: Implementation of the Protection of Geographical Indications Products Top Local Communities in Perspective of Intellectual Property Rights* (Malang: Brawijaya University, 2010), pg. 18.

15 Phillipus M. Hadjon, *legal protection for the people Indonesia* (Surabaya: PT. Bina Science, 1987), pg. 2.

Based on the exposured inconsistencies Copyright Act with these provisions, the efforts to realize the regulatory, order, justice and prosperity could not be achieved. In the future, the course would meet a problem in solving any disputes becaused it would give different interpretations in the end. Finally, the purposes of the law as aspired, namely fairness, expediency and legal certainty as expressed by Gustav Radburch would not be able to achieve.

D. CONCLUSION

There are inconsistencies criminal sanctions provisions stipulated in Act No. 28 of 2014 regarding Copyright with Penal Code. Inconsistencies imprisonment period on criminal acts specified in the Copyright Act as followed:

a. creation leasing got a maximum of 1 (one) year imprisonment.
b. creation translation, adaptation, composing, or transformation creation, creation exhibition and/or creation communication got maximum of 3 (three) years imprisonment.
c. creation publication, creation duplication or creation distribution and its copies and/ or the announcement of the creation got (four) years imprisonment. However, in the Penal Code was only punishable with a period of 1 (one) year 4 (four) months imprisonment, or maximum of 1 (one) year detential.
d. if creation publication, creation duplication or creation distribution and its copies in the form of ploughing should be punished by maximum 10 (ten) years imprisonment.

While imprisonment period for a criminal offense in the form of put a name or mark was counterfeit or falsify a name or the original sign or intentionally sold, offerred, submitted, had inventories for sale were in or on top of it had put a name or mark which was false, or the name or mark of the original was false by Penal Code only punishable by a maximum 2 (two) years and 8 (eight) months detention.

Juridical impact that would result due to the inconsistency of establishment Act No. 28 of 2014 on Copyright with Penal Code was the lack of legal ability to achieve preventively legal protection and represively legal protection as the law aims are fairness, expediency and legal certainty.

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DEMOGRAPHIC FACTORS IN HEDONIC CONSUMPTION. A STUDY ON THREE DIFFERENT INDONESIA ETHNICITIES.

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ABSTRACT

Hedonic consumption is those facets of consumer behaviour that relate to the multisensory, fantasy and emotive aspects of one's experience with products. This emotional involvement creates the shopping experience that customers feel. As it suggested in hedonic consumption, the shopping behaviour among consumers recently have had shifted not to only make the right purchase, but it is all about the experience of shopping. The research in this area would beneficial to marketers to discover especially in developing cities. The increasing number of new shopping centres or malls in developing cities like Yogyakarta or Denpasar are following with the people's demand of hedonic products that are available on those places. Previous studies found if demographic factors and ethnicity were significantly affecting hedonic consumption. This study would explain how demographic factors like gender, income, and age will contribute in hedonic consumption from the perspective of Balinese (n = 166), Chinese (n = 102), and Javanese (n = 140). Data were gathered from two different cities, Yogyakarta and Denpasar. The result suggests if female is more hedonic rather than male in three ethnicities. Meanwhile, different pattern was found in age and income from three ethnicities, suggesting different ethnicity may lead to different hedonic consumption pattern.

Keywords: hedonic consumption, gender, income, age, ethnicity

LEGAL ASPECTS OF PROPERTY OWNERSHIP BY FOREIGNERS

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ABSTRACT

The opening of the free market economy in the era of Asean economic community is the best momentum of the opening of foreign ownership of property in Indonesia. The government should not be afraid opening this opportunity because it will generate greater foreign exchange. Foreign interests to own property in Indonesia is very high and the purchase and sale transactions under the hand is already a lot going through a nominee agreement. This raises the loss to the state because the state did not obtain the maximum tax. Glabalization can not be avoided. The solution facing this condition is the existence of rules on the ownership of property by foreigners. Regulation of foreign ownership of property can be driver of economic growth. The Indonesia government recently issued Government Regulation No. 103 of 2015 about Housing Rresidential by Foreign Domiciled in Indonesia. This research is a normative juridical law and the method used to solve this problem is the legal research, the research is intended to examine the rules and principles of law whereas the approach used with emphasis on normative juridical. *First*, an inventory of legislation relating to the the ownership of property by foreign in Indonesia;*Second,* an inventory of the problems that arise with regard to the ownership of property in Indonesia by foreigners in this era of globalization. The purpose of this research is conducting analytic study of the legislation and the implementation of regulations governing property ownership by foreigners in Indonesiain the era of globalization in order to obtain a conclusion regarding law enforcement in property ownership by foreigners in Indonesia.

Keywords :property ownership law, foreigners.

I. INTRODUCTION

Asean Economic Community (AEC) is a form of integration of the ASEAN community in which their free of trade among ASEAN members that have been agreed together to compose ASEAN into a region that is stable, prosperous and highly competitive.

Currently to make AEC still have to face various challenges and obstacles contained in each member state.An agreement to integrate the various ASEAN countries (Indonesia, Malaysia, Philippines, Singpore, Tahiland, Brunei Darussalam, Cambodia, Vietnam, Laos and Myanmar), Each of which had a background of socio-cultural, political ideology, economic and different interests into a community called the Asean Economic Community is still facing a number major obstacles, particularly for Indonesia, which still confronted with various problems of multi dimensional.

Indonesia as one of the countries in the world which has an area of 735.400 mi^2which is various natural resources attract foreigners to settle down in Indonesia, both with limited residence permits*(Izin Tinggal Terbatas/ITAS)* as well as Permanent stay permit*(Izin Tinggal Tetap /ITAP)*. As social being who have been acculturated by Indonesian citizens there are some of those who have desire to be able to own land and buildings in Indonesia either to establish a family relationship or to do his business interests.

Based on this condition, the government needs to perform its role as guarantor of their institute legal certainty in Indonesia.

Land Law in Indonesia

Currently, the property prices in Indonesia can be said to be the lowest in Asia than in developed countries like the US or the UK. In the United States property prices of commercial products (apartments) US $ 16,216 / unit was in Indonesia only US $ 1,287 / unit . Compared with its neighbors, apartment prices could reach US $ 11,324 / unit .[1]Indonesia as a developing country is an investment destination for developed countries to expand its global business activities.[2] Therefore, more and more foreigners who settled in Indonesia to run the business even though there are limitations for foreigners to own residential dwelling.[3]

Minister of Housing (Menpera) Suharso Monoarfa explained that property ownership for foreign nationals in Indonesia seems to be getting closer to reality, even the subject of land and buildings (property) for foreign nationals who have been the desire of some people, especially the property industry in Indonesia has been agreed, The subject has been agreed that foreign nationals living in Indonesia within a certain period, it is conveyed in the Congress of The International Real Estate Federation (FIABCI) in Nusa Dua, Bali on May 26, 2010.[4]

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1 Tjahja Gunawan Diredja. *Tak Perlu Khawatir Orang Asing Memiliki Properti* .Harian Kompas 4 Februari 2009.hal. 37

2 Hiramsyah Thaib, *Tak Perlu Khawatir Orang Asing Memiliki Properti.* Hal. 2. www.kompas.com.2010

3 Adrianus Agung Nugroho.*Analisis Kepemilikan Tanah Oleh Warga Negara Asing.* Tesis. Depok. Fakultas Hukum Universitas Indonesia. 2011

4 Suharso Monoarfa.*Satu Langkah Lagi, Properti Bisa DIbeli WNA".* Hal. 1. www.google.com. 2010.

Land as a gift of God Almighty to the people of Indonesia is one of the main sources for the survival and livelihood of the nation of all time in achieving the greatest welfare of the people.In connection with the supply, allocation, possession, use and maintenance of the land needs to be regulated in order to ensure legal certainty in the acquisition and utilization as well established legal protection for the citizen.[5]

Not only the land, property or building is also a basic requirement of residence for allhuman.Along with the development property business in Indonesia, the government has an idea for selling property to foreigners.

The legal relationship between an Indonesian citizen or foreign nationals (foreigners) andlegal acts concerning land in Indonesia is regulated in Law No. 5 of 1960 about Undang-Undang Pokok Agraria. On the subject of land rights in accordance with the principle of nationality, UUPA Article 9 (nine) pharagraph 1 (one) determines that :

"Only Indonesian citizens who have ties completely with the earth, water and space"

In the explanation said, only Indonesian citizens be the subject of rights of ownership property other than such legal entity. According to Article 26 Paragraph 2 of UUPA, properties owned by foreigners is prohibited and a violation. This article contains sanctions against null and void.[6]

The legal provisions containing the principle of Nationalities as one of the principles in UUPA.[7]

In principle, it is confirmed that foreigners can not own land in Indonesia and the only Indonesian citizens can own land in Indonesia . So the land was only provided to the citizens of the countries concerned.

Since its inception, the principal laws agrarian UUPA stipulates that foreigners are only entitled to acquire rights of use and rights leases for buildings.Law defines use rights as the right to use and or collect the produce of the land directly controlled by the State or land owned by others.

Use rights created by lawmakers to accommodate a collection of understanding of the various names of rights in land law. However, from the beginning it was clear that the right to use have only limited authority . That is why foreigners can only obtain use rights.[8]

On the other hand the rapid development of the tourism industry and property in Indonesia made the interest of foreign citizens or foreign legal entities to own land and buildings in the territory of Indonesia , either as a residence or a place of investment.Foreign citizen can be divided into two groups in terms of presence, namely :

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5 Boedi Harsono, *Menuju Penyempurnaan Hukum Tanah Nasional*.Jakarta:Universitas Trisakti, 2007, page. 3

6 Wily Ardi Yohanis,*Tinjauan Yuridis Kepemilikan Tanah dan Bangunan Oleh WNA di Wilayah Indonesia Menurut Undang-Undang Nomor 5 Tahun 1960.* Jurnal Ilmiah Universitas Mataram, 2013

7 Article 21 Paragraph (1) jo. Article 26 Paragraph (2)

8 Eddy Marek Leks. *Catatan Kepemilikan property bagi Orang Asing.*Tgl 28 Januari 2016.http://eddyleks.blog.kontan.co.id/2016/01/28/catatan-kepemilikan-properti-bagi-orang-asing/). Accessed on Juni, 01, 2016.

1. Foreign nationals who settled in the region of Indonesia (the Indonesian population) ; and
2. Foreign nationals who did not reside in Indonesia , only occasionally are in Indonesia

The distinction was made to distinguish the formal requirements that must be met if the foreign citizen wants to take legal actions to get land or dwelling or house with certain rights. For the first group, formal requirements that must be met are permanent stay permit. As for the second group , the requirements that must be met is Visitation Permits or other Immigration Permits shaped mark stamped on the passport or other immigration documents which are owned by foreign nationals concerned.[9]

By that ultimately the parties concerned to find ways to get around this by doing a nominee agreement between Indonesian citizens and foreigners , by using the name of another party who is a citizen who is appointed as a nominee who is registered as the owner of the land. Explicitly provisions of Capital Market Law regulates the Treaty Nominee, where Article 33 Paragraph 1 states that domestic investors and foreign investors making an investment in the form of PT prohibited in making agreements and or a statement confirming that the ownership of shares in PT 's and on behalf of others.[10]

Nominee used to smuggle the law so that foreigners can own land. In practice notary and PPAT , especially in Bali , Nominee used for foreigners to own land by borrowing the name of an Indonesian citizen, and made an agreement nominee with a certificate under the hand between Indonesian citizens and foreigners, wherein using the agreement Foreigners can have land by registering the land on behalf of the Indonesian citizen designated as Nominee . Agreements must be based on an authentic basis , where the agreement should be taken as evidence that strong as a form of certainty and legal protection of the parties concerned it.[11]

The existence of this nominee agreement has provided an alternative for foreigners to own land and property in Indonesia , especially for investment purposes and tourism. Nominee agreement valid in terms of authenticity but still be at risk if the proxy default and contrary to the principle of nationality UUPA .

Facing the challenge of globalization , the government should issue a regulation to ensure legal certainty regarding land ownership for foreigners who retains the principle of nationalism and justice legal certainty for foreign nationals to own land and property in Indonesia, which will support the investment climate and the Indonesian economy. The government responded to the situation by issuing the Indonesian Government Regulation No. 103 of 2015 concerning the Home Ownership Housing or Residential By Foreigner

9 Natalia Christine Purba. *Keabsahan Perjanjian Innominaatdalam bentuk Nominee Agreement(Analisis Kepemilikan Tanah Oleh WargaNegara Asing)*.Thesis. Fakultas Hukum UI.Depok : 2006.

10 Miggi Sahabati.*Perjanjian Nominee dalam Kaitanya dengan Kepastian Hukum bagi Pihak Pemberi Kuasa Ditinjau dari Undang-Undang Pokok Agraria, Undang-Undang Penanaman Modal dan Undang-Undang Kewarganegaraan*.Thesis. Fakultas Hukum UI. Depok:2011.

11 Putra, G. Agus Permana.*Wanprestasi dalam Penggunaan Nominee Pada Perjanjian Yang Dibuat Dibawah TanganBerkaitan Dengan Kepemilikan Tanah di Bali*.Thesis. Semmarang, Fakultas Hukum Universitas Diponegoro. 2010.

Domiciled in Indonesia replaces Government Regulation No. 41 of 1996 on the Home Ownership Housing or Residential By Foreigner Domiciled in Indonesia.

Foreigners in question is a foreign citizen who is not a citizen Indonesia whose presence provides benefits, do business, work, or invest in Indonesia. Article 2 of the Regulation No. 103 of 2015 states that foreigners can own a home for residence or dwelling with use rights. Foreign nationals in question hold a residence permit in Indonesia in accordance with the provisions of the legislation. Article 4 of the Regulation states that the residence or dwelling houses owned by foreigners can be:

1. The single house that is above the ground with the right base to use for a period of 30 (thirty) years and can be renewed for a period of 20 (twenty) years and then can be further extended up to a period of 30 (thirty) years.
   Single house is a house that has its own plots and one wall of the building was not built above the plot.
2. The single house on land use rights above property rights are controlled by an agreement granting rights to use the above property by Deed notary with a period of 30 (thirty) years and can be renewed for a period of 20 (twenty) years which can then be extended again up to a period of 30 (thirty) years.
3. Moreover, it can also be a unit of Flats on the land use rights (Sarusun).

Article 5 mentions Foreigners granted rights of use for single homes and the purchase of new property rights over sarusun above use rights for new purchases sarusun.Apartment units or called sarusun are units of flats mainly used separately with the main function as a shelter and have a means of connecting to the public road (Article 1 paragraph 3 PP 103 2015).

Extension and renewal of rights of use are implemented throughout the foreigner has a residence permit in Indonesia.If the foreigner does not live in Indonesia, then given a period of 1 (one) year to release or transfer the right to housing and land to others who qualify. (Article 10 of Regulation No. 103 of 2015).If it turns out in a predetermined time period, the right to land and the house has not been released or transferred to other parties who qualify, the efforts made are :

1. The house was auctioned by the State , if the house is on the land use rights on state land ;
2. The house belongs to holders of land rights is concerned, if the house above the ground with the right base use rights under the agreement .

The results of the auction will be the rights of the former holder of such rights.

Government Regulation No. 103 of 2015 more freely provide more opportunity for foreign investors who will stay in Indonesia compared to Regulation No. 41 of 1996.The fundamental difference lies in the length of the land use rights for foreigners. Government Regulation No. 41 of 1996 provides for a period of 25 (twenty-five) years and may be extended or renewed for 25 (twenty five) years so that total foreigner can have a house on the ground with the use

rights for 50 (fifty) years, while the Government Regulation No. 103 of 2015 gives ownership of individual houses on land with the right to use the land for a period of 30 (thirty) years and can be renewed for a period of 20 (twenty) years which then can be further extended up to a period of 30 (thirty) years so that total foreigner can have a house on the ground with the use rights for 80 (eighty) years .

Against this rule appears Indonesian citizen concerns about the reduced opportunity to have the apartment, then Chairman of the Central Executive Board, Rei Eddy Hussy propose restrictions on the ownership of property by foreign nationals at a minimum of Rp . 5 billion / unit.[12]

Government Regulation No. 103 of 2015 has provided certainty about the time period foreigners can own property Indonesia along domiciled in Indonesia on land use rights but the drawback is the absence of clear rules limit how many houses or apartments that can be owned by foreign nationals.

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THE IMPACT OF SALES DISCOUNT AND CREDIT SALES TO COMPANY'S PROFIT IN A REAL ESTATE COMPANY IN BANDUNG

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ABSTRACT

Generally speaking, there are some drivers to push higher company's revenues, such as sales discount, sales return and allowances, and credit sales. The purposeof this studyis to knowthe effect of credit sales and sales discountsto earnings in property's companies. The objectof these study is PT PJM,as a real estate company, this company offer a simpledecorativereal estate forlower-middle-class and this study has used the data in the period of the year 2004-2014.

The result of this study which was used analytical descriptive method, are : (1) Sales discounts doesn't have a significant effect on company's earnings. It is only equal to 5.42%. (2) Credit sales have a significant effect on the company's earnings equal to 69.56%. (3) Sales discounts and credit sales have a significant effect. It is about 75.1% on company's earnings. According to the result, management should look carefully about credit sales's policy so that the company's earnings in the future won't going down. In addition, management also should pay attention to the movement of mortgage interest rates as a basis for making this policy. Beside that, management also have to consider about policy of sales discounts. Because, the effect of sales discount and credit sales are more greater than credit sales's effect alone.

Keyword: Sales discount, credit sales, company's barnings

INTRODUCTION

House is a primary needs for human. Recently, in its development of property businesses—results some opportunities to be more available to work on it. Society are more excited to buy property things whether they will use it for themselves or for investing. As well as other companies enhancing sales, the property companies also give credit facility for their consumer. However, generally, the credit given by the property company is slightly different with other companies. This kind of facility is called mortgage loan or in Bahasa Indonesia is KPR (KreditPemilikanRumah). Company implicates the third party, which is bank.

Therefore, consumer could directly pay their installment which is determined by the bank , to the bank. When they finish repaying their credit, they will get a certificate of ownership.

The core purpose of establishing company—including real estate company—is to get profit. Company performance is measured from their efforts in getting profit. Profit is used by the company to maintain their business continuity—and also to develop their efforts in the future.

Company sells to get profit. Sales activities are very important for the company. Therefore, company must manage their work properly as to determine sales policy which are profitable for the company.

A credit-selling activity causes the company not immediately getting cash. Cash which is obtained from selling, will be received in certain period. This kind of activity is very demanded by the consumer—because they could get goods or services first—instead of paying for it. The payment with certain period of time is matched with the provision made by the company. The other facility is discount. Many consumer excited with the sales discount. There are many kind of discounts used by the company and the immediate payment. Generally, there are two kind of sales discount—which are cash discount and trade discount. Cash discount is happened when consumer pay the installment sooner, instead of the deadline which is decided by the company. Trade discount/quantity discount is to reduce the prize of the product that is included by the company.

Based on the background research stated above, the research problem are as follows: (1) What effect does sales discount have on profit?; (2) What effect do sales on credit have on profit?; (3) What effect do sales discount and sales on credit together have on profit?; (4) Are the influence of sales discounts and credit sales on profits statistically significant?

The sales activity of goods or services is inseparable from the company. To maintain their life sustainability for the long term, every owner of the company will strive to obtain income as optimal as possible in order to fund it's company operation, and to get profit.

The core resource of income is from the sales activity of goods and services—as it is stated in the Statements of Financial Accounting Standards (SFAS) 23. The definition of revenue includes income as well as profit. Income appears in the company's activities—which has some various names like sales, fees income, interest, dividend, royalty, and rent.

The standard of the company—whether they have succeeded or not is usually followed by the profit they get. The profit functions to evaluate the sales enhancement—to be used by the manager—to help making decisions or managements towards the sales activities.

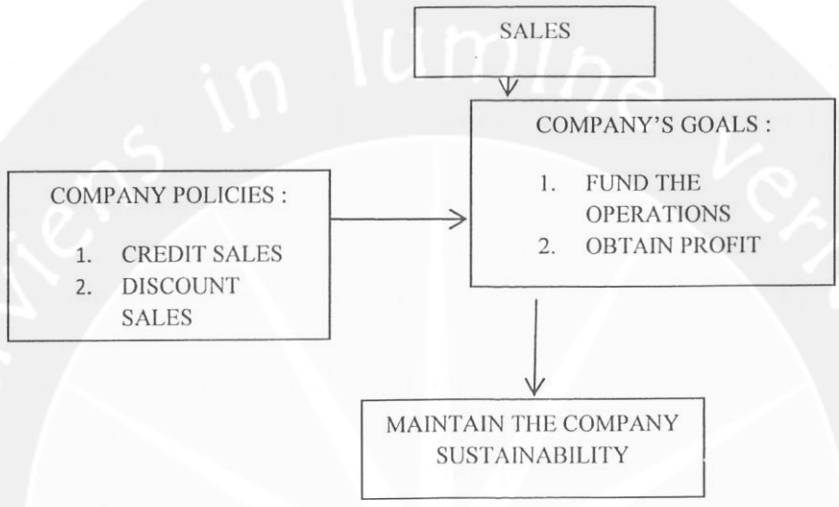
Providing sales discount for the consumer is one of the way—used by the company to interest their consumer in doing purchases—so then it could help the company to gain their sales which is also followed by the profit. The reason why the company gives sales discount are the intense competitions which cause the degeneration of trades, the promotions from each of the companies, the inventory capacity which is excessive, the withdrawal of the goods from the circulation, the financial problems of the company so that they need to get money as soon as possible, and so forth.

LITERATURE REVIEW

1. Accounting

Accounting is identification, measurement and communication of financial information about economic entities to interested persons (Weygand, et al: 2014: 4).The most important activity of a company is sales. By way of selling, company will get income. Selling is the prime mover in all the activities of organizations—and the point of agreement of consumer.

Figure 1 Framework Scheme



The sales and billing cycles implicates decision and process—which are needed to draw the ownership of goods and services to consumer—when the goods and services are ready to sell. This cycle begins with the request of the consumer—and ends with the conversion of material or services change into accounts receivable. Eventually it changes into cash. (Arens, et al.: 2014: 461)

Financial Accounting Standards Board 23 (Indonesia)/PSAK 23 states that income from the sale of goods must be acknowledged in the case of : (a) Company has significantly tackled down the risk—and brought forward the advantages of the ownership of goods to the consumer; (b) Companies are no longer to manage effective control of the sales of goods; (c)Income amounts could be reliably measured; (d)The economy advantages which are connected with transactions are most likely to flow to the company; (e) The expenses in connection with sales transactions that will be incurred in the future, could be reliably measured.

2. Income acknowledgements for construction agreement

Construction agreement is an agreement that is particularly negotiated to construct an asset or an combination assets which is closely related to each other—or are interdependent in plans, technology, and functions or purposes or primary use.

In Financial Accounting Standards Board 34 (Indonesia)/PSAK 34 of Construction Accounting, there are two kinds of construction agreement, which are: (a) Administration

services agreement which is directly connected with asset construction. For example, administration services for project manager and architect; (b) Agreement for assets restorations and environmental restorations subsequent to assets destructions.

Income agreement is measured on the fair value of rewards which is received or will be received. The measurement of income agreement is influenced by some various uncertainty things which are contingent by the results of incident in the future.The estimations are very often revised—corresponding to the realization and the loss of uncertainties. Therefore, the amount of income agreement could be increased or even be decreased from one period to the next period.

According to Weygand, et al. (2011:967) there two methods of accounting for the long-term construction agreement : (a) Percentage-of-completion method - Company admits that income and gross profit of each period are based on the construction enhancement. They accumulate the construction fees plus the gross profit on the inventory account (construction in process). So then, it accumulates the enhancement of billing on the contra inventory account (Billing in Construction in Progress); b. Cost-recovery (zero-profit) method - In some cases, contract income is admitted only to extend the fees which is appeared—and expected to be restored. Subsequent to admitting all the fees, profit are admitted. Company accumulates the construction fees on the inventory account (construction in process)—and it accumulates the enhancements of billing on the contra inventory account (Billing in Construction in Progress).

3. Sales types

There are several types of sales, which are :

(1) Cash Sales - According to Bodnar& Hopwood (2004:260)—cash sales—is an activity of selling which is occurred in the sales transaction—where there is no credit made by the consumer. Therefore, in this case, consumer does not have any debt towards company. The journal of cash sale is :Dr. Cash XXX Cr. Sales XXX

The recording of this transaction must be matched with the evidence of the sales. The example is sales invoice

(2) Credit Sales - According to Bodnar& Hopwood (2004:254), credit sales is happened if the sales transaction causes some credit towards the company. This occurred—when the consumer are in debt with the company. In this transaction, the consumer will pay by the deadline made by the company. This creates some credit on the company's assets. According to Weygant, et al. (2011:349) the journal of credit sales is :Dr. Account Receivable XXX Cr. Sales XXX

To prevent the uncollectible credit, prior to giving this facility to the consumer, company must consider first, whether the consumer could receive the credit or not.

(3) Consignment Sales - This happens when the producer or distributor send goods—but they also maintain their owenership of the goods until it is sold.In this kind of sales, consignor/producer uses revenue recognition to other sales. Consignor admits the

revenue only after they learn the sale notice and the proof of the cash from the consignee. Consignee does not record goods as assests.

(4) Sales Discounts - In order to intensify sales, company will strive to work out any kind of strategy. One of the ways to intensify sales is by giving discount.According to Kieso, et al. (2011:348)—there are two kinds of sales discount—which are: (a) *Trade Discount*- The price depends on the trade discount or quantity. Company uses trade discount to prevent the change that very often happens on the catalog. They change the price to the other quantitiy that is bought—or to hide the actual price of the competitors. Trade discount is usually written as a percentage; (b) *Cash Discount*- Company offers cash discount (*sales discount*) to urge the consumer to pay the payment on time. Generally, cash discount is presented in some terms, which are 2/10, n/30 (2 percent sales discount—if the consumer pays in ten days. The gross amount of the due date is in thirty days)—or 2/10, E.O.M., net 30, E.O.M. (2 percent sales discount—if the consumer pays anytime prior to ten days by the next month—with the full payment which is received with the thirtieth from the next month). There are two methods of recording cash discount :*Gross Method*and*Net Method*; (e) *Profit*- Every company purposes to get profit. Profit is a benefit—or the results of the operation which is done by the company in certain period. The measurement of the company—whether they have succeed or not is the ability of the company geting profit. Profit could be learnt from the report of the company.Profit is an overview of the net result of the company's operations in certain period which is stated in financial terms. (Subramanyam & Wild: 2009: 91).

RESEARCH METHOD

This research was used Analytical descriptive method. This method revealed the information about Company's sales discount, credit sales, Total sales, and company's profit in certain periods that obtained by collecting and analyzing data with high logical thinking to generate conclusion and used statistical analysis approach . In this case, we especially analyze about how those drivers that can push to increase revenues and can achieve the optimum profit.

Research Object

Research object which was used in this research is PMJ Comp. That is developer company in property business.The *dependent variable* or *criterion variable,* which was used in this research is company's profit.And *independent variable*or *predictor variable* is Sales discount and Credit sales.

RESULT AND DISCUSSION

The result of Descriptive statistical test about Sales discount, credit sales and company's profit, describe as follow.

Table 1: Descriptive Statistics

	N	Minimum	Maximum	Mean	Std. Deviation
Sales discount	12	169235000	445032500	298770987.50	94209679.799
Credit sales	12	3115600000	10981300000	6490310125.00	2179653476.141
profit	12	1171143409	4657298812	3271899158.00	976823940.382
Valid N (listwise)	12				

The result of statistical process based on SPSS 17.00 verssion from table 1, are: (a) The average value of sales discount in the year 2011 is about IDR 298.770.988,00 which the minimum value is IDR 169.235.000,00; and the maximum value is IDR 445.032.500,00 and Deviation Standard is IDR 94.209.680,00; (b) the value of average credit sales in the year 2011 is about IDR 6.490.310.125,00 which minimum value was IDR 3.115.600.000,00; and maximum is IDR 10.981.300.000,00. Deviation standard is IDR 2.179.653.476,00; (c) the average value of company's profit in year 2011 is IDR 3.271.899.158,00; which minimum value is IDR 1.171.143.409,00. And maximum value is IDR4.657.298.812,00Deviation standard is IDR 976.823.940,00.

The result of Determination Coefficient test

Table 2: Model Summary of Determination Coefficient Result

Model	R	R Square	Adjusted R Square	Std. Error of the Estimate
1	.866[a]	.751	.695	5.392E8

a. Predictors: (Constant), Credit sales, Sales Discount

The correlation of Profit with sales discount and credit sales is very high according to R value is 0,866. Also the value of R *square*reveal 0.751 means the profit variable effected by sales discount and credit sales is about 75.1%; and the rest value about 24,9% revealed that the impact of other variables which was not included in this model.

F Test result

Table 3: ANOVA[b]

Model		Sum of Squares	df	Mean Square	F	Sig.
1	Regression	7.880E18	2	3.940E18	13.554	.002[a]
	Residual	2.616E18	9	2.907E17		
	Total	1.050E19	11			

a. Predictors: (Constant), credit sales, sales discount

b. Dependent Variable: company's profit

Table3 shows, that the impact of all independent variables toward company's profit is revealed by significant Fvalue that is about 13,554 which was greater than Ftable is 4,26; and significantp value of Fis about 0,002 which was smaller than α = 0,05 then, alternative hypothesis is accepted.That means there is significant impact between sales discount and credit sales with company's profit simultaneously as well.

t - Test result

Table 4 Coefficients[a]

Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
B		Std. Error	Beta			
1	(Constant)	711716199.570	544258269.718		1.308	.223
	Sales discount	.737	3.395	.071	.217	.833
	Credit sales	.361	.147	.804	2.457	.036

a. Dependent Variable: profit

Based on table 4 result, we shows that the t value of sales discount (X_1) is 0,217 which is smaller than t table is about 2,2622 and the significant value is 0,833 bigger than the α value 0,05.Then, we conclude that Hois accepted. This means that sales discount variable (X_1) partialyhas no significant impact toward company's profit (Y). And credit sales (X_2) with t – value is about 2,457 which was bigger than t table is 2,2622with significant value is 0,036 that smaller than α = 0,05 that means Ho rejected or in other words credit sales variable (X_2) partialy has significant impacttoward company's profit (Y).

Correlation Test result

Table 5 Correlations Test Result

		Sales discount	Credit Sales	Profit
Sales discount	Pearson Correlation	1	.861**	.764**
	Sig. (2-tailed)		.000	.004
	N	12	12	12
Credit Sales	Pearson Correlation	.861**	1	.866**
	Sig. (2-tailed)	.000		.000
	N	12	12	12
Profit	Pearson Correlation	.764**	.866**	1
	Sig. (2-tailed)	.004	.000	
	N	12	12	12

**. Correlation is significant at the 0.01 level (2-tailed).

Table 5 shows us, that (1)correlation coefficient value is between $X_1$to Y around 0,764which means X_1has strong correlation with Y. And positive value of coefficient means, when sales

discount increase then company's profit will also increase;or that means 58,37% company's profit explained by sales discount, and 41,63% is the rest value determined by other variables that were excluded in this model.Table 5, also shows that correlation coefficientof (2-tailed) comes up to result value0,004 smaller than $\alpha = 0,05$, that means Ho rejected andsales discount has relation with company's profit.Correlation coefficient value between $X_2$and Y is 0,866 that means, there is strongly correlation between $X_2$and Y, with positive value means, when credit sales increase then company's profit will also increase by 0,75.and from 2-tailed correlation coefficient the value is 0,000 smaller than $\alpha = 0,05$, then also Ho rejected,this means credit sales affected the profit.

Path analysis result

There is direct and indirect impact between $X_{1\,a}$ndX$_2$ toY. The total direct and indirect impact of *independent variable to dependent*variable, are as follow:

Table 6 The Total of direct and indirect effect of Sales discount toward Profit

Variable	Coefficient	Total
X_1 direct	Pyx1Pyx1	0,5041%
X_1 through X_2	Pyx1 rx1x2 Pyx2	4,92%
Total effect X_1 toward Y		5,42%

The table6, shows us that direct impact of sales discount to profit (X_1) is 0,5041%; and the indirect impact around 4,92%. Furthermore, the total impact is 5,42%. That means each one unit increasing in sales discount will be effected profit increasingly around 0,0542.

Table 7 The Total of direct and indirect effect of Credit sales to Company's profit

Variable	Koefficient	Total
$X_{2\text{ - direct}}$	Pyx2Pyx2	64,64%
X_2 through X_1	Pyx2 rx1x2 Pyx1	4,92%
Effect Total of X_2 toward Y		69,56%

Source: Statistical process

This result can be concluded that direct impact of credit sales to profit (X_2) is 64,64%;and the impact of credit sales (X_2) through sales discount (X_1) is 4,92%. Furthermore, the total impact is 69,56%. That means, when credit sales increase 1 unit then profit will also increase around 0,6956.

Table 8 The impact of Trade discount & credit sales towards Company's profit

Variable	coefficient	Total
X_1 and X_2 toward Y	R^2_{yx1x2}	75,1%

Source: Statistical process

The contribution value of sales discount and credit sales to profit,simultaneouslyand directly is 75,1%. This result can be used by the company as the main strategy to increase their income in the future.

CONCLUSION

Based on the result and discussion before, this research result is credit sales of society housing based on mortgage loan has a significant impact toward profit, so furthermore the company can maintain this sales strategy to achieve more and more profit, and helping others to fulfill their need. Although sales discount has not significant impact toward company's profit, but simultaneously sales discount with credit sales has greater impact to profit than credit sales partially. So then, the company has to maintain all strategy about credit sales combining with sales discount with satisfy to achieve optimum profit.

The proving of the conclusion above, are as follow, The effect of Credit sales to profit statistically significant with the value of 80.4% and ρ value is 0.03, but the effect of sales discount to profit is not statistically significant, even though the coefficient correlation reflected highest value of 0.737. And the simultaneous impact of credit sales and sales discount based on path analysis is significant with ρ value 0.002 and coefficient regression is 75.1%.

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LIST OF SPEAKERS AND PRESENTERS

LIST OF SPEAKERS AND PRESENTERS

No.	Name	Institution	Description
1.	Professor Gabriël Moens	Curtin Business School, School of Law, Curtin University, Australia	Invited Speaker
2.	Professor Danture Wickramasinghe	Adam Smith Business School, University of Glasgow, United Kingdom	Invited Speaker
3.	Drs.Martinus Parnawa Putranta, M.B.A, Ph.D	Graduate Programme Universitas Atma Jaya Yogyakarta	Invited Speaker
4.	F.X. Endro Susilo, S.H, LLM	Faculty of Law, Universitas Atma Jaya Yogyakarta, Indonesia	Invited Speaker
5.	Dr. Henny Saida Flora, S.H, M.Hum, MKN	Universitas Katholik Santo Thomas	Presenter
6.	Aryuni Yuliantiningsih, S.H, M.H	Universitas Jendral Soedirman	Presenter
7.	Elly Kristiani Purwendah,S.H, M.Hum.	Universitas Wijaya Kusuma Purwokerto	Presenter
8.	Dr. Siti Malikhatun Badriyah, S.H, M.Hum.	Universitas Diponegoro	Presenter
9.	Methodius Kosay, S.H	Magister Ilmu Hukum Pascasarjana Universitas Atma Jaya Yogyakarta	Presenter
10.	Tutut Indargo, S.H	Magister Ilmu Hukum Pascasarjana Universitas Atma Jaya Yogyakarta	Presenter

11.	Martin Fernando, S.H	Magister Ilmu Hukum Pascasarjana Universitas Atma Jaya Yogyakarta	Presenter
12.	Novita Gold Ameyer Rehiana, S.H	Magister Ilmu Hukum Pascasarjana Universitas Atma Jaya Yogyakarta	Presenter
13.	Try Sarmedi Saragih, S.H	Magister Ilmu Hukum Pascasarjana Universitas Atma Jaya Yogyakarta	Presenter
14.	Opniel Hrsana BP, S.H	Magister Ilmu Hukum Pascasarjana Universitas Atma Jaya Yogyakarta	Presenter
15.	Yupita Jevanska Atuna	Graduates of Faculty of Law Universitas Atma Jaya Yogyakarta, from Philipina	Presenter
16.	Jae Woo Ko	Graduates of Faculty of Law Universitas Atma Jaya Yogyakarta, from South Korea	Presenter
17.	Kanugrahan Rahayu	Faculty of Law Universitas Atma Jaya Yogyakarta	Presenter
18.	Ei Ei Mio BSC	from Yangon	Presenter
19.	Mulyanto, S.H, M.Hum.	Universitas Sebelas Maret	Presenter
20.	Muhammad Adnan	Universitas Sebelas Maret	Presenter
21.	Dr. Fadillah Agus, S.H, M.H	Faculty of Law Universitas Tri Sakti	Presenter
22.	FelizaZubair	Faculty of Communication Science, Universitas Padjadjaran	Presenter
23.	Evi Novianti	Faculty of Communication Science, Universitas Padjadjaran	Presenter

24.	Dewi Nurul Musjtari, S.H, M.Hum.	Faculty of Law, Universitas Muhammadiyah Yogyakarta	Presenter
25.	Bambang Santoso, S.H, M.Hum	Universitas Sebelas Maret	Presenter
26.	Muhammad Rustamadji, S.H	Universitas Sebelas Maret	Presenter
27.	Yoserwan Hamzah, S.H, LLM	Universitas Andalas	Presenter
28.	Pentarina Intan Laksmitawati	Universitas Negeri Semarang	Presenter
29.	Dr. Benny Budiawan Tjandrasa, S.E, M.M	Universitas Kristen Maranatha	Presenter
30.	Yanti Setianti	Universitas Padjadjaran	Presenter
31.	Lukiati Komala	Universitas Padjadjaran	Presenter
32.	Franky Butar-Butar, S.H, M.Dev.Prac.	Faculty of Law Universitas Airlangga	Presenter
33.	Dr. Lilik Pudjiastuti, S.H, M.H	Faculty of Law Universitas Airlangga	Presenter
34.	Sri Wahyu Handayani, S.H, M.H	Faculty of Law Universitas Jendral Soedirman	Presenter
35.	Indrawati, S.H, LLM	Faculty of Law, Universitas Airlangga	Presenter
36.	Bayu Sulistomo, S.H	Magister Ilmu Hukum Pascasarjana Universitas Atma Jaya Yogyakarta	Presenter
37.	Dr. Sri Winarsi, S.H, M.H	Faculty of Law, Universitas Airlangga	Presenter
38.	Mpholle Clement Pae Pae	Graduates of Universitas Atma Jaya Yogyakarta, from Lesotho	Presenter

39.	Dr. Shinta Agustina, S.H, M.H	Faculty of Law, Universitas Andalas	Presenter
40.	Triyana, Yohanes, S.H, M.Hum.	Faculty of Law, Universitas Atma jaya Yogyakarta	Presenter
41.	Dr. Tri Budoyono, S.H, M.Hum.	Faculty of Law, Universitas Kristen Satyawacana	Presenter
42.	Dr. Christina Maya Indah S., S.H., M.Hum	Faculty of Law, Universitas Kristen Satyawacana	Presenter
43.	Teddy Mulyawan	Universitas Atma Jaya Yogyakarta	Presenter
44.	Lorenzo Vicario Esquivelda Fellycyano	Graduates of Universitas Atma Jaya Yogyakarta, from Timor Leste	Presenter
45.	Dr. Ir. Evo Sampetua Hariandja, M.M	Universitas Pelita Harapan	Presenter
46.	Dr.Fransisca Romana Harjiatni, S.H, M.Hum.	Universitas Janabadra	Presenter
47.	Elisabeth Tiur Manurung	Economic Faculty, Universitas Parahyangan	Presenter
48.	Made Pranadatha Gunawan.	Universitas Atma Jaya Yogyakarta	Presenter
49.	Charlyna S. Purba, S.H., M.H.	Law Faculty of Lampung University	Presenter