ON BUSINESS FRAUDULENT BUSINESS EXECUTORSTHE CARTEL OF GARLIC (CASE STUDY ABOUT CASE NUMBER DECISION 05 KPPU - I 2013 ON IMPORTER GARLIC)

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ABSTRACT

Business Executors are still doing the Cartel because with this act business, executors have a profit in immediately but community lost and cannot afford to buy garlic because the price that was not an affordable price. Business Executors he has been proven to have committed a violation of Article 11, Article 19, Article 24 of UULPM. It's starting from a setup supply based Affiliate, based on suspicion of investigator that has to negotiate agreements cartel that sets rates garlic in the market, a profitable supply that will be done by the group business executors is part of the effort to regulate rates garlic in the market affecting the loss to the public that should be the public can enjoy garlic with the affordable price and even in contrast with the price that business players not affordable. The executors must be given a sanction administration that was to give a deterrent effect for not doing the same thing in the latter days . Awareness about law and especially UULPM must be in constant will be done to the perpetrators and business community recommended to report any business actors who works were accused of violating UULPM. The Facts that happened in the field, there are still business actors who do the covenant cartel, such as in the case cartel that has been sentenced by the KPPU in case cartel sms and also cartel garlic. Anti-MONOPOLY commission said that as many as 19 importers garlic is guilty cartel. Anti-MONOPOLY Commission fined business executors is starting to several million rupiahs up to Rp 921 million, with total Rp 13.3 billion. Through this KPPU mention 19 importers was proven guilty of breaching Article 19 C and Article 24 UULPM. KPPU importers considered that some of this purpose monopolistic practices with how to restrict the circulation of garlic in the market that results in the price of garlic will be highest and many consumer will cannot afford to buy the price that is very high up to Rp 90,000 / kg. Business actors who Only really need and had to buy such as the owner restaurant and business executors users garlic other buy only to maintain business and probably will reduce the usage of garlic was because the highest price of.

Key words: Importers' Side, Business Players, The Business Competition Supervisor Commission**,** Garlic and its monopoly.

Introduction

Business Executors are forbidden to make the agreement, with the perpetrator into their competitors, which means to affect the price by setting up production and marketing or a goods and services from the stock market at once, this was firmly arranged in the Law No. 5, 1999 about the ban on monopolistic practices and Unfair Competition (henceforward called UULPM)[1]. This was forbidden to keep importance of the general public and increase the efficiency national economy as one of the efforts to improve the prosperity of the society; to realize the conducive business climate through the arrangement business competition is healthy and to ensure that there is a certainty career trying to large business players, large business practitioners, medium great business practitioners, and the small business practitioners; to prevent monopolistic practices and / or unfair competition that impact by the perpetrator business; and effectiveness and efficiency enforcedin business[2].

In fact there are still business actors who do the covenant cartel, such as in the case cartel that has been sentenced by the KPPU in case cartel sms and cartel garlic case that has been sentenced by the KPPU, with the decision for case No. 05/KPPU-I/2013.

Problematical formulation

Why the Business players are still carrying out the cartel by made an agreement with the prepetator into their competitiors, which means to affect the price by setting up production and marketing or a goods and services from the stock market at once?

Literature review

A. The agreement was banned

Before the term introduction agreement about, which is in UULPM, then the term agreement in general has long been known by citizen. Prof. Wirjono interpret the covenant relationship as legal wealth between the two parties in this where a participant promised to or is considered to be promised to do something or do nothing, and other parties have demanded implementation of

[1] Article 11 UULPM
[2] Article 3UULPM

the covenant.[3] While Prof. Subekti said that the agreement is an event, where a person promised to another, or where two people promise each other to carry out any of the things.[4]

Next Article 1313 expecting an internal KUH Civil said that an agreement or the covenant is an act in which one or more people attach itself to the one or more. In addition of the agreement, also known the term the rebel alliance. However, the Book Law Civil did not formulate what is a rebel alliance. Thus the doctrine tried to formulate what is meant by the rebel alliance. Reliable alliance is a the relationship of the law between the two people or two parties based on which the parties that one entitled demand things (achievement) from other parties that has an obligation to fulfill these demands. [5] An achievement in a rebel alliance according to Article 1234 KUH Civil case could be 3 types. The First duty to give something. Second a duty to do anything about it, and the third duty to not do anything about it.[6]

In the legal system, then held an open system, it means that the parties have the freedom of the amount to make a covenant and the shape is that contains what, as long as it does not violate public order and morality. This can we know from the Article 1338 KUH Civil case that the point is that all the treaties made legally applied Law for those who make it. Next Article 1320 out KUH Civil said that for a legal agreement must meet the 4 conditions. First, they agreed to commit themselves to agreement for. Second, skill to make a covenant. Third, a certain things, and the four, a because (honorary) that is lawful.[7]

Based on the terms of the covenant on Civil KUH this is and the principles of these terms that applied to all the covenant in general. Furthermore, a specific can only set up in particular that only applies to provisions of the law a specific. This can be found in UULPM that arrange specially what is meant by the agreement. [8] The Agreement is defined as: "a deed one or more business executors to it fastens itself against one or more business executors another with any name, either written or not it is written."[9]

The covenant which was formulated by Definition UULPM, can be known that UULPM deduce that the agreement can be written and has not been written, both recognized or used as evidence in the case business competition. Before the agreement has not been written is generally considered to not so strong as evidence in the court, since the law Fast civil case that occurred at the moment is more emphasis and households written evidences and authentic as evidence that strong.[10]
This confession and the entry agreement that has not been written as proof of the agreement, which will be done by the business players in the business competition is very accurate, and has been in line with the regime Personal business competition that occurred in various countries. In general the business players will not be so careless to formalize an agreement between them in a written, that will make it easier for be hinting at their
iniquity. Therefore written agreement between the business players who abetted or contrary to the Law is rare business competition will be found.[11]

UULPM set some agreements that are forbidden to be done by the perpetrator business, namely:

1. Oligopoly [12]
2. The setting of prices
a. The setting of prices [13]
b. Price Discrimination.[14]
c. Selling and Loss
d. A Profitable Selling Again[15] (Article 8 UULPM);
3. The division [16]
4. The boycott [17]
5. Cartel[18]

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[3] Wirjono Prodjodikoro, 1989, *The principle of the principle on the agreement*, PT. Eresto, Bandung, p. 9.
[4] R. Subekti, 1985, *the trees Goods Civil Law*, Intermasa, Jakarta, p. 1.

[5] Ibid.
[6] Fahmi, Andi and State Senior High, Ningrum Sirait (Ed.,), 2009, the Law *business competition between The text and The context*, Publishid and Printed with Support of Deutsche Gesellschaft Bundesanstalt Technische Zusammenarbeit (GTZ) GmbH, Printed in Indonesia, p. 85.
[7] Ibid. p. 86.
[8] Ibid. p. 86.
[9] Article 1 number 7 UULPM,
[10] Fahmi, Andi and State Senior High, Ningrum Sirait (Ed.,) op. cit. p. 86.
[11] Ibid. p. 86.
[12] Article 4 UULPM
[13] Article 5 UULPM
[14] Article 6 UULPM
[15] Article 7 UULPM
[16] Article 9 UULPM
[17] Article 10 UULPM
[18] Article 11 UULPM

6. Trust [19]
7. Oligopsoni [20]
8. Vertical integration [21]
9. The agreement was shut up[22]

a. Exclusive distribution agreement
b. Tying agreement
c. Vertical agreement on discount

10. The agreement with The department of foreign affairs[23]

B. Cartel

This Research specifically discussed Cartel related to the attitude business actors who do cartel in carrying out its business. The market structure which is a competitive, where business actors who tried to in the market was they were many: no obstacles and for criminals to enter into the market, makes every business actors who are in the market will not be able to drive according to his desire, they only accept the price that has been determined by the market and will try to start maximally in order to achieve a level that efficient in producing. But rather in the market which process oligopoly, where in the market was there are only some business players, it is very likely that business executors cooperate to determine the price products and the number of production of each business players to more than. Thus it is usually cartel practices to grow and expand the market which possess oligopoly, where it is easier to unite and control most markets.[24]

The cartel is one of the strategy that is implemented among the suspects may affect the price for business with regulates the amount of their production. They think if their production in the market has been reduced while demand for their products in the market is still, will have to rise in the price to a higher level. And on the other hand, if in the market their products are abundant, will surely have an impact on decline in the price of their products in the market. Thus, the suspect business trying to form a co-operation horizontal (pools) to determine the price and the number of production goods or services. But ulcers cooperation is not always successful, because the members are often tried to do injustice to the advantages each of them.[25]

Influx of supplies from a specific products in a market, can make a price of the product was in the market to cheaper, where this condition would be beneficial for consumers, but not in contrast to the business (producers or seller), progressively inexpensive price their products in the market, make money that will be obtained by the perpetrator business was to be reduced, or even and loss if the products they could not be absorbed by the market.[26]

That price of the product in market does not fall and price of the product can give profit greatly for criminals, business practitioners business usually makes the covenant between them to set about the number of production and the number of their production in the market is not ostentatious, and the objective is to not make their products in the market to more affordable. But sometimes cartel practices not only aimed at maintaining price stability their products in the market, but also to rake in profits greatness by reducing their products will significantly in the market, and cause in the market, the scarcity, resulting in consumers must pay more to buy the product business players was in markets, or it can be said that the purpose of to plunder the cartel is as much as possible the current account surplus consumers to producer. Thus cartel purchase competition on the actions that kolutif among competitors, but are forbidden in the business competition.[27]

Data Analysis

This Data analyzed in qualitative research, it means data dictum analyzed in depth, holistic, comprehensive. Using the methods in qualitative analysis is based on the council Commission in case the verdict KPPU case No. 05/KPPU-I/2013, to observe and learn carefully cases with good, implementing based on UULPM and also to compare with the decision has been diputs by the KPPU. In analyzing data is things that need to be addressed among others:

First, the data is analyzed various, has a different basic with one another, and would not be easy to be quantitative. The nature of the Second, he analyzes are similar data is a whole (*comprehensive)* is a unity round *(holistic)*. This was biodiversity is marked with data and information need a deep-seated *(indepth information)*. Data analyzed by using this method deductive, it means there is a method draw the conclusion that is from a special the claims his nature. This method will be maintained by means understanding or analyze the broader principles, among others of the principle of cartel that is still done by the business players,

[19] Article 12 UULPM
[20] Article 13 UULPM
[21] Article 14 UULPM
[22] Article 15 UULPM
[23] Article 16 UULPM
[24] Herbert Hovenkamp, 1995, the Federal *Anti-trust Policy: The Law of Competition and It's Practice, 2nd ed*. hlm..144 .
[25] Theodore P. Kovaleff. ed. 1994, *The Anti-trust Impulse vol. I* ,p.78 -80.
[26] Fahmi, Andi and State Senior High, Ningrum Sirait (Ed.,), op. cit. p. 107.
[27] William R. Andersen and C. Paul Rogers III, 1999, *Competition Law Law: Policy and Practice, 3rd ed.* (Mattew Bender), hlm.349

and this is clearly prohibited by Article 11 UULPM. Study of the principle that nature was general will be analyzed in particular aspect of UULPM operating rules and other.
Analysis of this conclusion is and basically is an answer out of the problems raised in this research. By doing procedures for analysis that good, can be obtained right answer to link relationships that have arisen from crisis to the process wisdom, that there is no or as well as relation with the theory that has been widely known that the formulation problems to be answered with tidy.

Discussion

Business Executors Buyback Cartel garlic

Cartel is the central issue that has never separated from business activities that will be done by the perpetrator business especially in the market which possess of oligopoly. This attitude against the law and banned UULPM and strategies to achieve maximum benefit (maximum profits) in a way to close competition and take economic benefit consumers. Anti-MONOPOLY COMMISSION is committed to fight against this behavior that perpetrators business not only seen the importance of the business executors alone but implementing public interests and provide this KPPU doing research and this is the first initiative at the end of 2013.

Cartel in the doctrine on conspiracy tender, the region, setting of price, and a setting of supply. This behavior dominated composition 224 cases that have been sentenced by the KPPU. Noted by 74% to 177 from 224 case is a case cartel with the details 165 case tender and 12 non-cartel case tender. A Cartel is broken economy that was big enough, beside because mendisinsentif for competition is also taking advantage consumer economy. No wonder if economic crimes KPPU made a great and become a priority on that should be abolished. [28]

Economists of University of Indonesia (UI), Ayudha D. Prayoga, argues that cartel was a form of conspiracy. If cartel is form of a conspiracy business executors, this what they conspirace about? What is the purpose of conspiracy?[29]. Ayudha D. Prayoga, said cartel was a form of conspiracy. Conspiracy will be done through price, output, the division, restrictions on production, and the demarcation input. So, according to him, a conspiracy itself is a basic idea in forming cartel. Conspiracy is their activities, while cartel is urgently[30]. Cartel, Ayudha continue, for a long time and carried out openly openly. They named themselves with various names and at the time to common. But after *sherman Competition Law Act* appears, on cartel is no longer considered legal[31].

On cartel involving several business executors. Usually, the big players in an industrial structure that market segmentation oligopoly tend to be tempted to behave like that. Cartel, clearly Ayudha, formed by the motif that is in antaraya in order to gain maximum *(maximum profits)*. It did not close the possibility cartel was formed to kill *entrance* (new players) to create *barriers to entry* (obstacles check-in).

Benefits for the cartel is not a few, the cartel gain many %trillions in one commodity prices, because this great benefits to turn a blind eye to public interest that is expected to be protected by bringing UULPM. One example of this is the value of the loss suffered by the consumer cartel in SMS which has never been terminated KPPU. Consumers, an estimated lost around Rp 1.6-1.9 trillion in the span of three cartel will be done by the cartel and is things that are not worthy of all praise.
Some 19 Importis garlic buyback cartel[32]

[28] Competition, 2013, to fight against Cartel, Edition 39, p. 3.
[29] Ibid,
[30] Ibid, p. 6.
[31] Ibid.
[32] The Tribun Central Java/Rev. Sulistiyawan Trading Center, a worker sends garlic imports from fleet a Chinese Area konntainer truck, Semarang, Central Java, on Thursday (9/12/2013).

All of 19 importers declared guilty KPPU cartel garlic, KPPU to impose a fine amount of 921 million with total 13.3 billion rupiahs. Verdict is read out on Thursday 23 March 2014 with chairman of the Council Sukarmi said that 1 importers has proven guilty of breaching Article 19 c and article 24 UULPM. KPPU importers considered that some of its monopoly with purpose to restrict circulation garlic profusion causing price leap garlic profusion. [33]

In addition 19 business executors, KPPU bemoaned buyback is Minister of Trade, The Director General of Foreign Trade Ministry and the Head of the body Animal Quarantine Department of Agriculture.

The Verdict KPPU case No. 05/KPPU-I/2013.[34]
For business competition Commission Republic of Indonesia as KPPU who examined Case No. 05/KPPU-I/2013 about suspected breach Article 11, Article 19 letter c and article 24 UULPM related to was Trigged garlic will be done by:

1) The First reported (I), CV Bintang, which is located in *Jalan Semangka II/S 165-A Desa Tambak Rejo Kecamatan Waru Sidoarjo, East Java, Indonesia*;
2) Second reported (II), CV Karya Pratama, the office address in *Jalan Tapian Nauli Komplek Mangga Indah Pasar I LK VIII No. 7-A Sunggal Medan, Medan, North Sumatera, Indonesia:*
3) Third reported (III), CV Mahkota Baru, which is located in *Jalan Stasiun Nomor 2-B Kelurahan Tanjung Mulia Kecamatan Medan Deli, Medan, North Sumatera*;
4) Fourth reported (IV), CV Mekar Jaya, which is located *Jalan P. Tubagus Angke Nomor 190 N Kelurahan Angke Kecamatan Tambora, West Jakarta DKI Jakarta, Indonesia.*
5) Fifth reported (V), PT Dakai Impex, which is located in the *Jalan Teluk Kumai Timur Nomor 64, Surabaya, East Java, Indonesia*.
6) Sixth reported (VI), PT Dwi Tunggal Buana, which is located in *Jalan Balikpapan Raya Nomor 22C Kelurahan Petojo Utara Kecamatan Gambir, Central of Jakarta*, DKI *Jakarta, Indonesia*;
7) Seventh reported (VII), PT Global Sarana Perkasa, which is located in *Jalan Bisma Raya D-I/8 Kelurahan Papanggo Kecamatan Tanjung Priok, North Jakarta***,** DKI Jakarta , *Indonesia***;**
8) Eighth reported (VIII), PT Lika Dayatama, which is located *Komplek Ruko Puri Mutiara Blok A Nomor 110-111 Kelurahan Sunter Agung Kecamatan Tanjung Priok, DKI Jakarta, Indonesia* **;**
9) Nineth reported (IX), PT Mulya Agung Dirgantara, which is located in *Jalan Raya Pandugo Nomor 147, Surabaya, East Java, Indonesia* **;**

[33] Ibid.
[34] Http://www.kppu.go.id/id/putusan/tahun-2013/

10) Tenth reported (X), PT Sumber Alam Jaya Perkasa, which is located in *Jalan KL Yos Sudarso Nomor 38-J Lk. 13 Kelurahan Glugur Kota Medan Barat, Medan, North Sumatera, Indonesia*;
11) Eleventh reported (XI), PT Sumber Roso Agromakmur, which is located in *Jalan Yos Sudarso Kavling 89 Gedung Wisma Smr, Lantai 11 Sunter Jaya-Tanjung Priok, North Jakarta, DKI Jakarta, Indonesia* ;
12) Twelfth reported (XII), PT Tritunggal Sukses, which is located in *Jalan Balikpapan Raya Nomor 22C, Lantai 3 Kelurahan Petojo Utara Kecamatan Gambir, Central of Jakarta, DKI Jakarta, Indonesia* ;
13) Thirteenth reported (XIII), PT Tunas Sumber Rezeki, which is located in *Perkantoran CBD Pluit Blok C, Nomor 20, Jalan Pluit Selatan Penjaringan North Jakarta, DKI Jakarta, Indonesia*;
14) Fourteenth reported (XIV), CV Agro Nusa Permai, located in *Ruko Tanjung Priok Indah Permai, Jalan Laksda M. Natsir Nomor 29 Blok C-7 Surabaya, East Java, Indonesia.*
15) Fifteenth reported (XV), CV Kuda Mas, located in *Jalan Panjang Jiwo Nomor 46-48 Ruko Panju Makmur Blok B-31 Surabaya, East Java, Indonesia;*
16) Sixteenth reported (XVI), CV Mulia Agro Lestari, which is located in *Ruko Klampis Megah Blok I-30 Surabaya, East Java, Indonesia*.
17) Seventeenth reported (XVII), PT Lintas Buana Unggul, which is located in *Pangeran Jayakarta Nomor 68 Blok A-16 Jakarta, DKI Jakarta, Indonesia.*
18) Eighteenth reported (XVIII), PT Prima Nusa Lentera Agung, which is located in *Perak Timur 512, Blok C-10 Surabaya, East Java, Indonesia.*
19) Nineteenth reported (XIX), PT Tunas Utama Sari Perkasa, which is located in *Jalan Pangeran Jayakarta 68 Blok A-18 Kelurahan Mangga Dua Selatan Kecamatan Sawah Besar, Central of Jakarta 10730, Indonesia.*
20) Twentieth reported (XX), Quarantine Ministry of Agriculture, Republic of Indonesia, which is located at the Ministry of *Agriculture, Jalan Harsono RM Nomor 3, Building E floor 1, 5, 7, Ragunan Zoo, DKI Jakarta 12550, Indonesia*;
21) Twenty one reported (XXI), Director General of Foreign Trade Ministry of Trade Republic of Indonesia, which is located at the Ministry of *Trade Republic of Indonesia, Jalan M.I. Ridwan Rais Number 5, DKI Jakarta 10110, Indonesia.*
22) Twenty second reported (XXII), Ministry of Trade Republic of Indonesia, which is located at the Ministry of Trade Republic of Indonesia, Jalann *M.I. Ridwan Rais Number 5, DKI Jakarta 10110, Indonesia.*

KPPU has taken the decision as follows:[35]

After reading the report suspected breach;
Him After reading the response to the report suspected breach;
After hearing to the information from the Witnesses.
After hearing the experts.
Him After hearing to the information from the;
After reading conclusion result of the trials of Investigator,
After reading conclusion reported on the trial of;
After reading the letters and documents in this matter.
Suspected breach that was carried out by the perpetrators business[36] is.

Considering that the report suspected breach and conclusion is a sign Investigator reported violations Article 11, Article 19 letter C, and Article 24 Law No. 5, 1999 reported evidence that were carried out by the was Trigged garlic period November 2012 - February 2013 in the form:

1. Do deals with business executors rivals to affect the price by setting up production and/or marketing a work and/or services;
2. Some activities both alone or with other business actors and other parties to limit distribution and/or goods and/or services on the stock market at once.
3. Collude with other parties to inhibits the production and/or marketing products and/or services business players their competitors with research to work and/or services that offer or supplied to the market at once to decreases both from number, quality and timeliness that has been required;

About a Profitable supply garlic;[37]

A Profitable supply based affiliate: That based on suspicion of investigator, setting supply that will be done by the group business executors is part of the effort to regulate rates garlic in the market. Has filled elements Article 11 UULPM;

"Business Executors are forbidden to make a covenant with the perpetrators into their competitors, which means to affect the price by setting up production and marketing or a goods and services, which can cause the monopolistic practices and/or unhealthy competition".

[35] Ibid.
[36] Ibid.
[37] Ibid

Fulfilling elements Article 11 UULPM is clearly business executors has a violation of UULPM and KPPU must sanction such as that which was arranged in the Article 47 UULPM to business players. So the decision will be done by the KPPU to the cartel garlic is according to the writer is correct and need to be given award to KPPU in this case. Law enforcement law has done well and do not worry about government intervention, because KPPU firm to the establishment of to create a conducive atmosphere in business activities in Indonesia.

The Panel conclusion Commission based on the investigation has to be done is: take into account that based on Directors and explanation above, the Assembly Commission arrived at the conclusion as follows:[38]

1. That is not found evidence of the agreement cartel reported I, between II, III, IV, V, VI, VII, VIII, reported, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII XVIII, and reported on XIX.
2. That It has been proven that business competition practices there was no healthy condition reported I, II, III, IV, V, VI, VII, VIII, reported IX, X, XI, XII, XIII, XIV, XV, XVI, XVII XVIII, and reported on XIX impede circulation of goods on the stock market at once in a way withholding supply through the delay import garlic.
3. That It has been proven that reported I pass a conspiracy between, reported on II, III, IV, V, VI, VII, VIII, reported IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX XXI, and reported on XXII with how to provide an extension SPI without legal basis.
4. That It has been proven that reported I pass a conspiracy between, reported on II, III, IV, V, VI, VII, VIII reported, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII XVIII, and reported on XIX by means document processing SPI and perpanjangannya through the period.
5. That policy regarding the quota for the product was trigged garlic is not right, where the garlic fully fulfilled through Imports, But local production garlic is not in the market at once.
6. That there is no coordination between Ministry of Agriculture, Republic of Indonesia as the authority publisher RIPH with Ministry of Trade Republic of Indonesia as the authority publisher SPI;

Business Executors have made on which do not build even break country with treatment cartel in the case importers garlic. Business Executors thought only benefits. People suffered greatly from price hearing garlic jumped expensive. The community to stop consuming garlic because cannot afford to buy taste of the dishes for the requirement, only restaurant is still buy.

Business Executors he has been proven to have committed a violation of Article 11, Article 19, Article 24 UULPM starting from a setup supply based Affiliate, based on suspicion of investigator that has to negotiate agreements cartel that sets rates garlic in the market, a profitable supply that will be done by the group business executors is part of the effort to regulate rates garlic in the market affecting the loss to the public that should the society be able to enjoy the garlic with the affordable price and even in contrast with the price that business players not affordable. should be given a sanction administration that was to give a shock therapy for not doing the same thing in the latter days. Legal awareness and especially UULPM should be continued to make the actor and business community recommended to report any business actors who works were accused of violating UULPM.

Conclusion

Business Executors are still doing the cartel because with this act business executors a profit in immediately but community lost and cannot afford to buy garlic because the price that was not an affordable price.

Business Executors he has been proven to have committed a violation of Article 11, Article 19, Article 24 UULPM starting from a setup supply based Affiliate, based on suspicion of investigator that has to negotiate agreements cartel that sets rates garlic in the market, a profitable supply that will be done by the group business executors is part of the effort to regulate rates garlic in the market affecting the loss to the public that should the society be able to enjoy the garlic with the affordable price and even in contrast with the price that business players not affordable. should be given a sanction administration that was to give the detterent effect for not doing the same thing in the latter days. Legal awareness and especially UULPM should be continued to make the actor and business community recommended to report any business actors who works were accused of violating UULPM.

Business Executors was proven to breach him UULPM such as: I, II, III, IV, V, VI, VII, VIII reported, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII XVIII, and reported was proven breaching Article XIX not 11 UULPM. M Later claimed that reported I, II, III, IV, V, VI, VII, VIII, reported, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII XVIII, and reported on XIX proven legally and convincingly violated Article 19 letter C UULPM. States that him I, II, III, IV, V, VI, VII, VIII, Reported, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX XXI, and reported was proven XXII and convincingly have breached Article 24 UULPM. States that we got adequate profits we XX not proven to be broken the Article 24 UULPM.

Suggestion

It suggests that business players did not do cartel again, because it will harm community, even on works the cartel is more evil and more abominable from corruptors. Business Executors should not violate UULPM in carrying out their business activities.

[38] Ibid.

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THE LEGAL AND REGULATORY FRAMEWORK FOR *ZAKAH* AND *WAQF* ADMINISTRATION IN KUWAIT: LESSONS FOR NIGERIAN ZAKAH AND WAQF INSTITUTIONS

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ABSTRACT

In strategies for poverty alleviation from the Islamic legal perspective, there have been continuous efforts to make zakah and waqf instrumental in the processes in Nigeria.While there has been number of studies addressing such poverty alleviation strategies from the economic and Sharī'ah perspectives, a holistic focus on the legal transplant from one of the leading zakah and waqf jurisdiction in the Muslim world, the Kuwait will complement the effort, particularly when it comes to proper administration. This paper therefore examines the dynamics of the legal and regulatory framework for zakah and waqf administration in Kuwait. The methodology used in this study is mainly qualitative legal research which draws significantly from relevant laws and policies on zakat and waqf through induction method to identify the viability of such models in addressing the economic needs of the poor in Nigeria. One key aspect examined in this study is the effectiveness of the existing laws in encouraging people to give charitable donations and the adequacy of such laws in furthering the noble cause of poverty alleviation. The study concludes that a robust legal and regulatory framework is necessary in the Nigerian zakah and waqf arena to ensure their maximum benefit in the long run. In addition, effective administration of zakah and waqf requires a sound and appropriate legal framework. While one may conclude that the existing laws are largely adequate, learning from experiences of other laws such as the Kuwait Law on Zakah and Waqf will enhance the existing initiatives.

Keywords: poverty alleviation, *zakat, waqf,* administration, Nigerian Zakah and Waqf, Kuwait.

Introduction

Since 1999 till 2003 a good number of Muslim States in Nigeria has enacted laws on zakah and waqf administration. While some of these laws appear adequate for a good zakah administration, the opposite is true in the case of waqf. Even those of zakah, the effectiveness still remains unproven. This is based on the available statistics obtained from Zamfara State Zakat and Endowment Board that is seen as the most performing of the Zakah and Endowment Institutions in Nigeria. For example, since the year 2000 till 2014 only total amount of zakat collected is N175, 037, 358 (879,667.05 USD), while the total zakat of heads of livestock collected is 7,005. The total zakat collected in cereals is 118, 545 bags.[1] All these seeming achievements are in a period of 13 years. Therefore a thorough look and transplanting of an internationally recognised and accepted system of zakat and waqf administration like Kuwait is paramount in Nigeria.

Be that as it may, as in any other Kuwaiti laws, section 51 of the Constitution of the State of Kuwait states that the legislative powers lie in the Amir of the State of Kuwait and the National Assembly.[2] By virtue of this The Kuwaiti authority has enacted two different *zakah* laws to provide for effective *zakah* administration in the State of Kuwait. The first law was the *zakah* law no. 5 of 1982/1403AH which established the Kuwaiti *Zakah* House in 1982 as a government agency under the jurisdiction of the

[1] Zamfara State Zakat and Endowment Board Annual Report.
[2] Constitution of the State of Kuwait, section 51.

Ministry of *Waqf* and Islamic Affairs.[3] The second *zakah* law was enacted in 2006, the *zakah* law no. 46 of 2006. This law grants the Ministry of Finance the jurisdiction to administer *zakah* on business corporations in Kuwait.[4] The effect of the co-existence of the two laws is that the *zakah* administrative powers in Kuwait are shared between two Ministries, namely; the Ministry of *Waqf* and Islamic Affairs and the Ministry of Finance.

Furthermore, in 1993 the functions of the former medical aid law no.15 of 1993 were transferred to the *Zakah* law no. 5 of 1982 and the medical aid law was consequently repealed.[5] This action displays the perspectives at which the Kuwaiti *zakah* system covers the areas of medical assistance by *zakah* proceeds. This is a far-reaching restructuring of the administrative framework and the responsibility of the *Zakah* House as an Islamic source of financial and socio-economic assistance to the society.

This is part of what this paper is trying to investigate, the possibilities of having similar operational structure in Nigerian *Zakah* System. in addition the waqf system of Kuwait also is one of the best performing in the world, it is against this and *inter alia* this paper focuses on Kuwaiti zakah and waqf laws.

This paper is mainly divided into four sections, after the introductory section, the second section seeks to examine the legal framework of zakah administration in Kuwait and the powers of the Kuwaiti Zakat house, the effectiveness in poverty alleviation and the annual report on zakah received by the house in 2014. The section also looks at the strategies employed by the house in encouraging people to pay zakah and modus operandi poverty alleviation. Section three delves into the legal framework of waqf administration in Kuwait, the role of the Kuwait Awqaf Public Foundation in poverty alleviation in Kuwait, analysis of the Kuwaiti Laws on waqf and their effectiveness. Section four is the conclusion and recommendation. It was concluded the Kuwaiti system of zakah and waqf administration is worthy of being a model and so the Nigerian Zakah and Waqf Institution should copy from the system.

Objective of the study

The main objective of this study is;
To explicate Kuwaiti system of zakah and waqf administration as a general guideline on effective zakah and waqf administration in Nigeria.

Literature Review

There are two types of zakah laws and one Waqf of law in Kuwait. The first zakah law is the *Amiri* Ordinance no.5 of 1982 while the second zakah laws is the Amiri Ordinance of the *zakah* law no. 46 of 2006 and the waqf of law is the *AmÊrÊ* Ordinance no. 257 of 1993**.** The review the literature will be based on the literature that is related to these laws and any other laws in Kuwait and Nigeria in connection with the subject matter of this paper.

Ibrahim Ahmad Khalil at el (2014) find that waqf in Kuwait is far developed more than many other Muslim countries. They found that the hedge the Kuwaiti waqf administrative system has over others is the adequate funding and commitment of the management.[6] Ahmad al-Hijji al-Karkhi wrote in Arabic on the Kuwaiti Zakah Law of 2006. His finding was that the Law did not comply with the Shariah in beneficiaries of zakah and that the Kuwaiti Fatwa Council did recommended that the Zakat House should be the approprite administrator of the zakah collected from commercial companies.[7] This is justifies why the author choose Kuwait as a model to Nigeria. Ostien (2011) in his book, *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook -Volume VI Ulama Institutions* in which he discussed zakah and waqf institutions in the Northern Nigeria. His findings concise with Umar Oseni (2012) who found that that prior to 1999 and since independence there had not been waqf laws in Nigerian apart from the general constitutional provision in section 277 (2) (C) of the 1999 constitution of Nigeria which grant the jurisdiction on waqf matters to Sharī'ah Court of Appeal without any further regulation in form of an Act was not enough.[8]

Methodology

[3] Kuwaiti *Zakah*house, "Summary Introduction" <http://beta.*zakah*house.org.kw/ar/About%20Us/Pages/default.aspx> (accessed February 14th 2015).
[4] The Kuwaiti *zakah* law on Public Liability Companies and Private Companies (Law no. 46 of 2006), section 2.
[5] See the Kuwaiti Medical Aid Fund Law no. 15 of 1993.
[6] Ibrahim Ahmed Khalil, Yunus Ali and Mohammad Shaiban, "Waqf Fund Management In Kuwait And Egypt: Can Malaysia Learns From Their Experiences", *Proceeding of the International Conference on Masjid, Zakat and Waqf* (IMAF 2014) held on 1-2 December 2014, Kuala Lumpur, Malaysia.
[7] Ahmad al-Hijji al-Kurdi, "*Mada Shaiyyah Masarif al-Zakah allati Nasa Alayha Qanun al-Zakah al Kuwaiti Raqm 46, 2006*," a paper presented at the 9th International Conference of Islamic Financial Institutions on 11-12 January, 2009 in Kuwait.
[8] Umar A. Oseni, "Towards The Effective Legal Regulation Of *Waqf* In Nigeria: Problems And Prospects" in Waqf Laws & Management (With Special Reference to Malaysia) edited by Syed khalid Rashid and Arif Hassan (India: Institute of Objective Studies, 2012), at 339; Philip Ostien, "SharÊÑah Implementation in Northern Nigeria 1999-2006: A Sourcebook", Sharia-in-Africa.net,< http://www.sharia-in-africa.net/media/publications/sharia-implementation-in-northern-nigeria-volume-six/Chapter%209%20Part%20II.pdf> Date accessed, 25th, Oct, 2013.

With the nature of this topic as implied by the title, content analysis using inductive method is best suitable to get the expected findings. This is to generate the lessons from the Kuwaiti system in order to suggest the replication to the Nigerian zakah and waqf institutions. The primary and secondary sources of Islamic law were consulted. In this regard the primary sources are the Quran and Hadith while the secondary sources are the *tafsir* (exigency of the Quran), books of Islamic jurisprudence. Other sources of data were mainly from website of the Kuwait Zakat House, Kuwait Awqaf Public Foundation, constitution of Kuwait and statutes, and journals. It becomes necessary to use Kuwait as the model to Nigeria because of its international recognition on zakah and waqf efficient administration.

Powers of the kuwaiti *zakat*house in *zakah* administration

The Kuwaiti *zakah* law no.5 of 1982 contains total number of five sections. Its section 1 provides for the establishment of the *Zakah* House as a corporate body and equally grants the Minister of *Waqf* and Islamic Affairs the jurisdiction to supervise the House. This makes the house a semi-autonomous body. Based on this law the *sÉÑÊ* of *zakah* in Kuwait is an institutional *sÉÑÊ* represented by the staff of the *Zakah* House and the Board of *Zakah* Administration.[9] The members of the Board are appointed by the law makers and the Amir,[10] unlike some of the Nigerian *Zakah* Board whose members are unconditionally appointed solely by the Governor.[11] The *zakah* law of 2006 which also contains five sections provides for an institutional *sÉÑÊ* which is the Ministry of Finance, but it has differed from the *zakah* law of 1982 in its exclusive area of jurisdiction, which is the *zakah* administration on business corporations and the power to compel on the payment. This is contained in section 1 of the law which imposes imprisonment of three years for evasion of the said amount.[12] The *Zakah* House has no powers to compel individuals to pay *zakah* but it has only persuasive powers and the right to receive the *zakah* from anyone who pays it out of his own free volition.[13] This is another aspect where the Kuwaiti *zakah* law of 1982 is different from some of the *zakah* laws in Nigeria.[14]

Section 2 of this law also detailed the sources of proceeds of *zakah* to the *Zakah* House as the following: the *zakah* paid by individuals and the likes; gifts and grants from organisations, companies and government annual aids.[15] Since the Kuwaiti *Zakah* law no. 46 of 2006 came into force the section 2 of the *zakah* law of 1982 must be read together with section 1 of the Kuwaiti *Zakah* Law of 2006; as it makes the payment mandatory on companies only[16] where the *zakah* law no. 5 of 1982 makes it voluntary to all.[17] The *Zakah* law of 1982 also grants the powers to make policies and regulations to the Board of *Zakah* affairs and not the leadership of the *Zakah* House.[18] From this it is clear that the internal policy making body of *zakah* administration in Kuwait is separated from the administrators in the *Zakah* House.

How effective the kuwaiti *zakah* laws have been in poverty alleviation?

Pursuant to the powers given to the *Zakah* House by section 3 of the *zakah* law of 1982 and section 36 of the interpreting memorandum which empowers the Council of *Zakah* House to make policies deemed suitable for the smooth running of *zakah*

[9] Section 3 of the Kuwaiti *Zakah* Law no. 5 of 1982 and the Ministerial regulation no. 16 of 1994 orders the House to constitute a body of *zakah* as the highest level of the *zakah* administration in Kuwait. The Board is headed by the Minister of *Waqf* and Islamic Affairs as the Chairman, permanent Secretary of the Ministry of *Waqf* and Islamic Affairs as a member; permanent Secretary of the Ministry of Social Affairs and Work as a member; General Manager of Kuwaiti Insurance Social Insurance Institutions, Director of the Underprivileged Affairs and six other Kuwaiti Nationals that have experience who are not engaged in any public job and must be appointed by the Council of Ministers for a tenure of three years. See the Kuwaiti *Zakah* Law (Law no. 5 of 1982) section 3 and section 36 of Ministerial regulation no. 16 of 1994.

[10] See section 51 of the Constitution of the State of Kuwait read together with section 3 of the .*Zakah* Law no. 5 of 1982.

[11] See for example the Zamfara State *Zakah* and Endowment Board Law 2003 (as amended) section 4(2); Niger State *Zakah* and Endowment Board Law 2001; see Kano State *Zakah* and Hubusi Commission Law 2003, section 5(1).

[12] The Kuwaiti *zakah* law with regards Public Liability Companies and Private Companies (Law no. 46 of 2006), section 1.

[13] Section 2, of the Kuwaiti *Zakah* Law (Law no. 5 of 1982).

[14] The Zamfara, Bauchi and States *Zakah* laws provide for compelling on payment of *Zakah*. However the statistics presented in the introductory part of this paper show that the law has not been very effective. See section 5 (g) Zamfara State *Zakah* and Endowment Board Law 2003 (as amended); Bauchi State *Zakah* and Endowment Fund Law 2003 section 22 (1).

[15] Section 2, of the Kuwaiti *Zakah* Law (Law no. 5 of 1982).

[16] Kuwaiti *Zakah* Law on Companies (law no. 46 of 2006) Section 1.

[17] Section 2 (a), of the Kuwaiti *Zakah* Law (Law no. 5 of 1982).

[18] Section 4 of the Kuwaiti *Zakah* Law (Law no. 5 of 1982)

affairs,[19] the House had been performing successfully. The effectiveness and efficiency of the system are evidenced by the huge amount of *zakah* being realised, the numbers of beneficiaries and the project being delivered.

Some annual report of *zakah* received

Table 1: A table showing the amount of zakah realised in Kuwait from the year 2012 to 2014.[20]

Year	Cash *Zakah* (KWD)	Charity(KWD)	Total
2012	30, 419, 058	3, 420, 190	33, 839, 248
2013	28, 468, 167	4, 462, 849	37, 931, 016
2014	20, 207, 780	5, 802, 816	26, 010, 596
Ground Total	79, 095, 005	13, 685, 855	92780860.

The table above shows the amounts of cash *zakah* received by the Kuwait *Zakah* House for the last three years, 2012, 2013 and 2014. As the figures appear, the total amount of *zakah* in the last three years is seventy nine million, ninety-five thousand and five cents of Kuwaiti Dinar (KWD79, 095, 005). This is equivalent to two hundred and sixty-three billion, five hundred and eighty nine million, three hundred ninety seven thousand and ninety-nine cents dollars (USD263, 589, 397.99). Beside the *zakah*, there are also accruals of general charities as *al-khayrat* (charities) which, according to the table, amount to thirteen million six hundred and eighty five and eight hundred and fifty five Kuwaiti Dinar (KWD13, 685, 855).

It is pertinent to note that the *zakah* proceeds realised under the *zakah* law of 2006 do not accrue to the *Zakah* House that is operating on the 1982 law, but to the national treasury[21] and to be used for the benefit of any public interest that is requested by the corporate body.[22] However, in 2007, the Kuwait Fatwa Council ruled against this provision of the law with respect to the beneficiaries of the *zakah*. The council directed that the *Zakah* House should be the proper channel through which *zakah* should be distributed.[23]

The question now is that what are the factors responsible for this success in the Kuwaiti *zakah* administration, even though the law does not compel on payment of *zakah*?

Strategies employed by the *zakah* house to ensure payment of *zakah*

The Kuwaiti *Zakah* House mentioned two methods of receiving the *zakah* from the members of the public, namely; direct cash payment of *zakah* and Monthly deduction from the account of the *zakah* payers. [24] According to the house, the motivational factors for the high responses, are the result of the following strategies: working towards the satisfaction of those paying *zakah* to the house by heightening their expectations in terms of performance; high standard of governance; active application of the rules and regulations for efficient management and unwavering adherence to a high level of security of information of *zakah* payers; strict adherence to shariah rules and regulation and laws; adoption of the concept of strategic planning as a fundamental method of service delivery of the *Zakah* House; quality assurance of *shariah*, financial and administrative governances in activities and services of the house; making the best use of the resources of the *Zakah* House; concentrating on the practical application of the concept of *shËra*[25] and group work in all the activities of the house; working towards a higher level of institutional performance and productivity; and collaboration with other institutions that have some connections with the *Zakah* House.[26]

In line with the concept of corporate governance the above mentioned strategies of the Kuwaiti *Zakah* House reflects good corporate governance in the administration of zakah. This is because these strategies are implementation of the Kuwaiti laws[27]

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[19] Section 4 of the Kuwaiti *Zakah* Law (Law no. 5 of 1982) and section 36 of the Interpreting Memorandum.

[20] Source: Qism al-*Ihsa Wa Tahalil al-Bayanat*, "Ihsaiyyah ÔrÉdÉh al-Zakah Wa al-Khayrah Fi al-Fatrah, 2012-2014," *Zakah* House, <https://www.*zakah*house.org.kw/AxCMSwebLive/upload/eradat12-14_3823.pdf> (accessed 16 March, 2015).

[21] See the *Zakah* Law no. 46 of 2006, Section 2.

[22] Ibid. Section 1.

[23] Ahmad al-Hijji al-Karaji, n.7

[24] See Bayt *Zakah*, "*MashÉrÊ RiÉyah al-ØÊÍiyyah"* Bayt *Zakah*, <http://www.*zakah*house.org.kw/AxCMSwebLive/ar_projects_loc_2_1.cms> (accessed 17 March, 2015); Bayt al-*Zakah*, "*MashrËÑ RiÉyah al-TaÑlÊmiyyah" Bayt al-Zakah*, <http://www.*zakah*house.org.kw/AxCMSwebLive/ar_projects_loc_2_2.cms> (accessed 17 March, 2015).

[25] The concept of shura is one of the building blocks of Islamic corporate governance. See *Mervyn K. Lewis, "*Islamic Corporate Governance", *Review of Islamic Economics*, v. 9, no.1, (2005): p: 19.

[26] *Bayt al-Zakah*, "Annual Report 2010," *Bayt al-Zakah*, <http://www.*zakah*house.org.kw/AxCMSwebLive/upload/AnnualReport_2451_3488.pdf> (accessed 20th January, 2015).

[27] As mentioned in the body of the body of this paper the laws of *zakah* in Kuwait are two, namely; the *Zakah* law no. 5 of 1982 which established the *Zakah* House with its mandates and the *Zakah* law no. 46 which makes the

and policies[28] on *zakah* administration that control and direct operations of the *Zakah* House with the objectives of protecting the interest of all the stakeholders, hence corporate governance. Thus, it could be concluded that the success of the Kuwaiti *Zakah* House is good corporate governance which encourages the potential *zakah* payers to continue to pay *zakah* even when the law did not compel its payment. Therefore, this system ought to be emulated by the Nigerian *Zakah* institutions.

modus operandi of poverty alleviation by the kuwaiti *zakah* house

Pursuant to section 48 of the interpreting memorandum to the 1982 *zakah* law, which instruct the *Zakah* House to do everything possible to remove the inactive poor to a financial and economically free person,[29] the House engages in various poverty alleviation projects that extend benefits to local and international beneficiaries. The *zakah* proceeds are used for the local *aÎnÉf* of *zakah* (beneficiaries) in the following areas: health sector, education sector and social affairs of the people, while the international beneficiaries enjoy benefits from proceeds of *sadaqat* and other types of charities that accrue to the house.[30] With regard to the local beneficiaries, the modus operandi is as follows;

1- **The health sector as a beneficiary in the Kuwaiti *Zakah* House:** the house provides means and support for treatment of the poor, treatment in a hospital abroad if the nature of the disease necessitates treatment outside Kuwait, welfare of the orphans, widows, divorced women, old people, poor families, families of those in jail as well as providing the necessary medical equipment.[31]
2- **The educational Sector as beneficiary in the Kuwaiti *Zakah* House:** under this project, the *Zakah* House uses the *zakah* proceeds to provide educational opportunity to the needy in the society by supporting them with all they need to complete their studies from primary to tertiary level and get gainful employment with the hope that they will become *zakah* givers instead of *zakah* receivers.[32] For example, in the last three years, the following number of students enjoyed the sponsorship of the house; in 2012, one thousand four hundred and sixty nine (1, 469) students; in 2013 six hundred and fifty one students (651) and in 2014 seven hundred and seventy five (775) students.[33]

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payment of *zakah* obligatory on business corporations in Kuwait. However, the focus is on the former as it deals with the larger public, both individuals and groups or business communities. This is the one under the control of the Ministry of *Waqf* and Islamic Affairs, according to section 1 of the law. Based on this, the section 2 mandates the establishment of a board of *zakah* and have the Minister of *Waqf* and Islamic Affairs as the chairman. Other members of the Board are permanent secretary of the Ministry of *Waqf* and Islamic, permanent secretary of Ministry of Works and social Affairs, general manager of the Kuwaiti Institution for social security, director of the office of the affairs of the minors, and six other Kuwaiti Nationals with experience and competency who must not have engaged in any public service, appointment of which must come from the Council of Ministers. See Section 3 of the Kuwaiti *Zakah* Law (Law no. 5 of 1982).

[28] In addition to the *zakah* law no. 4 of 1982, there are other rules and regulations that bind the House, as provided by the *Zakah* Board, Ministry of *Waqf* and Islamic Affairs and the leadership of the House pursuant to section 4 of the *Zakah* Law no. 5 of 1982. E.g. General policy of the house no. 16 of 1994; internal policy of the Shariah council of the House; policy for the distribution of *zakah* and charities; Financial Policy no. 4 of 2003 of the *Zakah* House; Financial Policy of *zakah* and charities no. 5 of 2003. There is also another document called *MÊthÉq al-ÑAmal* of 2011 (covenant of commitment to duty of 2011). This document is just a code of ethics based on Shariah principles of service delivery to the public. The themes of the *mÊthÉq al-ÑAmal* are, good manners, politeness, sincerity of purpose, trustworthiness, transparency, cooperation with leaders and colleagues, accountability, governance, civilized manner of dealing, skill development, perfection, creativity, and rationalization of usage of facilities of the *Zakah* House. See *Bayt al-Zakah*, "*IÎdÉrÉtuna,"* via *Bayt al-Zakah*,
< https://www.*zakah*house.org.kw/AxCMSwebLive/ar_publications.cms#&slider1=13> (accessed 17th March, 2015).

[29] See Kuwait *Zakah* House, *LÉiÍatu TauzÊÑ al-Zakah Wa al-KhayrÉt,* (Regulation on Distribution of Zakah and Charities), (Kuwait: *Bayt al-Zakah*, 2010), P: 25.

[30] Some of the international projects of the *Zakah* House are building of Mosques, schools, orphanage homes, skill acquisition centres, hospitals, home for the poor people, etc. See *Bayt al-Zakah*, "*al-MashÉrÊÑË al-InshÉiyyah Wa Tanmawiyyah Kharijah Dawlah al-Kuwait," Bayt al-Zakah*, <http://www.*zakah*house.org.kw/AxCMSwebLive/ar_projects_int_1.cms> (accessed 17 March, 2015).

[31] Bayt *Zakah*, "*MashÉrÊ RiÉyah al-ØÊÍiyyah"* Bayt *Zakah*,
<http://www.*zakah*house.org.kw/AxCMSwebLive/ar_projects_loc_2_1.cms> (accessed 17 March, 2015).

[32] Bayt al-*Zakah*, "*MashrËÑ RiÉyah al-TaÑlÊmiyyah" Bayt al-Zakah*,
<http://www.*zakah*house.org.kw/AxCMSwebLive/ar_projects_loc_2_2.cms> (accessed 17 March, 2015).

[33] Qism al-*Ihsa Wa Tahalil al-Bayanat*, Bayt al-*Zakah*, "*IhÎÉiyyah Adad al-Talabah Íasbah Sanah al-Kafalati fi al-Fatrati* 2012-2014*," Bayt al-Zakah*, <http://www.*zakah*house.org.kw/AxCMSwebLive/upload/student12-14_3829.pdf> (accessed 17 March 2015).

3- **Social welfare program:** this programme is used to solve the problem of poverty and deprivation in Kuwait. Under the programme, the *Zakah* House provides basic needs for poor families in a manner that transforms them from being liability families to productive families. The programme also caters for all the underprivileged in Kuwait.[34]

The above three programmes are part of the eight *aÎnÉf* of *zakah* mentioned in the Quran.[35] In observing the three programmes, the *aÎnÉf* of the poor, the needy and *fisabilillah*[36] clearly manifest. The remaining *asnaf*, even though no specific project is tagged with their name; they are captured by the general term of social welfare programme mentioned above. More importantly, the interpreting memorandum expressly mentioned all the eight asnaf with the conditions to be fulfilled before they deserve to be given *zakah*.[37]

Besides these three programmes that are focussed on by the Kuwaiti *Zakah* House, there are also others that are too many to mention and outside the scope of this research.[38] The focus given to these three are justifiable from the Quran, where Allah says, "Or do you think that you will enter Paradise while such [trial] has not yet come to you as came to those who passed on before you? They were touched by poverty and hardship[39] and were shaken until [even their] messenger and those who believed with him said,"When is the help of Allah?" Unquestionably, the help of Allah is near."[40]

In this verse all the above mentioned three *zakah* programmes of the Kuwaiti *Zakah* House are reflected. This is because the verse mentioned poverty and disease. The presence of these two correlates with presence of education deprivation, as unhealthy person cannot seek for knowledge. The smoothness of these three will allow the *zakah* receivers to manage whatever *zakah* is given to them as an economic empowerment.

The legal framework of *waqf* administration in kuwait

There are two types of *waqf* in Kuwait: the *Sunni* and the *Jaafari* (the *ShiÑat* Islamic School of jurisprudence) *AwqÉf*.[41] The legal framework of both *awqÉf* passed through several legal regimes and administrative developments. Its first phase of development was the institutionalisation stage through the establishment of the Directorate of *AwqÉf* in 1921 and ended in 1948. This directorate was officially saddled with the responsibilities of supervising and developing the *waqf* in Kuwait to its best ability. The second phase of the development started from 1949 till 1961. At this stage, the Directorate of *Waqf* was able to extend its tentacles in charity works, by assisting in the areas of health care services for the needy and constitution of board of *waqf* that included members of the public in the administration of *waqf*.[42] During this phase, the Mosques were put under the supervision of the Directorate with the responsibility of maintaining, renovating, building them and paying of regular salaries to the Imams and the callers to prayers. By 5th of April 1951 a *MarsËm AmÊrÊ* (Royal Ordinance) was issued for the administration of *waqf* in Kuwait.[43] The most important rule of this *MarsËm AmÊrÊ* are two; firstly, it ordered *waqf* administration must be subject to *awqÉf* rulings that are obtainable in the four *sunni madhhab* and secondly, in those matters that are not captured by the *MarsËm AmÊrÊ* reference should be made to the Maliki School of jurisprudence.[44]

By the year 1962, the directorate of *awqÉf* evolved to a full fledge ministry, 'The Ministry of A*waqf*', and in 1965 it was saddled with additional responsibilities of Islamic Affairs and the name became the Ministry of A*wqÉf* and Islamic Affairs. Under this

[34] Bayt al-*Zakah*, "*MashÉrÊ RiÉyah al-IjtimÉÑÊyyah, Bayt al-Zakah* <https://www.*zakah*house.org.kw/AxCMSwebLive/ar_projects_loc_2_3.cms> (accessed 17 March 2015).
[35] Quran, *al-Tawbah*: 60.
[36] The interpretation of *fisabilillah* is very broad; it has been interpreted also to cover those seeking for knowledge.
[37] See Kuwait *Zakah* House, *LÉiÍatu TauzÊÑ al-Zakah Wa al-KhayrÉt*, (Regulation on Distribution of Zakah and Charities), (Kuwait: *Bayt al-Zakah*, 2010), 35-8.
[38] For example, the House, in addition to the above three areas, it also engages in what it terms as *mashÉrËÑ al-Khayriyyah Dakhila* al-Kuwait (charitable projects inside Kuwait): under this project, there is student portfolio, *zakah al-fitr*, *aÌÉÍÊ* (Eid Kabir feast), breaking of fast, reception of all kinds of tangible asset and distributing same to the deserving members of the society, provision all required edible items for fasting the month of Ramadhan from begging to the end to about 8000 families in Kuwait, bottle water gift distribution at every place of people gathering, etc. see *Bayt al-Zakah*, "*mashÉrËÑ al-Khayriyyah Dakhila* al-Kuwait," *Bayt al-Zakah*, <*https://www.zakahhouse.org.kw/AxCMSwebLive/ar_projects_loc_1.cms*> (accessed 17 March, 2015).
[39] Hardship here was translated by Ibn Abbas as diseases. See Ibn Kathir Abu al-FidÉ'Ismail Ibn Umar, *Tasir al-Quran al-Azim*, ed. SÉmi Ibn Muhammad Salamah (Dar al-Taybah, 1999/1420AH), v. 1, p: 571.
[40] Glorious Quran, al-Baqarah: 214.
[41] *al-AmÉnah al-ÑÓmmah Lil AwqÉf, al-Waqf al-JaÑafari, al-AmÉnah al-ÑÓmmah Lil AwqÉf*, (accessed 8 May 2015)
[42] Kuwait Public *Waqf*, "*al-Nash'ah* (Historical Development)," <http://www.*waqf*.org.kw/Arabic/AboutMunicipality/GeneralSecretariatOf*Waqf*/Pages/Establishment.aspx> (accessed February 14th 2015)
[43] Ibid.
[44] Ibid.

stage, the most notable developments were division of the administrative divisions of the *waqf* in the ministry into two sub-divisions namely, division for *waqf* administrative affairs and division of *waqf* resources management.[45] This stage was however interrupted by the Kuwaiti-Iraqi war, but upon the return of peace to Kuwait, there was another development in the *waqf* sector; the establishment of the Kuwait Public *Waqf* by virtue of the Royal Ordinance that was issued on 13th November 1993.

The legal framework of the kuwait *waqf* public foundation (kapf)

The KAPF was established by the *AmÊrÊ* Ordinance no. 257 of 1993.[46] The basis of this law was the Constitution of the State of Kuwait;[47] the Amiri Ordinance of 1951 that subjected administration of *waqf* to jurisprudence of the *sunni* four *madhhab* regardless of *sunni waqf* or *jaÑfari*, and the Amiri Ordinance of 1979 with regards to the Ministry of *Waqf* and Islamic Affairs.[48] The title of the ordinance no. 257 of 1993 reads as follows; *MarsËm AmÊrÊ* no. 257 of 1993 *Bi Sha'ni Inshai' al-AmÉnah al-ÑÓmmah Lil AwqÉf* no. 257 (*Amiri* Ordinance with regards to Establishment of KAPF no. 257 of 1993).[49] The Ordinance of the Establishment of KAPF, the *Marsum Amiri* no. 257 of 1993 was legislated purposely to transfer all the *waqf* affairs under the Ministry of *Waqf* and Islamic Affairs to the KAPF with reasonable autonomous administration.[50]

Analysis of the kuwaiti *waqf* law

The *MarsËm AmÊrÊ* no. 257 of 1993 that governs *waqf* administration and management in Kuwait contains 13 sections.[51] The section one of the law clearly states that all the *waqf* functions of the Ministry of *Waqf* and Islamic Affairs have been transferred to the KAPF from the coming into law of this *Marsum Amiriri*.[52] It would be recalled that what is presently obtainable in Nigeria is that each state has its own *waqf* institution, as against the Kuwaiti system that is unified under the Ministry of AwqÉf and Islamic Affairs through the KAPF. The section 2 of the *Marsum Amiri* mandates the KAPF to take all possible steps that serve the interest of *waqf;* to publicize its awareness, manage its funds, invests it, distribute the revenues in line with the conditions stipulated by the settlors, actualise the *MaqÉsid Shariah* of *waqf*, develop the society in a civilized manner, develop the cultural values and carry out societal development with the aim of providing succor to the needy in the society.[53] Similarly, section 3 of the *Marsum Amiri* specifies *waqf* affairs under the jurisdiction of the KAPF as follows;[54]

1- To create the avenue for public participation in the development of *awqÉf*,
2- To administer and invest resources of both charitable *waqf* and *waqf dhuri (family)*[55] in Kuwait subject to the conditions stipulated by the settlors if the *awqÉf* fall under the following categories;
   a. *AwqÉf* whose trusteeship is granted to the Ministry of *AwqÉf* and Islamic Affairs;
   b. *A wqÉf* that are settled for mosques;
   c. *A wqÉf* that lack any *mutawalli*, either there had been none or the criteria to qualify as their *mutawalli* have ceased to exist;
   d. *AwqÉf* with an appointed *mutawalli* from the settlor but the law has given the KAPF authority to be part of the trusteeship;
   e. *AwqÉf* whose *nÉzir's* trusteeship is in the meantime barred from the *a wqÉf*;

[45] Ibid.
[46] Council of Ministers General Secretariat, "Amiri Ordinance of 1993 (*Marsum Amiri* no. 257)", Establishment of KAPF<https://www.cmgs.gov.kw/Electronic-Services/Decrees/Decree-Result.aspx?qry=%D8%A7%D9%84%D9%88%D9%82%D9%81&sMode=0&sOption=0&pSize=5> viewed 28 February 2015.
[47] Section 2 of the Constitution of the State of Kuwait states that "the religion of the State is Islam and the Shariah is the primary source of legislation." This means that the Constitution of Kuwait guarantees the practice of *waqf* in Kuwait. Also section 51 of the Constitution of the State of Kuwait states that "the legislative powers lie with the Amir and the House of Assembly." These are the constitutional bases of the *Marsum Amiri* no. 257 of 1993 that governs *awqÉf* in Kuwait.
[48] Ibid.
[49] Ibid.
[50] *Marsum Amiri* (Ordinance) of the Establishment of KAPF (Ordinance no. 257 of 1993), section 1; ÑAbd al-MuÍsin al-Uthman, "Tajrubah al-*Waqf* Fi Dawlah al-Kuwait" in *NiÐÉm al-Waqf Fi al-TaÏbÊq al-MuÉÎir (namadhaj Mukhtarah Min TajÉrub al-Duwal Wa al-MujtamaÑÉt al-Islamiyyah)* , edited by Mahmud Mahdi Ahmad (Jeddah: IRTI-IDB, 1423AH/2003), 94.
[51] Council of Ministers General Secretariat, *"Marsum Amiri* no. 257," Council of Ministers General Secretariat, <https://www.cmgs.gov.kw/Electronic-Services/Decrees/Decree-Result.aspx?qry=%D8%A7%D9%84%D9%88%D9%82%D9%81&sMode=0&sOption=0&pSize=5> (accessed 8 May 2015)
[52] *Marsum Amiri* (Ordinance) of the Establishment of KAPF (Ordinance no. 257 of 1993), section 1.
[53] Ibid, section 2.
[54] Ibid, section 3.
[55] This is another major lacuna in the present Nigerian *Waqf* Laws; there is none of them that put the interest of *waqf dhËri* into consideration.

3- Establishment of projects with the proceeds of *waqf* subject to the conditions stipulated by the settlors.

4- Collaboration with the government agencies and individuals in building projects of *awqÉf* with the aim to meeting the expectations of the settlors and actualization of objectives of *waqf*;

This point is of immense importance whether in Kuwait or in Nigeria and elsewhere since there is no law that compels contribution for *waqf*. With this legal backing, the institution of *awqÉf* have access to the government organizations and the ordinary citizens to convince and encourage them to contribute their token for the development of *awqÉf*.

In the same vein, the Section 4 of the law states that the KAPF is authorized, within the sphere of the *SharÊÑah*, to carry out the following developmental projects;

a. Establishment of business corporations, either as a sole owner or in partnership;
b. Permission to solely take-over an already exiting companies either as a single owner or in partnership;
c. Possession of stocks in the stock market, moveable and immoveable assets;
d. Participation in any means of investment of *waqf* funds;
e. Active participation in commercial, manufacturing and agricultural works;
f. May purchase for the eligible beneficiaries from the account of the charitable *waqf*

It is expedient to note that the above section 4 of this Marsum Amiri, if properly implemented in Nigeria will go a long way in alleviating poverty which is one of the objectives of this paper. The seemingly corresponding sections[56] in the Nigerian *waqf* Laws have not been harnessed. Moreover, such sections need to be broadening to ordinarily allow and push the management towards working to achieve the objectives of the contents of this section 4 of the Kuwaiti *MarsËm AmÊrÊ*.

Section 5 of the law requires constitution of a board of *awqÉf* affairs that consists of the following personalities;

i. Minister of *AwqÉf* and Islamic Affairs Chairman
ii. General secretary of the KAPF Member
iii. Secretary to the Ministry of *AwqÉf* and Islamic Affairs Member
iv. General Manager, Kuwait Institution for social security Member
v. General Manager, *Zakah* House Member
vi. Representative of Ministry of Finance Member
vii. Representative of the Kuwait Investment Authority Member
Viii. Three other experienced members who shall be appointed for a period of three years.

The same section 5 also allows the board to coopt any useful person in the *waqf* affairs without right of voting in the affairs of the board. The members of this board are entitled to annual compensation at amount determined by the Council of Ministers.
From the lessons learnt from Nigeria *waqf* administration, it was clear that there is one board for both *Zakah* and *Waqf*. It would then be better to adopt the Kuwaiti system of having separate board for each.

Section 6 of the *Marsum* states that the Board of *Waqf* Affairs is the highest authority in the supervision and designation of policies for *waqf* affairs in Kuwait. It reserves the right to choose any of the reliable auditing office to audit the account of the KAPF. The provisions of sections 5 and 6 guarantee good corporate governance for the KAPF; as the staff of the KAPF inclusive of the secretary cannot enforce any major decision except the board has approved it and the personalities of the board also add value to the type of actions being taken by the KAPF in carrying out its affairs.

Section 7 of the *marsum* states that the board must meet, at least four times in a year and beside, the chairman reserves the powers to call for any emergency meeting as additional sittings. The section 8 of the *marsum* states that attendance of majority of the board members forms a quorum if the chairman is available and the decision is taken by majority opinion, at the absence of majority the side of the chairman will prevail. Section 9 states that the KAPF is headed by the Secretary General, with one or more deputy. The appointment of the Secretary General is through the *Amiri* Ordinance subject to the advice of the Minister of AwqÉf and Islamic Affairs. Section 10 instructs the board to constitute permanent committees that consists members of the board and non-members of the board to carry out the following duties;

1- *Shariah* committee whose function is to give sharia views on issues pertaining to religious affairs of KAPF.
2- Committee on investment and development of *waqf* resources; strategic plans; policy formulation on investment of *waqf* resources and follow-up for the project under execution.
3- Committee on *waqf* projects. It is concerned about strategic plans; policy formulation for the spending of the *waqf* revenues in line with *maqasid Shariah* and to fulfill the conditions of the settlors, with the aim of meeting findings of the studies and conforming with the projects and *waqf* program.

The section 11 of the law obliges the KAPF to prepare account of its total annual incomes and expenditures of all the *waqf* under its jurisdiction with unqualified trusteeship and those under it with qualified trusteeship. The section 12 states that the KAPF is entitled to special budget from the budget of Kuwaiti Ministry of *Waqf* and Islamic Affairs. Interestingly, the last

[56] For example, section 5 of Zamfara State enactment 2003 (as amended) provides for the boards to make rules, regulations and policies for the good management of endowment. The performances so far are short of the requirements of this provision. If this is the situation in Zamfara which is for the time being performing ahead of other states the situation is definitely worse in other states of Nigeria.

section, section 13 mandates all the Ministers to enforce the provisions of this law where affected. This is another key point that will guarantee the cooperation of the public in the development of *waqf*, both government staff and non-government staff.

How has the kuwaiti *waqf* law been effective in poverty alleviation?

The inherent *shariah* objective of *waqf* is to provide succor to the poor segment of the society as well as uplifting the socio-economy of the people. To this end, by virtue of section 2 of the Kuwaiti *MashrËÑ AmÊrÊ* no. 257 of 1993 which mandates the KAPF to do all possible means to achieve the *SharÊÑah* Objectives of *waqf* the KAPF has been dynamic in devising various strategies tailored at achieving this aim. As a matter of fact, the KAPF expressly said that the concept of *ØanÉdÊq "Al-Waqfiyyah'* and the concept of *al-MashÉriÑ al-Waqfiyyah* are the most viable strategies devised as instruments to actualizing the *maqÉÎid SharÊÑah* of *waqf*.[57] Nevertheless, the author also understands from the ongoing that, in addition to *ØanÉdÊq "Al-Waqfiyyah'* and *al-MashÉriÑ al-Waqfiyyah* the success of the KAPF heavily lies on good corporate governance.[58] In light of this, it should be concluded that there are three *waqf* strategies devised by the KAPF to actualize the objectives of *waqf*, namely; good corporate governance framework, the concept of *ØanÉdÊq "Al-Waqfiyyah',* and the concept of *al-MashÉriÑ al-Waqfiyyah*. Below are the details of these strategies.

Good corporate governance of the kuwaiti *waqf*

The Kuwait Public AwqÉf Foundation put in Place an elegant corporate governance[59] system that helps to provide a good result of *awqÉf* administration in Kuwait. This is done through the following organs of regulations: self-induced monitoring to beware of Allah's wrath; *SharÊÑah* governance through the *SharÊÑah* committee on governance; the public concern of the fate of their pool of resources in the cause of Allah; official governance machinery under the auspices of the honourable Minister of AwqÉf; State Audit Bureau of Kuwait;[60] other Auditors, a befitting information networking that allows for online payment of *waqf*, transparency, making of enquiries, keeps data base consisting of knowledge of *awqÉf* and all *awqÉf* activities in Kuwait and outside Kuwait.[61] Based on this, the law that established the KAPF provides for the guarantee of the interest of the stakeholders in all aspect of *waqf* administration in Kuwait. For example the law requires that there should be a constitution of a board as the highest authority of the administration of *awqÉf* under the KAPF.[62] Similarly, the law subjects all internal decisions of the KAPF to the approval of the board.[63] So also, the KAPF is required to prepare annual report of all its expenditures and income and submit to the board.[64] This is a factor that assists on accountability and transparency.

It is worth noting that the website of the KAPF represents a high level of transparency so that all its activities are viewable by all the stakeholders of *waqf*. Furthermore, one important aspect of corporate governance in the KAPF is the division of the board into three permanent committees assigned with various duties: committee on addressing of *SharÊÑah* issues; committee on

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[57] *al-AmÉnah al-ÑÓmmah Lil AwqÉf, "'Al-ØanÉdÊq "Al-Waqfiyyah'" al-AmÉnah al-ÑÓmmah Lil AwqÉf,* <http://www.*waqf*.org.kw/Arabic/AboutMunicipality/EndowmentFunds/Pages/default.aspx> (accessed 8th March 2015)

[58] This is inferable from the provisions of the *Marsum Amiri* no. 257 of 1993, the composition of the Board and its leadership, as evidenced in section 5 *Marsum*; the powers of the Board mentioned in section 5 as evidenced by section 6 which states that, the Board is the highest Body of authority in the administration of affairs of *waqf*, it has the powers to design the best policies for KAPF as deemed fit and in particular, it has the following functions; 1- designing the general governance framework for the managing and investing of *waqf* resources, 2- drawing of regulations and policies that will guarantee the development of proceeds of *waqf*- this is another subtle way to forcing the KAPF to do everything in its disposal for the development of *waqf*, 3- the internal arrangement of the KAPF is subject to the approval of the Board, 4- the KAPF internal regulations and policies that are connected with finance and administration are subject to the approval of the Board, 5- to propose any law deemed suitable for *waqf* and give an opinion to justify any project that is associated with the proposed law, 6- annual report of incomes and expenditures of the KAPF is subject to the approval of the board, 7- only the reserves the right to choose an auditing firm to audit the account of the KAPF, 8- the Board is to review the rotational reports on the KAPF with regards to day-to-day affairs, 9- to review any new topic being presented by chairman (the Minister of *Waqf* and Islamic Affairs) of the Board. Furthermore, is of constitution of specialized committees, as evidenced by section 10 of the *Marsum*.

[59] In its Islamic form it is not different from the definitions that agreed on the common notion that it is a system by which corporations are controlled and directed to protect the interest of the stakeholders of a corporation. This includes accountability, fairness and transparency.

[60] Audit Bureau of Kuwait was established by *marsum* no. 30 of 1964 to protect public funds, monitor how they are being spent and where they are spent. See State Audit Bureau, "*Kalimah RaÊs*" Audit Bureau, <http://www.sabq8.org/sabweb/home.aspx> (accessed 6 March, 2015).

[61] DÉÍÊ al-Fadhli, *Tajrubah al-NuhËÌ Bi Dawr al-Tanmawi Lil waqf Fi Dawlah al-Kuwait,* (Kuwait: Kuwait Public *Waqf* Foundation, 1998), P: 74-6.

[62] See section 5 and 6 of the *Marsum Amiri* (Ordinance) of the Establishment of KAPF (Ordinance no. 257 of 1993).

[63] See Section 6 of the *Marsum Amiri* no. 257 of 1993.

[64] Ibid., section 11.

designing policies for investment of *waqf* resources and committee on policies and strategy for matter relating to execution of projects earmarked for *waqf* resources and distribution of *waqf* resources to the beneficiaries in order to actualize the objective of *waqf* and fulfilling the intentions of the settlors.[65] This is another aspect that can be mirrored to the Nigerian *waqf* arena. Moreover, the strategic plans document of the KAPF that is issued to all the *waqf* funds in Kuwait make it make a common practice for annual meeting of the all the stakeholders. This includes the chairman of the board of the KAPF, that is, the Minister of *Waqf* and Islamic Affairs, the general secretary of the KAPF and his subordinates, all the leadership and members of boards of *waqf* funds. This meeting is said to be tantamount to company's annual general meeting.[66]

AL-ØANÓDÔQ AL-WAQFIYYAH (*WAQF* FUNDS)

'Al-ØanÉdÊq"Al-Waqfiyyah' is two Arabic words out of which the first one, *'al-sanÉdÊq"*is the noun and plural of *al-ÎundËq* and the second one '*al-waqfiyyah'* is the adjective which describes the nature of the *'al-ØanÉdÊq"*. In Arabic Language, *al-ÎundËq* refers to box in which books or clothes are kept. Over a time the word evolved to connote additional meaning and usage which is a pool of money that enjoys safekeeping. The English Literal translation is *waqf* Fund. Technically, it refers to a legal entity consisting of appointed professionals of fund management, established by the law of its jurisdiction as a *waqf* with specific societal developmental purposes, to pool together, amount of money from cash *waqf* or *waqf* shares, from donors who may come from the general public domain, corporations or government so that the donated amount would be invested and administered in accordance with Islamic rules of cash *waqf*.[67] The idea is based on creating various offices with each of them focusing on one specific *waqf* fund that targets a specific societal development. By virtue of this specified office, the office will be responsible for calling the public to donate *waqf* for the specific societal development, managing the donations and using the profit to fund the targeted societal development. For example, a *waqf* fund may be established for the welfare of the orphans and the widows; or the poor, or the old people who no longer work for their own sustenance; or for the treatment of a specific segment of the society.[68]

Historically, the concept of *al-ÎanÉdÊq al-waqfiyyah* was part of the KAPF initiatives of good *waqf* administrative strategies after its establishment in 1993, and in 1994, 1995 and 1996, KAPF successfully established several *al-ÎanÉdÊq al-waqfiyyah*[69] These Kuwaiti *waqf* funds, called *al-ÎanÉdÊq al-waqfiyyah* are regulated by the Marsum Amirir no. 257 of 1993. The section 6 (2) of the Marsum empowers the Board of the KAPF to make any regulation and policies that will guarantee the development and investment of *waqf* resources and proceeds.[70] By virtue of these powers, the board issued two set of regulations, the *al-NiÐÉm al-ÑÓm* (the general regulatory framework for the administration of *al-ÎanÉdÊq al-waqfiyyah*) and the *al-LawÉiÍ* (the interpreting memorandum of the general regulatory framework). The regulatory framework contains 32 sections, while the memorandum contains 59 sections.[71] With this, *al-ÎanÉdÊq al-waqfiyyah* is regulated by three set of legal documents namely; the *Marsum*, the general regulatory framework and the interpreting memorandum.[72]

Conclusion and recommendations

Summary of findings

The study found that the success of the Kuwaiti system of zakah and waqf is attributable to the following;

1- Imbibing fear of Allah in the administration of zakah and waqf since they are charitable funds given because of Allah;
2- The legal and regulatory frameworks, though very brief, but very efficient because they hit on the point-directive and focus
3- The corporate governance of the both zakah and waqf is another thing the inductive method of this study reveals as being another thing responsible for the success of the two institutions. This is because the personalities involve in the Board cannot allow the staff of either Zakat House or Kuwait Awqaf Public Foundation to play negligent in the process of delivery their service such personalities are naturally awful to every person that reports to them and so, to save himself from shame of failure he has to be very hardworking and sincere, hence the progress of the system.

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[65] See ibid. section 10.
[66] DÉÍÊ al-Fadhli, n. 58 at 11.
[67] Muhammad al-Zuhaili, *al-ÎanÉdÊq al-waqfiyyah al-MuÉÎirah*, (al-Sharjah: N.p, n.d), p:3-4; Husain Abd al-Mutalib al-Asraj, "Dawr al-ÎanÉdÊq al-*waqf*iyyah" *Majallah Buhuth al-Islamiyyah Wajtimaiyyah Mutaqadimmah* 2, no. 4, (October, 2012): 375; *al-AmÉnah al-ÑÓmmah Lil AwqÉf, "al-ÎanÉdÊq al-waqfiyyah" al-AmÉnah al-ÑÓmmah Lil AwqÉf,* http://www.*waqf*.org.kw/Arabic/AboutMunicipality/EndowmentFunds/Pages/default.aspx> (accessed 7 March, 2015).
[68] Muhammad al-Zuhaili, *al-ÎanÉdÊq al-waqfiyyah al-MuÉÎirah*, n. 64 at 5.
[69] DÉÍÊ al-Fadhli, n. 58 at 18-27.
[70] Section 6 of the *Marsum Amiri* no. 257 of 1993.
[71] *al-AmÉnah al-ÑÓmmah Lil AwqÉf, "al-ÎanÉdÊq al-waqfiyyah".*
[72] DÉÍÊ al-Fadhli, *Tajrubah al-NuhËÌ Bi Dawr al-Tanmawi Lil waqf Fi Dawlah al-Kuwait,* P: 17; *al-AmÉnah al-ÑÓmmah Lil AwqÉf, "al-ÎanÉdÊq al-waqfiyyah".*

4- Due to the good result of the concerted effort of the leadership, the board and the staff of the two institutions, the members of the public have confidence to continue to give their charities for the purpose of assisting the less privileged.

Conclusion and recommendation

In the light of the forgoing, the Kuwait zakah and waqf institutions have been discussed and analysed. The study has shown that the system is well rooted and became a model for others to follow. The zakah laws which are divided into two; the one of 1982 and the one of 2006 which deals with individuals and companies respectively attract a huge collection of zakah. In the case of waqf , the system put in place in the administration which create waqf funds and waqf projects are worthy of being transferred to Nigeria as they have been proven by Kuwait and testified by the Muslim world as a good system of waqf management. Against the above the objective of this study as stated earlier is achieved since the study has exhibited administrative framework of the Kuwaiti Zakah and Waqf institutions. Therefore the Nigerian Zakah and Waqf Institutions need to copy from the Kuwaiti System of administration of these two institutions.

Furthermore, the study shows that good corporate governance is paramount for a successful zakah and waqf administration, as proven by the Kuwaiti system. Therefore, the Nigerian Zakah and waqf would have to borrow a leaf from this jurisdiction for a robust zakat and and waqf laws that would guarantee the production of a vibrant corporate governance system in the zakah and waqf arena in Nigeria.

The study also shows that fear of Allah is the key ingredient for good governance that will bring success into any system. This is evidenced in the covenant of commitment to duty of 2011 which is about good service delivery. The leadership of the Nigerian Zakah and waqf are therefore called upon to imbibe fear of Allah and inculcate it in the staff in the administration of zakah and waqf. The call to fear of Allah here means that the leadership must wake up to its responsibility to protect the interests and rights of every stakeholder of zakah and waqf. This becomes more demanding looking at the two institutions are religious duties and the reward that awaits those working in favor of the poor. The limitation of the study is the inability of the author to have one-one interview with the officials of the Kuwaiti zakah and waqf institutions, which will definitely reduce the data and consequently, the findings cannot will exhaustive.

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LEGAL EDUCATION FOR WOMEN RUNNING SMALL AND MICRO ENTERPRISES (SMEs) AS AN EFFORT TO ENCHANCE AND STRENGTHEN THEIR ROLE IN PROTECTING AND MANAGING THE ENVIRONMENT

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ABSTRACT

Sustainable development aims to achieve sustainable economic, social and environmental. Pursuant to Article 33 paragraph (4) of the Constitution of the Republic of Indonesia 1945, it has been the commitment of the state and the nation in implementing sustainable economic development and environmentally. Micro and small enterprises are economic actors that have the potential as a driver of the real economy and an essential component of the national economy. The numbers are a lot of (+ 98.9%), mostly performed by women. On the institutional side as well as human resources, especially women SMEs has many weaknesses and limitations. In addition to the legality of the institutional aspects of the business as a weakness, education is one of the limitations of women entrepreneurs. It is a problem and an obstacle for SMEs to flourish and contribute to protecting and managing the environment. Women as a national asset has an important role to realize the potential and sustainable development. But from the perspective of gender are still many women who are marginalized and do not have the empowerment to take an active role in development. Empowerment for women entrepreneurs through legal education is needed to improve the quality of abilities, skills and knowledge in the field of law. This will increase the legal awareness of women's SMEs, so that they can play an active role in protecting and managing the environment to achieve sustainable development.

Keywords: education, law, women, micro-small enterprises, environment-life

Introduction

Environment and natural resources is very important wealth for Indonesia in carrying out national development. This is a basic capital development to achieve national objectives of the Republic of Indonesia. Alinia IV as defined in the Preamble to the Constitution of the Republic of Indonesia Year 1945, the first goal of RI state is to protect the people and the country of Indonesia. It is none other than the environment and natural resources, which can be used to achieve the welfare of society as stipulated in Article 33 paragraph (3), based on sustainable development and environmentally friendly.

Sustainable development is a concept that has been agreed the construction of the nations on earth summit in 1992 in Rio de Janeiro. Indonesia's commitment to implement the concept, constitutionally has been set in Article 33 paragraph (4) of the Constitution of the State of RI 1945. Sustainable development aims at achieving sustainable economic, social and environmental. It is expressed in Article 1 paragraph (3) of Law No. 32 of 2009 on the Protection and Management of the Environment (Law-PPLH), which mentions sustainable development as a conscious and planned effort that combines aspects of environmental, social and economic development strategies.

To carry out efforts to achieve that goal requires the involvement of all parties as a component of the nation, not least women's micro and small businesses. In Indonesia, the micro, small and medium enterprises (SMEs) is a business entity that is the most numerous and considerable potential to drive the business in the real sector. Until in 2014 the number of SMEs reached 56.5 million units, and 98, 9 percent are micro businesses. [1] Data from the Ministry of Cooperatives and SMEs, the number of micro enterprises reached 55,586,176 units (99.79 percent) of all SMEs in Indonesia. Small businesses 629 418 units (1.11 percent), and medium-sized enterprises 48 977 units (0.09 percent).[2]

SMEs are generally labor intensive enterprises engaged in the field of informal and formal as well as utilization of natural resources. It is labor intensive requiring quite large, so it is a potential in the provision of employment opportunities, especially

[1]Priyambodo RH, "Menkop: Jumlah koperasi dan UMKM terus meningkat", Antara News (01 Pebruari 2014) http://www.antaranews.com/berita/416949/menkop-jumlah-koperasi-dan-umkm-terus-meningkat,

[2] *I b i d*

for women. According to the Ministry of Trade (Mari Elka Pangestu), the involvement of women in the business world, especially small and medium enterprises significantly.

Statistical data says 60 percent of the 85.4 million workers in SMEs are women[3]. In reality many women are involved either as owners or workers in micro and small scale enterprises.

In the context of sustainable development, SMEs potential as components to realize environmental friendly development. SMEs activity is strongly associated with economic, social and environmental. For that reason as an economic entity which in reality has many limitations, SMEs can be developed to support the implementation of sustainable development. As Otto Soemarwoto said, based on the concept of ADS (Set Yourself) sustainable economic development process can be done through the development of SMEs.[4]

One of the efforts to achieve environmentally sustainable development is to implement the protection and management of the environment is regulated in Law No. 32 of 2009. This Act is the elaboration principle of "environmentally sustainable" (Article 33 (4) of the 1945 Constitution), which is the legal basis for the implementation of sustainable development in Indonesia. To apply the principles of sustainable development requires a fundamental change in viewing the concept of development. Compared with conventional development has been done before, the concept of sustainable development contains the values and orientations are different and thus requires a new paradigm shift. As Emil Salim[5] said that the paradigm shift of development requires a change of values and orientation. Continuously developing the values of sustainable development as a new value is needed. To encourage the creation of new values can be done through education and human resource development as agents of development. Human resources are not only equipped with the skills to achieve economic goals, but also skills to achieve social and environmental goals.

Referring to the opinion Otto Soemarwoto and Emil Salim, the development of SMEs as an economic entity and human resources in this case the female SMEs are indispensable in supporting the implementation of sustainable development. Involvement and participation of women SMEs in protecting and managing the environment is very important. The existence and amount of significant in moving the economic development, not only economic but also at the same aim achieve social and environmental objectives. While on the other hand has many limitations including knowledge of the law relating to the protection and management of the environment. Therefore, an understanding of the values of sustainable development is important to be implanted and delivered through legal education.

Research Method

Writing this article is based on research using the law of non-doctrinal approach to socio-legal research. The study was conducted on fishing communities, especially women micro and small businesses in the field of processing of fishery products. The study was conducted in the coastal areas of the city of Bengkulu. This research requires the primary data collected through field research with observations and interviews. Secondary data was collected through the study of literature, in the form of legal materials and non-law that can support problem solving research. The data were analyzed qualitatively.

Result and discussion

Sustainable development and the law

Sustainable development is a concept of development that has been agreed in the earth summit in 1992, has been the commitment of countries, including Indonesia. Sustainable development which contains the concept of 'needs' and 'limitations' is, in principle, is the construction being done to meet the needs of a generation should remain always consider the needs of the next generation. The limitations of natural resources and ecosystems, in their utilization should be considered in order to maintain the sustainability of both aspects of environmental, economic and social. It is a goal of sustainable development which was confirmed on the Rio + 10 Conference in Johannesburg in 2002.

Sustainable development is an attempt to synchronize, integrate, and give equal weight to the three main aspects of development, namely economic, socio-cultural, and environmental aspects.[6] To carry out these efforts require a positive synergy between the three major powers that is the country with the political forces, the private sector with the strength of the economy and society of citizens with moral strength.[7] The third force has a role and responsibility in achieving sustainable development. Therefore, positively collaborate for mutual control and balance are the force that can drive the success of sustainable development.

[3] ViVanews, Monday 22 December 2008

[4] Otto Soemarwoto, *Atur Diri Sendiri Paradigma Baru Pengelolaan Lingkungan Hidup*, Yogyakarta: Gajahmada University Press, Cet. 2, 2001, p. 152.

[5] Emil Salim, *Paradigma Pembangunan Berkelanjutan*, in Iwan Aziz, et all (Ed), " Pembangunan Berkelanjutan, Peran dan Kontribusi Emil Salim", Jakarta: KPG (Kepustakaan Populer Gramedia), Cet. 1, 2010, page. 28.

[6] A Sonny Keraf, *Etika Lingkungan*, Jakarta: Kompas Publisher, 2006, p. 182

[7] *I b i d*

According W. Friedman was quoted as saying by Johny Ibrahim there are four state functions in a mixed economic system that is as providers, the regulator, intervened in the economy (entrepreneurs), and umpire.[8] In this case the role of the state as regulator is very important, because it is necessary to carry out the sustainable development of various regulations and legal provisions that can encourage people's behavior towards behavior that is in accordance with the values of sustainable development. Law according to Warassih Pujirahayu Esmi, is a requirement inherent in social life itself. In addition to protecting the interests of members of society, also guarantee the achievement of the goals set in the community[9]. Sustainable development is a commitment of the Indonesian nation to achieve national goals. It is necessary for the law as a means to achieve it. Indonesia is a country of law (Article 1, paragraph 3 of the Constitution NRI 1945) where every attitudes, policies, and behavior of the state apparatus and the population must be based on law.

According to Herman J Pietersen, the law is normative building is conceived as an instrument of the state or police concerned with justice, with rules of conduct to regulate human behavior. In this view, the law is an instrument for justice in the form code of conduct to regulate the primary function of human behavior.[10] In the context of sustainable development, as a guide to make it happen, the state has set up in the form of Act No. 32 of 2009 on the Protection and Management of the Environment and various other legal provisions. This provision contains the norms that must be guided and adhered to by all the components of a good society that is engaged in the business (private) and the general public. Nevertheless, apart from the legislation itself by Soerjono Soekanto, the application of legal provisions is also strongly influenced by many other factors, namely law enforcement officers; supporting facilities; and legal awareness, legal compliance and behavior.[11] This article relates to the community in question is the business community, namely women's SMEs.

Role of Women Performers SMEs in Environmental Protection and Management

Law No. 32 of 2009 Section 3 of the one of the goals of environmental protection and management is to realize sustainable development. It is not just the responsibility of the state, but also all the components of society, including the business community. SMEs which is one of the private sector has an important role in the national economy. Not only in Indonesia but also in many countries is quite a lot, and generally is driving the country's economy. In developing countries SMEs play a key role in improving the economic well-being. Contributing to employment through innovation and creativity as well as assist in the development of human resources. In the long run, increase revenue, and help reduce poverty. While small businesses play a key role in the creation of employment (especially for women). [12]

SMEs are a group of people who perform economic activities individually or in groups on the strata of micro, small and medium enterprises. Mostly done by women, especially in rural areas. From various studies of Indonesian women as a hallmark of Indonesian women market traders dominated by women. [13] Data from the Ministry of Cooperatives and SMEs mention that from around 52 million SMEs as much as 60% of businesses run by women. In general, SMEs are businesses capable people who have power and toughness as an economic entity. But on the other hand also has many limitations, especially women SMEs.
Law No. 32 of 2009 has been set aside rights (Article 65) everyone is obliged to preserve the function of the environment, including those who conduct business and / or an activity (Article 67-68). In addition, people also have the right and equal opportunity to play an active role in the protection and management of the environment (Article 70). The role of the public made to: (1) increase awareness in environmental protection and management; (20 increase self-reliance, community empowerment, and partnerships; (3) develop community capacity and initiative; (4) foster community responsiveness to social control; and (5) developing and maintaining the culture and local wisdom in the framework of environment conservation.

Women are an asset of the nation, therefore, as a community group of women SMEs also have the right and the opportunity to play an active role in the protection and management of the environment. According Khofifah Indar Parawansa, women have tremendous potential in maintenance, environmental protection, and the prevention of environmental pollution. In addition to numerous (more than 50 percent of Indonesia's population), also has a lot of evidence women were able to overcome the problem of the surrounding environment.[14] P4OWLH research results (1999) indicate that women have a very big concern for the environment. Women are closest to nature, and usually the most intelligent household system maintains natural or ecosystems.[15]

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[8] Johny Ibrahim, *Pendekatan Ekonomi Terhadap Hukum (Teori dan Implikasi Penerapannya dalam Penegakan Hukum*), Surabaya: PMN & ITS Press, 2009, p. 138.

[9] Esmi Warassih Pujirahayu, *Pranata Hukum Sebuah Telaah Sosiologis*, (Cet. 1. PT Suryandaru Utama, 2005, p. 36

[10] Herman J Pietersen, "Root Patern of Thought in Law: A Meta Jurisprudence", accessed and quoted from www.examlifejournal.com, oleh FX. Adji Samekto dalam " Kajian Hukum: Antara Studi Normatif dan Keilmuan", *Jurnal Hukum Progresif, Pencarian pembebasan Pencerahan*, Volume . 2 Nomor 2/ Oktober 2006, ISSN: 1858-0254, p. 65.

[11] Soerjono Soekanto, *Beberapa Permasalahan Hukum Dalam Kerangka Pembangunan di Indonesia*, Jakarta: UI Press, 1993, p. 36

[12] Daniel Aggyapong, 'Micro, Small and Medium Enterprises' Activities, Income Level and Poverty Reduction in Ghana – A Synthesis of related Literature', *International Journal of Business and Management*, Vol. 5, No. 12; December 2010, ISSN 1833-3850 E-ISSN 1833-8119, p. 198 downloaded from www.ccsenet.org/ijbm.

[13] Zoer'aini Djamal Irwan, *Besarnya Eksploitasi Perempuan dan Lingkungan di Indonesia*, Jakarta: Penerbit PT Elex Media Komputido, 2009, p. 43

[14] Khofifah Indar Parawansa, *Mengukir Paradigma Menembus Tradisi, Pemikiran Tentang Keserasian Jender*, Jakarta: Pustaka LP3ES Indonesia, 2006, p. 117

[15] *I b i d.*

SMEs generally women engaged in labor-intensive and natural resource-based, such as agriculture, forestry, fisheries. For example KIARA revealed that 48 percent of family income generated from economic activity fisherman fishing women. [16]

Legal Education in Improving and Strengthening the Role of Women Performers SMEs

Law serves as instrument settings, is also a means of changing society, building or directing people to more advanced. As said Lawrence M. Friedman, that the legal system can act as an instrument of change in an orderly, social engineering.[17] Relating to the application of the Law of Environmental Protection and Management of the necessary changes in people's behavior that support the realization of sustainable development. Therefore, in addition to the active role of the state is also necessary that the other elements of society, namely the business community and the general public. In this case the female SMEs are part of the business community / private shore up the economy.

Law relating to human. Law not only in the form of text in the system of legislation, but also manifests in the form of behavior. In the empirical realm, the law can be found as human behavior. Therefore, in the workings of the human role law plays an important role. In a business context is not only the application of the legislation environment but also the behavior of entrepreneurs including women SMEs can promote the establishment of sustainable development.

To apply the new values embodied in the principles of sustainable development, the necessary changes in the behavior of members of the community. Law as a moral institution relies on good human behavior.[18] Women as member of the community is the nation's assets as potential agents of change. As previously described women have abilities that can be explored and developed. However, in reality there are obstacles for many women with little education, lack of skills for a particular problem, especially technology. The low quality of life due to the limited participation, opportunities, opportunities, and access to, and control for women to participate in various development fields as change agents and beneficiaries of development [19]

In the context of environmental protection and management of women can be agents of change for the environment. The potential for large women can be developed in the maintenance, preservation of the environment and prevention of environmental pollution. Have a lot of evidence that women are able to cope with environmental problems in the vicinity. So far, women are less included in the environmental management both in the access, participation, control and benefits. Women are also less given the knowledge about how environmental management, including waste management and prevention of environmental pollution. Women only as object, as a user ingredients in household consumption, without any knowledge about the dangers of the materials against him, his family and his environment.[20]

Referring to the condition that it is necessary an act of empowerment as an effort to strengthen the role of women, especially women in this context SMEs. Pattareepan Pongwat[21] experience the Credit Union League of Thailand Women Cooperative Product Development Center (CULT WCPDC) shows indeed required a special effort to reach out to women micro-entrepreneurs who are generally illiterate thus limiting their creative power and knowledge. Efforts made in helping women, well developed capacity to increase confidence. The lending institution also serves to connect the global market with women micro businesses and connect with other business centers as well as a source of raw materials in other places. So, give credit alone is not enough, but there must be continued other activities.

Women's empowerment program geared fatherly improve the quality of life, especially women and his participation in the community who are active in the Development sustainable. In the social pillar of the division of roles women often put women intensity more often in direct contact with objects are handled. On the economic pillar of the economic role of women as a regulator of the family including the family breadwinner. On the ecological pillars of sustainable development is found in everyday life. In the religious and cultural traditions, women known to be close to nature and the surrounding environment. [22]

One effort that can be done through legal education to encourage and provide reinforcement to women SMEs. In this sense legal education is not only a modern legal education which is formal, but also informal / non-formal form of training, counseling and so on. This is mainly to increase the knowledge, skills in the field of law. In this context it is emphasized to promote increased awareness and compliance with laws that lead to changes in behavior, especially in implementing and developing the values and principles of sustainable development. With legal knowledge possessed, as businesses can implement in business activities

[16] Kiara. (2012). http://www.langitperempuan.com/perempuan-nelayan-jawa-dominasi-pasca-panen-hasil-laut/

[17] Lawrence M Friedman (terjemahan M Khosim), *Sistem Hukum Dalam Persfektif Ilmu Sossial,* Judul Asli: *The Legal System A Science Persfetive* (New York: Rusel Sage Foundation, 1975), Bandung: PT Nusa Media, Cet.1, 2009, p. 21

[18] Satjipto Rahardjo, *Hukum dan perilaku, Hidup baik adalah Dasar Hukum yang Baik,* Jakarta: Penerbit Buku Kompas, 2009, p. 59

[19] Zoer'aini Djamal Irwan, *Op. Cit, p. 34.*

[20] *Ainul Mardhiah,* **"Perempuan, Agent of Change Lingkungan Hidup",** accessed **25 Mei 2015 from http://potret-online.com/index.php/news-flash/1305-perempuan-agent-of-change-lingkungan-hidup**

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[22] Yusriani Sapta Dewi" Peran Perempuan Dalam Pembangunan Berkelanjutan, Women in Sustainable Development", Jurnal PPS UNJ, Volume 12 Nomor 02 September 2011, ISSN: 1411-1829 , accessed http://journal.ppsunj.org/jpklh/issue/view/24

carried on. With women Accordingly eventually SMEs can increase their capacity to play an active role both as subjects and beneficiaries of sustainable development.

Conclusion

Indonesia as a constitutional state has sovereignty and responsibility to implement sustainable development aimed at achieving economic, social and environmental. To carry out these responsibilities there should be synergy between government, business and society. Environmental issues can not be separated from economic activity in the community. Therefore women SMEs as economic actors who are part of the corporate world, have the duty and responsibility to play an active role in the protection and management of the environment. For it must have the knowledge, ability and skills in various fields, especially in the field of law. It is therefore necessary to increase awareness of legal education and legal compliance to support its role in environmental protection and management of regulated Act No. 32 of 2009.

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THE PROTECTION OF THE ART OF TRADITIONAL MALAY SONGKET AS AN INTELLECTUAL PROPERTY RIGHT

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ABSTRACT

The harmonization of modern and traditional knowledge is an essential matter in achieving sustainable development. The concept putting forward that the need of development is in tune with the need of development of cultural preservation can take place without harming its surroundings. As a consequence, traditional knowledge has important significance and new issue in the protection of intellectual property right. It is a fact that the people of Indonesia have various legal systems both customary law and Islamic law that remain applied in the middle of the society. There is a tendency in the culture of Malayan society Muslim in majority not to be too concerned about who is entitled to ownership of the art of Traditional Malayan Songket, whereas in fact a protection of intellectual property right will bring about a protection over moral right and economic right which will bring prosperity to the rights holder.

Keywords: Songket, Intellectual Property Rights

Introduction

Human intellectual creation can be present in varied products that have economic values. Such products are intellectual property rights because they are born on the basis of the use of power of thinking and human intellectual creation. Such products might be products of culture that have art values which can generate economic values for local society.

Traditional knowledge and expression of traditional culture which are Indonesia's wealth and identity should be preserved and conserved so these traditional cultures can be placed side by side with both international culture and international works of art and are state assets beyond compare. (Ahmad Zen Purba: 2011)

Songket cloth is a very valuable traditional fabric of Malay society. The making of songket is usually carried out by females. *Malay Songket Cloth* itself is a fabric that is a Malay handicraft made through the process of thread weave that is varied with golden or silver thread weave by using certain various weaving motive. Malay songket cloth has much uniqueness and is rich in values of beauty or aesthetics as a form of combination of cultural aspects that usually symbolizes Malay society's pattern, perspective and thought. Diversification of songket's motives is closely related to the relationship between man and natural realms, both animals and plants. The diversification also reflects mankind's both way and perspective of life.

Songket is an artifact. The definition of artifact is an object or historical objects, namely all objects made or modified by humans which can be moved (KBBI: 2001), such as Batu Bara Malay Songket Cloth aged 180 years exhibited in Jakarta in 2014 in an event of traditional exhibition of cultural art (O.K. Saidin, Pemuka Adat Melayu Batu Bara; 2014). In the culture, songket is Malay self-identity. Clothes usually function to cover the body, in accordance with social norms. There is a time when religion encourages how clothing manners and etiquette go. Besides, values of beauty and supporting societal etiquette are realized in clothes. These clothes are functioned in varied cultural activities, such as in wedding ceremony, circumcision, leader appointment (sultan, religious judge, head of village and so on).

Craftsmen of traditional Malay songket are the craftsmen in the category of Small and Medium Entreprises. Location of this study is in Pahang Village, Talawi District, Batubara County, North Sumatera Province, Indonesia. They are still using traditional tools of weave, like Azhar's group of traditional Malay songket craftsmen.

Learning system from generation to generation is conducted openly, by anyone and from any ethnic. Nowadays, the use of songket is not monopolized by Malay noble families. Even, the Governor of North Sumatera Province has announced the year 2015 as the year of The Shine of Malay Songket. There is a duty, in certain occasions, for wearing songket cloth (Harian Waspada, 12 April 2015). This Regional Government Policy becomes an opportunity for the development of Malay songket to be able to compete in both national and international market. As a result, this can improve the economy of Malay songket craftsmen.

Harmonization of modern knowledge and traditional knowledge is an essential matter in achieving continuous development; the concept putting forward that the need of development is harmonious with the need of development concerning cultural conservation can take place without harming the surrounding environment, and as a result, traditional knowledge (Glossary of Terms WIPO: 2001) has an important meaning and new issues in the protection of Intellectual Property Rights (Afrillyana Purba: 2009). Intellectual Property Rights is the rights emerging from human activity in the sector of industry, science, literature and art (WIPO: Geneva 2001).

Law of a society is a society's special identity while, on other side, transplantation of legal transfer of a legal system from a country to another country has been a common matter for a long time. Basically, legal transplantation which are both comprehensive and partial legal transfer are divided into these three following main parts: *first* legal transplantation due to a migration to a new region whose civilization is different by bringing new law which comes from different civilization, *second* when a race moves and takes along their law to a new place whose civilization is alike, *third* when a race adopts most of other race's legal system (Alan Watson: 1991).

Indonesia's participation in signing the agreement of establishing of World Trade Organization (WTO) and Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) has a consequence of being ratified through Law No. 7 of 1994 on Ratification of Agreement Establishing The World Trade Organization, and it finally breeds some laws concerning Intellectual Property Rights although in principle Indonesia had recognized the law regulating Intellectual Property Rights before the period of WTO/TRIPs (Agus Sardjono: 2015) and although laws regulating Intellectual Property Rights have not worked as expected up to now; proved by level of Property Rights violation in Indonesia.

Characteristic of the society of Malay very identical with obedience in doing Islamic religiousness particularly in Batubara County is more likely to consider that intellectual creativity attempts in creating the motive of Batubara Malay songket is God's guidance, consequently, design socialization through the same design products among craftsmen is something that is made proud by early designers; even, motive-imitating is a common thing among the craftsmen. This becomes an issue how to apply Intellectual Property Rights rules of law.

The knowledge obtained via community or individuals and passed from generation to generation through traditional ways can be accessed easily so that it gives a chance to the emergence of problem and violation towards Intellectual Property Rights.
Traditional Knowledge (will be next mentioned as TK) can also be obtained or developed by people who are not members of the community and is used for either the same or different purpose. For instance, weaving can be learned by anyone; but the knowledge about whether the cloth's motive that has been woven is suitable with the obeyed values for being worn in certain cultural ceremonies is only owned by the community's indigenous people. Truly recognizing whether the TK is owned by an individual or a community has been becoming a problem towards legal protection of a TK (Zainul Daulay: 2011)

Legal protection towards TK in Indonesia is very weak. One of the factors is the restriction of data, written documentation, and information about TK that actually has been being existing since hundreds of years ago (Imas Rosidawati W: 2013). This is very disadvantageous to the indigenous people as the owner of the TK when there are other parties or countries signing up first to get legal protection (Eva Damayanti: 2012).

It is a fact that Indonesia's society has various legal systems, including customary law and Islamic law, applied amid the society. The tendency of culture of Malay society, like in Batubara County which has Islam in the majority, is not in the position to blame or accuse anyone feeling entitled to the Art of Batubara songket. In actual fact, a protection of Intellectual Property Rights will result in protection over moral right and economic right that will bring in welfare to the right-holders.

A. Discussion

1. Theory of Lawrence M. Friedman's legal system

In a legal system, in order the law is effective in protecting a right, according to Lawrence M. Friedman, it must indicate a fulfillment of three important aspects, namely legal structure, legal substance, and the legal culture. (Lawrence, M. Friedman: 1984)
About the structure, Friedman states:
"First many feature of a working legal system can be called structural the moving parts, so speak of-the machine Courts are simple and obvious example; their structures can be described; a panel of such and such a size, sitting at such and such a time, which this or that limitation on jurisdiction. The shape size, and powers of legislature is another element of structure. A written constitution is still another important feature in structural landscape of law. It is, or attempts to be, the expression or blueprint of basic Features of the country's legal process, the organization and frame work of government."

And about the second aspect of legal system, Friedman explains:
"*The second type of component can be called substantive. These are the actual products of the legal system-what the judges, for example, actually say and do. Substance includes, naturally, enough, those proportions referred to as legal rules; realistically, it also includes rules which are not written down, i.e. those regulations of behavior that could be reduced to general statement. Every decision, too, is a substantive product of the legal system, as is every doctrine announced in court, or enacted by legislature, or adopted by agency of government."*

In this study, I discuss that what Friedman stated above describes that the aspect of *structure* of a legal system includes varied institutions created by such legal system with its various functions in the framework of the operation of such system. One of the institutions is the Government as the holder of Copyright on Cultural Expression (Article 38 Law No. 28 of 2015).

Legal protection of TK in Indonesia is very weak. One of the factors is the inadequacy of data, written documentation, and information concerning TK that actually has been being existing since hundreds of years ago (Imas Rosidawati W: 2013). This is very disadvantageous to the indigenous people as the owners of the TK when there are other parties or countries signing up first to get the legal protection (Eva Damayanti: 2012).

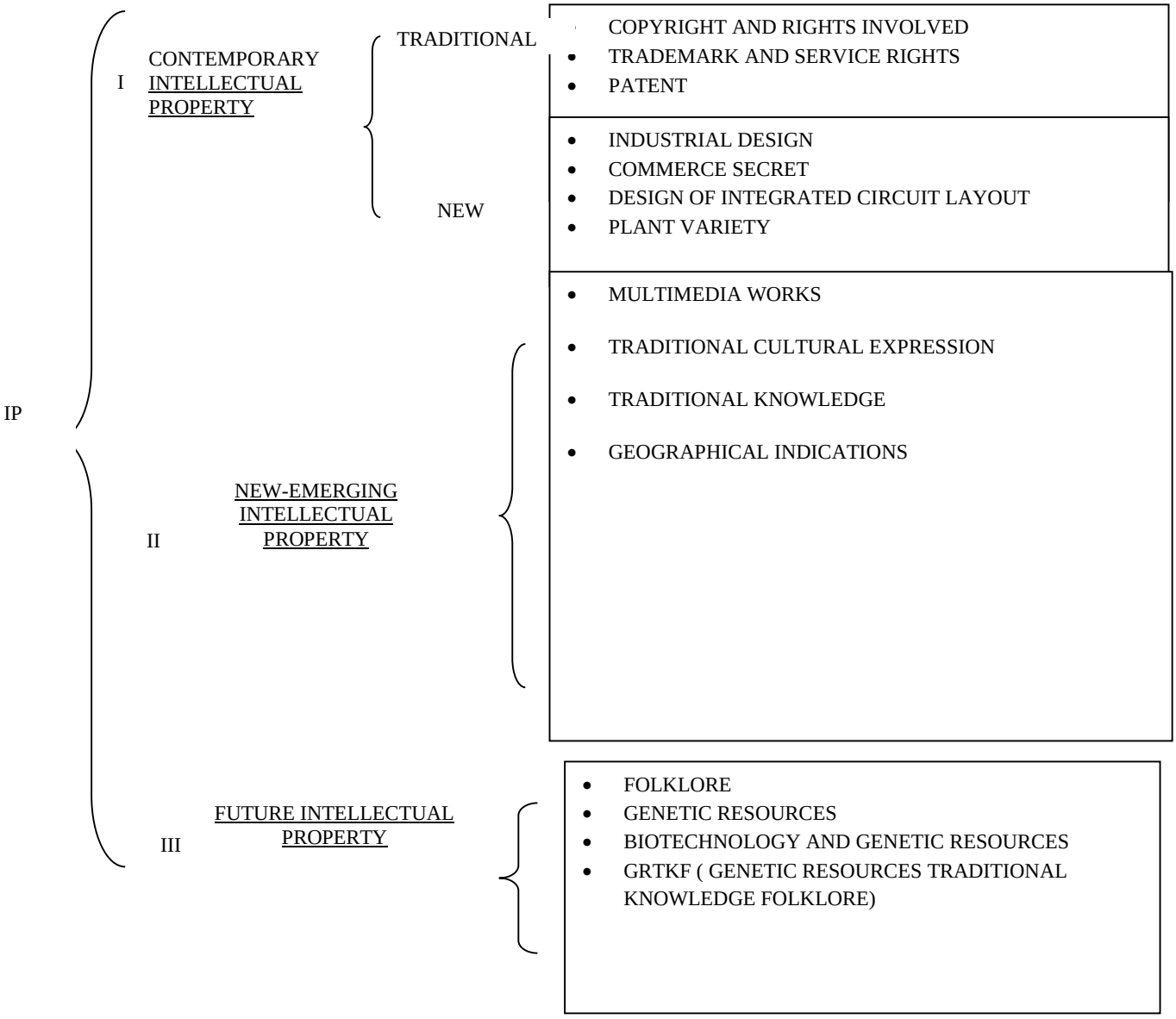
The protection of TK is in Law of Copyright No. 28 of 2014, Chapter V on Expression of Traditional Culture and The Protected Creation, Article 38 Section (1): Copyright on expression of traditional culture is held by the State. Then, in Article 40 of the Law is stated: the protected creation includes creation in the sector of science, art and literature, also the art of Batik or other arts of motive.

The component of *substance* concerns everything that is the result of *structure.* This covers legal norms in the form of rules, decrees, and doctrines. Substantively, the definition of Intellectual Property Rights can be described as "the rights over the richness that is born because of human intellectual capability". Basically, the explanation above gives a vividness that Intellectual Property Rights indeed turns the works coming up from human intellectual capability into the core and objects of their organization. (Suyud Margono: 2003).

Intellectual Property Rights covers a sector of law administering juridical rights and works or creations which are results of human contemplation attached to economic and moral interests (Eddy Damian: 2004).

Schematically, the classification of intellectual property by Eddy Damian (Eddy Damian: 2012) in three ranges of time is as follows.

Figure 1: INTELLECTUAL PROPERTY (IP) "CONTEMPORARY – NEW-EMERGING – FUTURE"



From the chart above, it is understood that TK in its development both today and in the future is an intellectual property and needs to get protection.

In the stipulation of such Law Article 40 Section (1) letter j, signified as "batik work of art" is the motive of contemporary batik that is innovative, up-to-date, and not traditional. The work is protected because it has values of art in its relation to the drawing, motive, and color composition. Signified as "wok of art of another motive" is the motive which is the richness of Indonesia that can be found in various regions, such as the art of songket motive, motive of ikat weave, motive of tapis, motive of ulos, and other art of motives which are contemporary, innovative and can be well developed. In accordance with the stipulation of such Law, songket art is included to the work of art of motive of contemporary songket protected by copyright.
Furthermore, Friedman states that if contemplated, many will admit that aspects of legal system do not just consist of *structure* and *substance.* There is still an importance of the third aspect, even the most necessary for a legal system's success, namely *legal culture.*

Legal culture concerns people's attitude or values that they obey determining the operation of the legal system involved. These attitudes and values will contribute both positive and negative influence to behaviors relating to law; as a result, legal culture is an actualization of people and a thought of people and social power determining how the law is used, avoided or condemned.
Legal culture as a societal actualization and thought towards law will change in accordance with change of behavior, perspective and values perceived by members of society. Therefore, understanding of a society's legal culture must comprehensively consider societal aspects and the involved society and changing process and also the development happening inside it. (Steward Maccaulay: 1995).

Can punishment achieve the purpose to keep orderliness? Theoretically, this does not depend on certainty, distinctness and sufferings and punishment, but depends on perception and potentiality of the doer concerning their acts.

Many humans believe that society needs network of rules and structures of rules in the purpose to protect freedom of choice (Lawrance M. Friedman: 1990). A craftsman of traditional Malay songket who has low-economy level does not ask or doubt the need of protection for his or her work of intellectual creativity. He or she respects moral right just when and where he or she wants it, but the right is nearly useless when his or her work is not sold in the market.

The concept of legal culture in legal system is very important for understanding legal development. By legal culture, it means that ideas, attitudes, values, and beliefs in society show that people understand about legal system. Not because a certain country has a culture, single law unites. There are usually many cultures in a country because of the complexity of people, and consisting of various groups, classes and levels so it should be distinguished between internal (legal culture of lawyers and judges) and external legal culture (general legal culture population).

If someone asks how social change leads to legal change, the answer will be by legal culture. This would mean that social change causes society's change of values and attitude, and this is a chain of demands (or drawing) which in time will push law and government in some certain course.

Hence, the essence of legal culture is a society's attitude and behaviors towards law and legal system in the perception believed by the very society. Accordingly, legal culture is a dynamic of social perspective determining how such law is used, avoided, or violated (Ansori Sinungan: 2013).

Presently, improvement in government's scope and power has responded demands and the society itself. The state conducts what people want to conduct ("people" here means whoever has influence or power) so modern state is created, namely Welfare State, can also be called Insurance State meaning that a state that knows how to lessen risk of mistake. (Steward Maccaulay: 1994)
Constitutionally, Indonesia has had hierarchy of legislation with various laws which have been codified partially. This is a proof that Indonesia is a follower of *civil law*. However, in its implementation, the state laws lose their existence when it is faced with the people's strong desire to apply their own laws, such as customary law and Islamic law, over societal problems they face.
Indonesians' pride in their creation like Malay songket being worn by other people is a reality that proves that Indonesia professes communal ownership more than private ownership. The belief that intellectual capability in creating a work is based on the thought that it is a God's guidance becomes a reason why the imitation of art creativity of traditional Malay songket is not questioned.

In fact, that kind of legal behavior is a characteristic of the implementation of *common law* system. Such fact shows that Indonesia follows not only one legal system but also more likely to be a mixed system. (Ahmad Ali: 2010)

2. **Legal Theory of Development Method by Mochtar Kusumaatmadja**.

This theory is suitable with this study because this theory has proximity to the context of the condition of being Indonesian; the Indonesia which remains trying to build its country after being attacked by various economic problems and problems of law enforcement that is not yet fulfilled. (Soetandyo Wignjosoebroto: 1994)
Legal theory brought up by Moctar Kusumaatmadja a lot discusses law as a method of people renewal where the law functions in the development namely to assure the performance of development process based on legal certainty, or known more as "Law as The Method of Development".
According to Mochtar Kusumaatmadja, law is not only about norms or principles, but also related to sociocultural symptom where law is a pattern of values in society *acknowledged* communally. Law itself can be used to change society. Law is required

for the process of change including a fast process of change that is usually expected by developing society when the change is to be conducted in arranged and orderly way. (Mochtar Kusumaatmadja: 2002).

A good law is a law suitable with the values obeyed by a society. Development takes reformation of mindset, attitude of life, and values obeyed by a society. As stated by Mochtar Kusumaatmadja, it also takes the principles contained in The Constitution of 1945 and the Preamble of the Constitution of 1945 to do a reformation of national law. One matter that needs to be remembered is a mandate contained in the purpose of struggling for independence namely to build a society free from poverty, backwardness and stupidity. It is reminded here that unlimited liberal capitalism is obviously not suitable with this principle which states that social justice is an essential purpose in having a society and country in this republic.

National economic development must be based on The Constitution of 1945 and Pancasila acts as the morality of nation's life. By basing on Article 33 The Constitution of 1945 stating that economic matters are organized based on the principle of kinship, it is expected that a balance can be formed in the activity of big, medium, and small business partnership. In such economic system based on togetherness and kinship, it is expected that all parties can compete in family way, develop each other so that can advance together in developing efficient national economic. (Djuhaedah Hasan: 2011).

Besides the organization of basic right equality of citizens, it is also implied that the State requires protecting its economically weak citizens. This is intended that in the process of economy, gradually, the people can compete normally with other businessmen or states that are more firstly competent based on the principle of economic democracy. (Sri Edi Swasono: 1985) To be able to actualize such economic development, it takes legal protection for individual economic right (Article 27 the Constitution of NKRI of 1945), for instance, protection for intellectual property rights of craftsmen of traditional Malay songket. Mochtar Kusumaatmadja states that law is a social reformation method. This matter is based on an assumption that the existence of regularity or orderliness is something wanted, even needed. In addition to it, another assumption contained in legal conception as a method of social renewal is that law in the sense of axiom or legal rule can function as a tool (controller) or as a method of development in the sense of the organizer of human activity to the direction desired by the development or reformation. (Mochtar Kusumaatmadja: 1976).

According to Mochtar Kusumaatmadja, law is the whole rules and principles regulating human life in society including institution and process in actualizing the law into reality.

The art of songket (Songket is a type of traditional cloth from Malay and Minangkabau, Palembang and other regions in Indonesia. The origin of songket cloth is associated with people's handicraft and the area of living place and Malay culture introduced by Chinese merchants that contributed silk thread while Indian merchants contributed gold and silver thread so that songket can be created) is really associated with TK. In accordance with stipulation of Convention on Biological Diversity (CBD: June 5, 1992), Traditional Knowledge is knowledge, innovation and practices of indigenous people or local society (Durning A.T: 2001) that realize traditional way of life and local and original technology (Afrillyana Purba: 2014).

According to *World Intellectual Property Organization* (WIPO), the term of TK refers to literature on the basis of tradition, artistic or scientific work, performance, invention, scientific invention, design, brand, name and symbol, unstated information, and all other innovation and creation on basis of tradition produced by intellectual activities in the sector of industry, science, literature or artistic. Ideas based on tradition show that system of knowledge, creation, innovation and cultural expression that are generally considered having relation to certain society or area have been developed as a response to a changing environment.

Conclusion

The protection for TK in Law of Copyright No. 28 of 2014, Chapter V on Expression of Traditional Culture and The Protected Creation, Article 38 Section (1): Copyright on expression of traditional culture is held by the State. Then, in Article 40 of the Law is stated: the protected creation includes creation in the sector of science, art and literature, also the art of Batik or other arts of motive.

In the stipulation of such Law Article 40 Section (1) letter j, signified as "batik work of art" is the motive of contemporary batik that is innovative, up-to-date, and not traditional. The work is protected because it has values of art in its relation to the drawing, motive, and color composition. Signified as "wok of art of another motive" is the motive which is the richness of Indonesia that can be found in various regions, such as the art of songket motive, motive of ikat weave, motive of tapis, motive of ulos, and other art of motives which are contemporary, innovative and can be well developed. In accordance with the stipulation of such Law, songket art is included to the work of art of motive of contemporary songket protected by copyright.

In the era of globalization and free trade today, quality of human resources and technology is one of the factors becoming the main determinant of a country's success. Moreover, other factors that the modern theory also regards to be influential towards economic growth are availability and condition of infrastructure, law and order, political stability, government's policy (such as reflected by large extent of government's expense), bureaucracy, and terms of trade.

Legal awareness of the community of the craftsmen of traditional Malay songket in Batubara County, about the importance of legal protection towards copyright, needs to be socialized by the Government so that they do not imitate each other in order to boost more economically valuable products.

It is not doubted that high economic development, especially in long term, is very essential for declining poverty. Basic framework of its theoretical thinking is that economic development creates or improves working opportunity that would reduce unemployment and raise income of the poor. With an assumption that the right mechanism that is needed to facilitate profit and economic development towards groups of poor craftsmen of Malay songket is running well, economic development can be an effective tool, though not the only one, to the reduction or eradication of poverty.

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THE OBLIGATION OF MINING COMPANY IN APPLYING CORPORATE SOCIAL RESPONSIBILITY (CSR)

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ABSTRACT

The obligation of corporate social responsibility (CSR) in Indonesia is regulated explicitly in legislation. The implementation of CSR based on voluntary principle in the light of business ethics can apparently be shifted to mandatory principle because legal obligation should be built on the basis of moral values. Such thing does not need to be argued because law and morality are not separable. The obligation of mining company of CSR is in Law No 40 of 2007 on Limited Liability Company Article 74: company running its business activity in the sector and/or connected with natural resources requires performing social and environmental responsibility budgeted and estimated as corporate cost whose implementation is conducted by considering propriety and appropriateness. Concerning the management of mining in Indonesia, the one that is recently applied is Law No 4 of 2009 on Mineral and Coal Mining, pluralistic in nature and the CSR implementation is in dualistic system. The adjustment of CSR as a part of company's legal scope, especially in the sector of mining, is still succinct and partially degrading. As an entity, mining company formed as Limited Liability Company should submit to Law No 40 of 2007, however in the activity of mining does submit to Law No 4 of 2009.

Keywords: Corporate Social Responsibility, mining

Introduction

The obligation of corporate social responsibility (CSR) in is regulated explicitly in legislation. The implementation of CSR based on voluntary principle in the light of business ethics can apparently be shifted to mandatory principle because legal obligation should be built on the basis of moral values. Such thing does not need to be argued because law and morality are not separable. There is a strong connection between law and ethics; in the Roman empire, there is a well-known saying: *Quid leges sine moribus?* what is the meaning of law if it is without morality? (K. Bertens: 2000).

CSR and continuous development become extremely important if associated with environmental issue. Demand of CSR becomes inevitable when the fact shows that corporate consumption towards natural resource reaches more that 30 percent from what the nature/environment can provide. The world now engages the difficulty in getting clean water, tropical forests diminish, extinction of endangered animals occur, air pollution and climate change take place. (Reza Rahman: 2009). Corporation is demanded to have concern with not only environmental issues, but also social issues coming from negatively affected society due to corporate operation. The role of corporation amid societal community is not only as economic institution pursuing profit maximization but also as social institution. As social institution, corporation is demanded to be proactive in removing social and environmental problems in where the corporation takes place. (Andreas Lako: 2010).

Mining company is no exception; mining has some following characteristics: non-renewable, having relatively high risk and its endeavor has relatively high, both physical and social, environmental impact compared to other commodities' endeavor in general. Basically, due to its non-renewable nature, mining business doers always look for new proven reserves. Proven reserves decrease by producing and increase by making discovery. There are some types of risk in mining sector, namely: geological risk (exploration) related to the uncertainty in finding reserves (production), technological risk related to cost uncertainty, market risk related to price change, and risk of governmental policy related to tax change and domestic price. Those risks relate to variables affecting business profit, namely: production, price, cost, and tax. The business having higher risk demands higher rate of return. Basically, exploration generates environmental impact; nevertheless, exploitation generates the main mining environmental impacts. Such environmental impacts can be in the physical form of destruction of forest, water pollution (river, lake, sea) and energizing air pollution. Such environmental impacts can also be in social nature, namely: the loss of the livelihood of the people surviving from the products of forest. (Adrian Sutedi: 2012).

This is why the existence of mining company in Indonesia seems to be held in contempt by various groups of people. This is like what happened to gold company PT Agincourt Resources, subsidiary of G-Resources Group Ltd, operated in Martabe, in the

western Sumatera, District of Batang Toru, and Province of North Sumatera. According to Kusnadi, as Director of Vehicle of Indonesia's Ecosystem (WALHI) North Sumatera, it is stated that, from the time the license was given to Martabe G-Resources Group Ltd gold mine in April 1997 to today, forest destruction in Distict of Batang Toru, County of Tapsel, is quite extensive, that is, from 163.900 hectares of licensed area, 30 percent of the forest in the area is destroyed. The forest destruction was conducted by dredging the land, chopping down woods, and by other destruction process using explosives. In the last finding, from about September 2013 to January 2014, this mining company re-explores by destroying the forest and environment in the County of North Tapanuli. It damages not only the forest but also the river because the company's waste disposal is executed to Batang Toru River. (Ayat Suhaeri KaroKaro: 2014). The next one is PT Newmont Nusa Tenggara (PT NNT) that operated in 2000 in the project of Batu Hijau of County of North Sumbawa, Province of West Nusa Tenggara. This company earned many obstacles from the community because the mining of PT NNT not only created pollution but also aggravated the ecosystem, land ownership right of the people based on their progeny ownership and their livelihood. (Nor Hadi: 2011).

Again, this phenomenon is because the existence of mining company has caused negative impacts in the endeavor of mining materials; the impacts are as follows: the forest destruction in the area of mining perimeter, the pollution of sea, the diseases for the people residing in the mining perimeter and the conflict between the people of mining perimeter and the mining company. (H. Salim HS: 2004). There is a phenomenon describing that mining companies are companies sensitive to the impact environmental pollution. Mine Advocacy Network (Jatam) approximates about 70% of Indonesia's environmental destruction is due to mining operation. Around 3.97 million hectares of conservation area are in danger because of mining activities, including biological diversity. Not only that, areas of river streams (DAS) get destroyed and this escalates in the last 10 years. There are 108 which are badly damaged out of 4.000 DAS. (http://www. neraca.co.id/: 2012).

Truly, program of societal empowering and environmental conservation are very important to mining companies. However, there are few mining companies in Indonesia that are aware and willing to practice CSR. From thousands of mining company operating in Indonesia, there are just 10 (ten) companies who are seriously and continuously run the CSR program. (Feby Dwi Sutianto: 2012). Presently, multinational companies still dominate the implementation of CSR activities in Indonesia. To multinational companies, particularly in the sector of mining, there is an impression that CSR is solely for protecting their business. Indeed, such aspect is clearly seen. However, nothing is wrong if one of the goals of CSR implementation is to protect their business from the hands of the surrounding people. (Bismar Nasution: 2009).

The obligation of mining company of CSR is in Law No. 40 of 2007 on Limited Company Article 74: company running its business activity in the sector and/or connected with natural resources requires performing social and environmental responsibility budgeted and estimated as corporate cost whose implementation is conducted by considering propriety and appropriateness. Concerning the management of mining in Indonesia, the one that is recently applied is Law No. 4 of 2009 on Mineral and Coal Mining, pluralistic in nature and the CSR implementation is in dualistic system. The adjustment of CSR as a part of company's legal scope, especially in the sector of mining, is still succinct and partially degrading. Based on the statements above, analysis need about application of rule of CSR at the Mining Company.

Discussion

1. Legislation Regulating on CSR

In Indonesia, business ethics related to CSR have been formulated in positive law as regulated in:

a. Law No. 9 of 2003 on State-Owned Enterprises Article 2 in connection with Article 66 Section (1) therefore states that State-Owned Enterprises is expected to improve the quality of service towards society and contribute to improving national economic growth and help the input of national finance. Its implementation is in the form of partnership program and environmental construction program having originated from the allocation of after-tax profit of 2% in maximum. The amount of such contribution has been stipulated by Minister (General Meeting of Stakeholder) for companies; in certain situation, it can be re-stipulated by the approval of Minister (General Meeting of Stakeholder). The contribution of partnership program is given in the form of a loan to afford working capital, a special loan to afford business activity of the intended partner, the development cost of affording education, training, marketing, promotion and the other things concerning with the improvement of productivity of the intended partner. Other than that, the scope of the contribution of environmental construction program provided by State-Owned Enterprises are in the forms of disaster victim assistance, educational and or training assistance, health development assistance, infrastructure and or public facility assistance, religious facility assistance, natural conservation assistance; and the procedure or mechanism of the distribution of contribution, criteria for being State-Owned Enterprises partner and procedure of reporting are all organized in this regulation. This is also in Regulation of Minister of State-Owned Enterprises No. Per-05/MBU/2007 on Partnership Program of State-Owned Enterprises with Small Enterprise and Environmental Construction Program.

b. Law No. 25 of 2007 on Investments Article 15 Section (b): every investor shall have obligations to implement corporate social responsibility. "Corporate social responsibility" means a responsibility mounted in every investment company to keep creating relationship which is in harmony, in balance and suitable to the local community's neighborhood, values, norms, and culture.

c. Law No. 40 of 2007 on Limited Liability Company Article 1 Section (3). The definition of social and environmental responsibility is the company's commitment to take part in continuous economic development in order to enhance the

quality of life of the company itself, the local community, and the society in general. The following have been CSR obligations included in Article 74:

(1) The company running its business activity in the sector and/or in relation to natural resources requires performing social and environmental responsibility.

(2) Social and Environmental Responsibility as stipulated in Section (1) is a company's obligation budgeted and estimated as corporate cost whose implementation is conducted by considering propriety and appropriateness.

(3) The company who does not perform the obligation stipulated in Section (1) will be imposed with sanction in accordance with stipulation of the legislation.

(4) Further provision concerning Social and Environmental Responsibility is regulated by Government Regulation which is Government Regulation No. 47 of 2012 on Limited Liability Company's Social and Environmental Responsibility.

d. Law No. 4 of 2009 on Mineral and Coal Mining Article 108, stating:

(1) The holder of Mining Business License (IUP) and Special Mining Business License (IUPK) requires arranging the program of societal development and empowerment.

(2) The arrangement of program and plan, as mentioned in Section (1), is consulted with the Government, regional government, and community.

Article 109: Further provision concerning the implementation of development and empowerment of society intented in Article 108 is organized by government regulation. The detailed and technical outline of the implementation of development and empowerment of society is documented in Government Regulation No. 23 of 2010 on Implementation of Business Activity of Mineral and Coal Mining, namely from Article 106 to Article 109.
Article 106 states:

(1) The holder of Mining Business License (IUP) and Special Mining Business License (IUPK) requires arranging the program of development and empowerment of society around the Area of Mining Business License (WIUP) and the Area of Special Mining Business License (WIUPK).

(2) The program mentioned in Section (1) must be consulted with the Government, provincial government, municipal government, and local society.

(3) The society mentioned in Section (2) can propose a program of development and empowerment of society to local head of county or mayor to be passed on to the holder of IUP or IUPK.

(4) The development and empowerment of society, as stated in Section (1), are prioritized for the people around WIUP and WIUPK directly affected due to mining activities.

(5) The people priority stated in Section (4) is the people who are close to mining operational activities by not concerning the administrative border of district or county area.

(6) The program of development and empowerment of society stated in Section (1) is funded from the allocation of the cost of program of development and empowerment in the budgeting and the cost of IUP or IUPK holder every year.

(7) The cost allocation of program of development and empowerment stated in Section (6) is managed by the holder of IUP or IUPK.

Article 107 states: "The holder of IUP and IUPK every year requires informing the plan and cost of the implementation of program of development and empowerment of society as a part of annual working plan and cost budgeting to the Minister, governor, or county head/mayor in accordance with the entitlement to achieve an approval".
Article 108 states: "Every holder of IUP in the period of production activity and IUPK in the period of production activity require informing the report of the realization of program development and empowerment of society every six months to the Minister, governor, county head/mayor in accordance with their entitlement".
Article 109 states: "Further provision concerning the development and empowerment of society is regulated by Ministerial Regulation".

Based on the statements above, State-Owned Enterprises Law carry out CSR financing with "after profit" concept. This constitutes the allocation of profit of 2%, whereas in Limited Liability Company Law does apply "before profit" concept because in the beginning it is supposed to be budgeted and estimated as company cost which implementation is conducted by considering

propriety and appropriateness. However, Law of Mineral and Coal Mining indirectly implements "after profit" concept. So, it is obvious that although the program of development and empowerment has been organized and budgeted, the implementation and report of such budgeting is performed after license period of production activity.

Actually, there are two negative impacts that threaten after-profit way of thinking, which are:

a. In the argumentation implementing CSR as "after profit", a company might avoid performing CSR until it enters the profit period. In actual fact, a company's negative impacts might even have started since it is not in operation yet (for instance, in construction period). CSR should be performed by a company since in the early period it comes in contact with the kindred parties.

b. A company could also avoid performing CSR if in the previous year it experienced loss. Logically, a company should practice its business responsibly despite the fact that whether it experiences profit or loss. (Anto Sibarani: 2014)

2. Regression in Law No. 4 of 2009 on Mineral and Coal Mining

Mining management system recently applied in Indonesia is Law No. 4 of 2009 on Mineral and Coal Mining to which many parts of society criticize. The process from its drafting to its enactment that consumed quite a long time does not make this law is accepted by every part of people as a product of law that satisfies every part of society. There are so many interests that must be accomodated in this law such as government interest, mining business doers and local people interest.

According to annual survey of independent consultancy Pricewaterhouse Coopers (PwC) towards Indonesia's sector of mining, PwC's Technical Advisor of mining sector, Sacha Winzenried, states: "Law No. 4 of 2009 is a regression if compared to system of Working Contract / Kontrak Karya (KK) which gives more long-period legal protection for large-scale investation. (Alexander Yopi and Happy Amanda: 2009).

According to Busyra Azheri, the principle of CSR has actually been accomodated in Law No. 4 of 2009; however, it remains implicit and or succinct except for article concerning development and empowerment of society around mining area. Also, the application of CSR in the sector of mining has dual system characteristic. To state-owned enterprises, its implementation has been mandatory in the sense of legal obligation because it has been regulated likewise. As for private-owned enterprises, the implementation of CSR is voluntary even though has been regulated in Law No. 25 of 2007 on Investments, Law No. 40 of 2007 on Limited Liability Company and Law No. 4 of 2009 on Mineral and Coal Mining, with reactive motive in the form of charity. (http://prasetya.ub.ac.id: 2010). In fact, state-owned enterprises in the sector of mining in the form of Limitied Liability Company also comply with the provisions of Law No. 40 of 2007 on Limited Liability Company. This would mean that if state-owned enterprises in the sector of mining fulfill the Law No. 40 of 2007, they have already fulfilled the Law No. 4 of 2009.
The adjustment of CSR as a part of the legal scope of companies, particularly in the sector of mining, partially degrades namely in the practice of obligation of CSR implementation. As what we already know that Law No. 40 of 2007 on Limited Liability Company more firstly came up than Law No. 4 of 2009 on Mineral and Coal Mining.

Law No. 40 of 2007 Article 74 Section (2) states: "Social and Environmental Responsibility is a corporate obligation that is budgeted and estimated as corporate cost whose implementation is conducted by considering propriety and appropriateness". This article contains the understanding that the company itself performs CSR in accordance with the principle of propriety and appropriateness. The fact that the implementation of CSR is charged to each company can prevent the existence of corruption and at the same time ease the interaction between companies and society, while the Government's role is just as a monitor whether such companies has performed the CSR. For instance, if they do not perform CSR, the alleged companies will be sanctioned in accordance with sectoral law; if disregarding environmental responsibility, the alleged companies will be sanctioned in accordance with environmental law, and if disregarding social responsibility, they will be sanctioned in accordance with some proper law. (See Supreme Court Verdict No. 53/PUU-VI/2008).

This is in line with Reflexive Law Theory. As put forth by Eric Orts, describes reflexive law as a regulatory system that recognizes the limited ability of the law in a complex society to direct social change in an effective manner. Instead of trying to suppress the complexity and diversity in society through extensive regulation, reflexive law aims to guide behavior and promote self-regulation. The law is "reflexive" in that it encourages corporations to constantly re-examine their practices and reform those practices based on the most current information. (David Hess: 1999) This reflexive law theory focuses on social process in the way of "regulated autonomy", namely by letting private actors, such as corporations, to independently manage themselves. On other side, reflexive law intervenes in social process by creating reference procedure for corporate behaviour.

Meanwhile, Government Regulation No. 23 of 2010 Article 106 on Implementation of Business Activity of Mineral and Coal Mining that is in line with Article 109 Law No. 4 of 2009 on Mineral and Coal Mining states:
"The holder of IUP and IUPK requires arranging program of development and empowerment of society around Area of Mining Business License (WIUP) and Area of Special Mining Business License (WIUPK). Such program must be consulted with the Government, provincial government, municipal government, and local society. Society can propose a program of activity of development and empowerment of society to local county head or mayor to be passed on to the holder of IUP or IUPK. The holder of IUP and IUPK every year requires informing the plan and cost of the implementation of program of development and empowerment of society as a part of working plan and annual budgeting cost to the Minister, governor, or county head/mayor in accordance with the entitlement to get an approval".

Based on the explanation above, companies no longer organize themselves unrestrictedly. Gunther Teubner states that there has been a legal evolution resulting in three types of law, namely formal, substansive, dan reflexive. Formal law is a type of a form of government authorization regulating through rules of legislation. This type troubles government in intervening private issues. In the meantime, substantive law is a form of state intervention on purpose and result aimed. Although it is more permissive than formal law, the focused point of substantive law emphasizes on the result aimed by regulation. Substantive law has two obstacles to be applied in a complex society, namely cognitive limitation and normative legitimacy. Gunther Teubner calls this by crisis of the interventionist state. This crisis is the consequence of the incapability of substantive law to fulfill demands of various societal problems that keep changing. If this is forced to follow changes in society, there will be too many legal products that will ruin people understanding. (Mukti Fajar ND: 2010). In responding to crisis of state intervention, reflexive law emerges. Similar to substantive law, reflexive law interferes with social process, "but it avoids taking full responsibility for substantive result". Reflexive law takes the moderation between formal law and substantive law by creating regulated autonomy. On one side, reflexive law of corporate personality is free to determine their own result. On the other side, reflexive law interferes with social process by settling the procedure that leads corporations. (David Hess: 1999).

Basically, reflexive law is a procedural law and therefore it can be considered as self-regulation. Instead of controlling the outcome that has been determined before, reflexive law tries to influence decision making and communicating processes by using procedures conditioned. However, final decision remains to be in private sectors. The purpose is to push reflexive processes alone or to be independent within corporations towards impacts of their actions towards society. Regarding CSR, this has the sense of social responsibility oriented to the process connected to the concept of corporate social response. Social response refers to capacity of a corporation to respond social pressures. To examine CSR, reflexive law theory is a legal theory attempting to push corporations to re-evaluate practices that they have conducted by giving latest information. In controlling corporate behaviour, reflexive law theory desires the existence of social reporting. Social reporting is a form of concise report regarding social impacts of corporate ethical behavior towards public interest or stakeholders. (Mukti Fajar ND: 2010).

Then again, in Law No. 40 of 2007, Article 74 Section (2) states: "Social and Environmetal Responsibility is a company's obligation budgeted and estimated as a corporate cost whose implementation is conducted by considering propriety and appropriateness". This means that CSR follows the concept of "before profit" because of the obligation of budgeting CSR as a corporate cost.

Meanwhile, in Law No. 4 of 2009, Article 108 Section (1) states: "The holder of Mining Business License (IUP) and Special Mining Business License (IUPK) require arranging program of development and empowerment of society". However, report of the realization of program development and empowerment of society is obliged to the holder of IUP production operation and IUPK production operation. As for the definition of IUP production operation: business license given after the implementation of IUP eksploration in order to conduct the stage of production operation activity. (See Article 1 Number (9) Law No. 4 of 2009 on Mineral and Coal Mining). The definition of IUPK production operation is business license given after the implementation of IUPK eksploration in order to conduct the stage of production operation activity in the area of special mining business license. (See Article 1 Number (13) Law No. 4 of 2009 on Mineral and Coal Mining). It can be concluded that the realization of CSR funding is done after IUP production operation and IUPK production operation. So, what are IUP eksploration and IUPK eksploration? As we know, the meaning of IUP eksploration is the business license given to conduct the stage of the activity of general investigation, eksploration and propriety study (See Article 1 Number (8) Law No. 4 of 2009 on Mineral and Coal Mining); the meaning of IUPK eksploration is the business license given to conduct the stage of the activity of general investigation, eksploration and propriety study in the area of special mining business license. (See Article 1 Number (12) Law No. 4 of 2009 on Mineral and Coal Mining). Do, in the license period of IUP eksploration and IUPK ekploration, corporations not require actualizing CSR funding? This would mean that the concept of CSR follows the concept of "after profit".

Such thing, written in Government Regulation No. 23 of 2010 on Implementation of Business Activity of Mineral and Coal Mining, in Article 108, is stipulated: "Every holder of IUP production operation and IUPK production operation require informing report of realization of program of development and empowerment of society every six months to the Minister, governor, county head or mayor in accordance with their authority". This means that the implementation CSR obligation by mining companies is conducted after the realization of IUP and IUPK production operation.

Actually, as an entity, mining companies in the form of Limited Company should comply with Law No. 40 of 2007 on Limited Company; however, in regard of mining activity, comply with Law No. 4 of 2009 on Mineral and Coal Mining.

2. Management System of Mineral and Coal Mining Has Pluralistic Characteristic

Mining management system in Indonesia also has a pluralistic characteristic. This is because of varied mining contract or license recently applied. There are applied mining contracts or licenses based on Law No. 11 of 1967 on Main Stipulations of Mining, and there are licenses applied based on Law No. 4 of 2009 on Mineral and Coal Mining. (Salim HS: 2012).

In the system of mining business in Law No. 4 of 2009, there are three forms of license. Licenses given to applicants are the following: license of mining business (IUP), license of public mining (IPR), license of special mining business (IUPK); however, this Law acknowledges the existence of formerly applied contract or license. As what is clarified in Article 169 Law No. 4 of 2009 on Mineral and Coal Mining:

a. Working Contract (KK) and working agreement of business of coal mining (PKP2B) that have been existed before the enactment of this law is still applied until the end of time period of the contract/agreement.

b. Terms included in article of working contract and working agreement of business of coal mining, as mentioned in (a), are adjusted as late as possible one year since this law is enacted except for state income.

After the validity of this Law No. 4 of 2009, the Government published Presidential Decision No. 3 of 2012 on Evaluation Team for Adjustment of Working Contract and Working Agreement of Business of Coal Mining. This team has a focus on doing mining contract renegotiation of the holder of working contract and working agreement of business of coal mining. The matters negotiated are as follows: the extent of working area, contract extension becoming IUP, state income both tax and royalty, divestment obligation, the obligation of domestic maintenance and refinement and the obligation of use of domestic mining product and service.

Based on the information from Director General of Mineral and Coal Ministry of Energy and Mineral Resources (ESDM), today there has been more than 50% of the companies who are holders of Working Contract (KK) and Working Agreement of Business of Coal Mining (PKP2B) agrees to the renegotiation. From 37 companies who are holders of KK, 12 have approved, while there are 51 companies out of 74 holders of PKP2B that have approved. (Yurika Indah Prasetianti: 2014).

One of the companies ratifying signing the points of mining contract renegotiation is PT Newmont Nusa Tenggara (PT NNT). In this matter, PT NNT signed Working Contract Generation IV on December 2, 1986. 56 percent of its shares are owned by Nusa Tenggara Partnership BV controlled by Newmont Mining Corporation and Nusa Tenggara Mining Corporation of Japan. The other shareholder is PT Pukuafu Indah of 17.8 percent, PT Multi Daerah Bersaing of 24 percent, and PT Indonesia Masbaga Investama of 2.2 percent. Basically, in Working Contract designed between Indonesia's Government and PT NNT has accommodated the development of society.

Concerning development of local business activity, provision in Article 27 on working contract states: "Companies must, as long as the matter is appropriate and economically practicable, by remembering characters of goods and services concerned, improve, support, motivate and help the people of the state of Indonesia who want to establish a company and business that will provide goods and services for local companies and society, and in general improve, support, motivate and help the development and activities of local business in the area of mining (...)"

Nevertheless, dispute of program of development of society once happened between society of mining circle especially society of Ropang Village, District of Ropang County of Sumbawa Province of Nusa Tenggara Barat and PT NNT regarding the non-realization of suggested proposal of 10 billion rupiahs. The money would have been used for infrastructure construction, farming and workforce training. As a consequence, the people did a protest by burning the base camp of PT NNT in Elang Dodo, District of Ropang, County of Sumbawa. From the research conducted by Salim HS and Idrus Abdullah, the PT.NNT's base camp attack was because the non-fulfillment of substances of working contract by PT NNT. The substances of the working contract cover: (1) the people of Ropang Village may participate as workforce in the implementation of eksploration and eksploitation of PT NNT, (2) the fulfillment of the proposal to the value of 10 billion rupiahs. (Salim Hs dan Idrus Abdullah: 2012).

Regarding agreement of contract renegotiation signed on Wednesday, September 3, 2014 was only in the form of memorandum of understanding (MoU) of contract amandment. Later on, the MoU proceeded to the signing of special mining business license (IUPK) as the replacement of working contract. Discussion of contract amandment took place for six months. In general, there was no change on the terms of working contract except for royalty and fixed levy. The subject of the MoU was the rise in royalty of gold, silver, and copper previously from 1.1 and 3.5 percent to 3.75, 3.25 and 4 percent respectively in accordance with Government Regulation No. 9 of 2012 on Non-tax State Income. PT NNT was also imposed with fixed levy of 2 US dollars per hectare, and also the following: the obligation of constructing the manufacturing and smelter factory, the obligation of paying 25 million US dollars as bail money, reduction of size of land from 87.000 to 66.422 ha, share divestment of 51 percent, and reduction of domestic component. In accordance with Minister of Finance Regulation, PT NNT will be imposed with export duties on consentrate export of 7.5 percent. This export duty will go down to 5 percent if the improvement of smelter construction exceeds 7.5 percent and to 0 percent if the improvement of smelter is over 30 percent. (hukumonline: 2014). In this matter, there was ever a tough negotiation between Indonesia's Government and PT NNT on the issue of restriction of raw mineral export that made PT NNT sue Indonesia's Government to The International Center for the Settlement of Investment Disputes (ICSID) on July 1 2014; however at last PT NNT canceled the claim.

Conclusion

Implementing CSR, as to mining company, is an obligation, but there are too many pluralistic rules of legislation regulating about corporate social responsibility and mining management system in Indonesia. The adjustment of CSR as a part of the legal scope of companies, particularly in the sector of mining, partially degrades namely in the practice of obligation of CSR implementation. As what we already know that Law No. 40 of 2007 on Limited Liability Company more firstly came up than Law No. 4 of 2009 on Mineral and Coal Mining. *As an entity, mining company formed as Limited Liability Company should submit to Law No 40 of 2007, however in the activity of mining does submit to Law No 4 of 2009.* Based on the statements mining company should apply "before profit" concept because in the beginning it is supposed to be budgeted and estimated as company cost which implementation is conducted by considering propriety and appropriateness.

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IMPLEMENTATION THE PRINCIPLE OF *IN GOOD FAITH* IN THE STANDART CONTRACT

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ABSTRACT

The purpose of this research was to determine how the principle in good faith was formulated in the standard contract, and the implementation of the principle of in good faith in implementing consumer financing of PT Astra Sedaya Finance Branch Medan. The method used in this study, is a normative study by taking legal material as a basis for analyzing the problem, namely the Minister of Finance Decree No.1251/KMK.013/1988 on the Implementation of the Provisions and Procedures Financing Agency in conjunction with the Finance Minister Regulation No.84/PMK.012/2006 on Financing Company expressly stated to obtain business licenses, financial institutions must attach an example of the financing contract that will be used as a standard contract. The results showed that the principle in good faith in the Consumer Financing Agreement of PT Astra Sedaya Finance Branch field is not formulated in writing in the articles that include the right of PT Astra Sedaya Finance Branch Medan and obligations of consumers, because of its nature as an abstract principle, but there must be a basis to determine the ethical value of the agreement in question. The principle of in good faith in the Consumer Financing Contract of PT Astra Sedaya Finance Branch field does not exist because basically the financing agreement only stipulates the obligation of the consumer without mentioning the obligation of PT Astra Sedaya Finance Branch Medan when tikat well defined as to implement the agreement in accordance with the eligibility (redelijkheid) and propriety (billijkheid). whereas the principle of goodwill generally contains obligations consumers without discussing the terms or obligations arising from the financing agreement with the consumer prior to formulating

Key words : implementation, in good faith standart contract

Introduction

Article 1338 paragraph (3) of the Civil Code that a contract must be implemented with *in good faith*. This means that in carrying out the contract shall be implemented in accordance with the eligibility (redelijkheid) and propriety (billijkheid). Implementation of the contract with *in good faith* is defined by both parties must apply the one against the other as among polite person without guile without guile, without subterfuge, without interfering with the other party, not by looking at its own interests, but also with see the other party's interests.[1] *In good faith* mentioned in Article 1338 paragraph (3) is called a good faith measure is normative because the written law and morality in society as a value basic. *In good faith* both from the perspective of the perpetrator , the perpetrator well-meaning or not related to the contract.

In the contract, the *in good faith* it has the function of complement or as an enhancer, that *in good faith* that can be used to increase the functionality of a treaty, meaning that if a contract is not clear, it can be explained by *in good faith*, as a the Article 1344 of the Civil Code determines, that if in explaining the contract must be such that the intent of the contract was not deviate. In addition, *in good faith* can serve to restrict or negate, that an contract can be ruled out, if the conditions have changed so that if the contract was carried out in accordance with the contents of the contract, would be unjust.

In a standart contract, seldom was said the state tend to give rise to abuse (undue influence), because the standart contract is an agreement where it is determined a priori by one of the parties. In practice, the standart contract can be seen in contract of the Consumer Financing Contract of PT Astra Sedaya Finance Branch. The financing contract was made by a business entity engaged in the financing unilaterally made in writing. It is also in accordance with the provisions of Article 13 paragraph (1) letter e Decree of the Minister of Finance No. 1251/KMK.013/1988 on the Implementation of the Provisions and Procedures Financing Institutions in conjunction with Ministry of Finance Regulation No. 84/PMK.012 /2006 on Financing Companies which clearly states to obtain business licenses, financial institutions must attach examples financing contract that will be used.

Standart contract is often called quasi legislation or particuilere as having binding force which inevitably must be obeyed. In terms of benefits, the standard contract is intended to keep costs down, especially in a time of making a complicated agreement. The situation is not balanced or circumstances are not the same between the two sides has the potential to be misused (undue influence). Abuse of this situation may occur after the contract occurred. Unbalanced state occurs when one of the parties have unequal position both in terms of economic, psychological or potential misused his position stronger party in the contract. This is

[1] P.LWery, 1990, *Perkembangan Hukum tentang Itikad Baik di Nederland,* Percetakan Negara RI, hlm. 9.

caused, of these standart contract often do not observe the principle of in good faith its not implementation. Although when viewed from the birth of the agreement, there is no standard agreement misuse of state, since the birth of the contract were given the freedom to others to accept or reject. This can be seen in the agreement terms applicable standard, namely "take it or leave it contract."

Under the provisions of Article 1338 paragraph (1) of the Civil Code, all contract are made legally valid as a law for those who make it. Based on the content of Article 1338 paragraph (1) that the parties can not terminate or revoke the contract unilaterally. This means that the contract that has been made legally should be carried out in accordance with the already agreed. Associated with the provision of Article 1338 paragraph (3) of the Civil Code that a contract should be implemented in good faith, then the contract shall be implemented in good faith. This means that the principle of in good faith must exist in every contract includes standarts contract. Therefore, although not explicitly stated in the contract, but as a base mind, to be contained in any contract. This arrangement is regarded as the legislation should contain the principle of in good faith. Although considered in the standart contract, the principle of in good faith is often overlooked due to the standart contract basically made unilaterally, so tend not to include the principle of in good faith. Therefore, in this study, to be disclosed how the principles of in good faith was formulated standart contract and also how the principle of in good faith implemented in the standart contract.

Research design

This study is normative research, which used the data legal material as a basis for analyzing the problem, namely the Minister of Finance Decree No.1251/KMK.013/1988 on the Implementation of the Provisions and Procedures Financing Agency in conjunction with the Finance Minister Regulation No.84/PMK.012/2006 on Financing Company in Article 13 paragraph (1) expressly stated to obtain business licenses, financial institutions must attach an example of the financing contract that will be used as a standard contract. In this research that standart contract which used in Consumer Financing Agreement of PT Astra Sedaya Finance Branch Medan as primary legal materials in addition the rules and regulations relating to the cases. To complete the normative research, conducted empirical research with primary data obtained from PT Astra Sedaya Finance Branch Field which is considered a better understanding of the problems.

Babbie accordance with the opinion, that the appropriate method for analyzing legal materials containing messages/communication in the form of something that must be observed and followed by members of the community is content analysis.[2] These research results in this study were analyzed by content analysis, because the law is an indication of life which should be adhered to in life together. Primary data were analyzed by descriptive, normative, logical and systematic, and the conclusion is done by using deductive and inductive methods in order to answer the problems. To draw a conclusion use deductive and inductive methods. Deductive method or methods of reasoning is a method to draw conclusions from things common to specific things, being the inductive method is the opposite of the deductive method is to draw conclusions from things that are specific to the things that are special.[3]

Basic Law

Financing contract between PT Astra Sedaya Finance Branch Medan with customer/consumer is financing contract with fiduciary guarantee. This contract is a written agreement that has been standardized or a standart contract that has been provided by PT Astra Sedaya Finance Branch Medan as a creditor to be signed/initialed by consumers as debtors in making the contract.

Regulations are used as a legal basis for the implementation of the financing contract with PT Astra Sedaya Finance Branch Medan, is the President of the Republic of Indonesia Regulation Number 9 of 9 of 2009 on Financing Institutions and the Minister of Finance Regulation No. 84/ PMK.012/2006 on Financing Company. Article 13 paragraph (1) letter e Decree of the Minister of Finance No. 1251/KMK.013/1988 on the Implementation of the Provisions and Procedures Financing Agency in conjunction with the Finance Minister Regulation No. 84/PMK.012/2006 on Financing Company expressly stated to obtain business licenses, financial institutions must attach examples financing agreement that will be used.

Financing contract with PT Astra Sedaya Finance Branch Medan, consisting of, financing contract and fiduciary contract.

The financing contract as a principal contract that includes a contract between PT Astra Sedaya Finance Branch Medan with consumers to provide financing facilities in the form of providing funds for the purchase of motor vehicles. Fiduciary contract is an additional contract contains jamian payment of all liabilities of the debtor /consumer to the creditor where the debtor submit a motor vehicle that has become hers to PT Astra Sedaya Finance Branch Medan as a guarantee set forth in the Acta of Fiduciary in made by Notary and registered according to regulating applicable.

Formulation principle of in good faith in the Standart Contract

[2] Earl, Babbie, 1986, *The Practiceof Social Research*, Wadsworth Publishing Co. California, hlm 294.

[3] Soerjono, Soekanto, 1990, *Pengantar Penelitian Hukum*, Cetakan Ketiga, UI Press, Jakarta, hlm. 75.

In this financing contract, the terms and conditions of a contract the object of the contents of the rights and obligations of both parties for the contract that has been specified and standardized by the PT Astra Sedaya Finance Branch Medan in the form of standart contract. Terms in the standart contract drawn up unilaterally without discussed beforehand with the consumer.

From the results of the research also note that the financing contract provided by the PT Astra Sedaya Finance Branch Medan always accepted by consumers without reading the terms or filling the entire contents of the contract. As noted by Mariam Darus,[4] that the standart contract is a concept promises written, compiled without discussing its contents and usually poured into an infinite number of contract that are specific, or simply stated that the standart contract is an contract whose contents are standardized and poured in a form. For reasons of efficiency, it is in practice to grow the contract as a written contract in a form, so that similar legal actions that occur repeatedly and regularly involving many people need a treaty that has been prepared in advance, for the contents of the contract that is standardized and so on are printed in large quantities so easily provide it at any time if needed. Although in principle the shape of a contract freely and not tied to any particular shape, which means it can be oral or in writing, but for the sake of efficiency and effectiveness of the same legal act over and over again, this standard contract is required. Similarly, in the financing contracts undertaken by PT Astra Sedaya Finance Branch Medan, has prepared the contents of the contract for the people who perform similar legal relationship with Astra Sedaya Finance Branch Medan, regardless of differences in conditions between the debtor with each other.

F.A.J. Gras, in the book of Mariam Darus,[5] has conducted research for three years concluded that the standard contract to grow and thrive in modern society that uses the organization and planning as a lifestyle. Contents of the standart contract, was planned by interested parties because they expect that what he wanted to become a reality. The problem, whether the standard contract ignores the principle of the is one of the conditions the validity of the contract referred to in Article 1320 of the Civil Code, has been fulfilled? The principle of agreement of the contract is an essential principle in was to make the contract. The principle of this contract contains the same desire to bind themselves. Principles of this agreement have a relationship with the principle of freedom and the binding principles contained in Article 1338 paragraph (1) of the Civil Code, which determines the agreement made lawfully in a sense created by the agreed binding as law.

According to Mariam Darus,[6] raw agreement legally-binding theoretically has no power because it does not comply with Article 1320 of the Civil Code in conjunction with Article 1338 paragraph (1) of the Civil Code, the consequences if the in good faith associated with the principle in Article 1338 paragraph (3) of the Civil Code, then the contract standart can not be carried out in accordance with in good faith. The principle of in good faith is one of the principles that must be considered in the implementation of the contract. As mentioned in Article 1338 paragraph (3) of the Civil Code which specifies that a contract should be implemented in good faith.

In the standart contract drawn up unilaterally by the employer often it contains promises that are very detrimental to the consumer due to the contract made without the rights of consumers and disputes arising in the fulfillment of his achievements are basically always submitted to the court which has been determined solely by employers so inclined give a decision in favor. The nature of in good faith is meant here is that in implementing the contract, the parties take into account the interests of the opposition. Requirements to take into account the interests of the other party seen from the exercise of the rights and obligations arising from the agreement, and therefore the standard agreement, often negating the inclusion of the rights of the opposition because it can lead to conflict with the interests of the other party.

Definition of in good faith in terms of the objective defined in Article 1338 paragraph (3) of the Civil Code, that a contract must be implemented in good faith. Good faith pursuant to Article 1338 paragraph (3) of the Civil Code, refers to the unwritten norms objective, namely what is the common assumption about behavior that should be in the implementation of the agreement. Article 1338 paragraph (3) of the Civil Code specifies that an agreement must be implemented with goodwill. This means that in carrying out the agreement shall be implemented in accordance with the eligibility (*redelijkheid)* and propriety (*billijkheid*).

The principle of law which is the basis of mind or basic norm, not a concrete legal regulations, but the background of a concrete legal regulations, can be found in legislation or verdict. Legal principle, is an abstract, in the sense that can not be found or is poured in concrete regulations or clauses. Thus the principle of in good faith was not formulated explicitly in the provisions of the standart contract , but because it contains the legal principle of decency assessment, or has an ethical dimension, then the principle of in good faith is always present in every regulation.

Implementation of the principle of in good faith in the Standart Contract

The principle of in good faith is an abstract notion and difficult to be formulated, so the more defined it through the events in court. This is because the principle of law is a basic norm of a general nature, then so should not be considered as a concrete legal norm but should be viewed as a general basis or instructions for the applicable law. This means, the establishment of law must be oriented to the principles of the law. In Black's Law Dictionary,[7] in good faith is defined as "inclusive or with good faith, honestly, openly and sincerely, without deceit or fraud truly, actually, without simulation or pretense". Sutan Remy Sjahdeini

[4] Mariam Darus Badrulzaman, 1981, *Op Cit,* hlm. 96.
[5] *Ib id,* hlm. 98.
[6] *Ib id,* hlm. 104.

[7] Black, Henry Campbell, 1990, *Black's Law Dictionary,* Sixth Edition, West Publishing Co., Paul Minn.

generally describe good faith as an intention of the parties in an agreement partners promise not to harm or not harm the public interest.

Definition of in good faith in terms of the objective defined in Article 1338 paragraph (3) of the Civil Code, that a contract must be implemented in good faith. Good faith pursuant to Article 1338 paragraph (3) of the Civil Code, refers to the unwritten norms objective, namely what is the common assumption about behavior that should be in the implementation of the contract. Article 1338 paragraph (3) of the Civil Code specifies that an agreement should be implemented in good faith. This means that in carrying out the contract shall be implemented in accordance with the eligibility (*redelijkheid*) and propriety (*billijkheid*). The contract which have been agreed by and binding on the parties that often cause problems and obstacles in the future. Therefore, it is very important for all parties to understand and grasp the substance or content of the contract before agreeing or agreeing a contract.

In good faith in the implementation of the contract relating to the issue of propriety and decency. Theoretically stages in the preparation of contracts according to van Dunne can be divided into three stages, namely the preparation of contracts (precontractuele phase), the stage of implementation of the contract (contractuele phase) and a stage after the contract is executed (postcontractuele phase). Precontractuele phase is the stage where the parties are negotiating to determine the content of the contract which will have to agree on. This contract is one important requirement to publish legal relations in addition to other requirements as mentioned in Article 1320 of the Civil Code. In addition to the provisions of Article 1320 of the Civil Code, in making the parties' contract should also pay attention to the principles of in make of contract. The 1338 paragraph (3) of the Civil Code states, a contract must be implemented in good faith. This Article meaningful that the contract which agreed upon by the parties must be realized in accordance with propriety and fairness. Subjective in good faith, which is carried out before the contract the parties must demonstrate honesty. Usually the subjective good faith is in the stage of negotiations, where the parties openly gave-the real information about who he was with gave the evidence in the form of documents about him and the other party shall check carefully.

In good faith objective, namely at the time of the execution of the contract must be in accordance with the propriety or justice. In the legal system in Indonesia, the main principle of developing goodwill in business activities such as financing because many finance companies that perform the requirements in the form of a standart contract. Financing contract of the PT Astra Sedaya Finance Branch Medan, which is a standart contract, which was made unilaterally by the company. Therefore, the conditions contained in the financing contract further highlight the obligation on the part of consumers to negate his rights as a party to the contract. Therefore, the principle of in good faith on the part of PT Astra Sedaya Finance Branch Medan, considered non-existent, because in good faith is related to the implementation of the obligations.

It can be seen from the terms set forth in the financing contract that define such an obligation of the debtor (consumer) to authorize the creditor to use the funds obtained from the liquefaction facility financing, the obligation to provide all data and information and become the property of the creditor, the obligation to prioritize payments in accordance with the agreed amount including penalties and other obligations arising from financing contract, as well as the rights of creditors to adjust payments arising from the monetary policy. When linked to Section 1320 in conjunction with Article 1338 paragraph (1) of the Civil Code, then the financing contract with fiduciary among consumers with PT Astra Sedaya Finance Branch Medan, there is no contract in the sense of obligation to the consumer which is born of the financing contract without discussing it first with consumers. Although according to research results, prior to the contract signed by the consumer, the PT Astra Sedaya Finance Branch Medan provide sufficient information to consumers about the obligations/ requirements are defined in the contract. Then after all understandable information about the terms of the financing agreement was given approval by his signature. Furthermore, said the thrust of the contract, the PT Astra Sedaya Finance Branch Medan, never forced to consent to consumers, so it is said that approving the financing agreement at PT Astra Sedaya Finance Branch Medan, based on the free will of the consumer. But if it is connected to Article 1321 of the Civil Code that regulate the three factors causing the defects will occur namely, mistake, fraud, and abuse of state that grows and develops in jurisprudence. This means that approval will be deformed in the event because of the cause of the defect will. Legal consequences of the contract can be canceled. According to research results, financing contract made unilaterally by PT Astra Sedaya Finance Branch Medan always accepted by consumers, in the sense that there is never a problem in the implementation of obligations by consumers.

If explored in depth, basically, in financing contract with fiduciary guarantee of Astra Sedaya Finance Branch Medan which contains the terms of raw consumer burden is not problematic because in general, consumers who are economically lower position of Astra Sedaya Finance Branch Medan. Consumers who are aware of a very weak position compared Astra Sedaya Finance Branch Medan, so in general they always perform his duty well.

From the results of the research also note that if they are not able to perform the obligation, namely to pay installments in accordance with the contract, basically they never put up a fight, in the sense of the company Astra Sedaya Finance Branch Medan without resistance exercise their rights, which is executing the collateral. But if it is connected to Article 1321 of the Civil Code that regulate the three factors causing the defects will occur because there is an element of coercion, mistake and fraud, and abuse of state that grows and develops in jurisprudence. This means that approval will be deformed in the event because of the cause of the defect will.
Mistake/oversight/fallacy occurs when a contract arise in making an oversight on the desire or concerned not obtain a clear picture/real against the wishes. So a mistake to assume a state of ignorance. In relation to the lack of knowledge as an element of mistake known what is called the hidden disability. Equally assume their ignorance at the time the agreement but it is known after the agreement implemented. In the third case this will handicap the injured party can apply to be canceled. This is due to

defects relating to the will of the contract as a condition relative to make arrangements, by factors of the defect will cause it to be a flawed contract.

Agreement or given free will in a treaty can be disabled as a result of the contract happened because of coercion, or because mistake and for fraud. Legal consequences, if it is proven in later emerged that the deal happened because one of the factors specified in Article 1321 of the Civil Code, then the agreement can be canceled.

In the Law of Contract, known as the four factors that cause disability will, namely mistake, duress (force), fraud and undue influence (abuse of state). Now in jurisprudence found abuse of state as factors causing defects will by using the term van omstandingheden. Abuse of state happens when one party has superior state. This superior state can be seen in terms of psychological or economically unequal parties. It is often said that in the standart contract, tends to give rise to abuse of circumstances (*undue influence*), because the standart contract is a contract where it is determined a priori by one of the parties. However, if viewed from the birth of the agreement, there is no standard agreement misuse of state, since the birth of the contract were given the freedom to others to accept or reject. This can be seen in the contract terms applicable standart, namely "take it or leave it contract."

Instead of undue influence can occur after the agreement occurs, in which one of the factors that will lead to disability is not the same situation that has the potential to be misused. Basically, the judge handed down a decision in the face of undue influence by ignoring altogether the terms in the standard agreement, or reject all of these requirements, or also hear the case based on in good faith and decency.

In good faith principle contained in Article 1338 paragraph (3) Civil Code, which reads: "contract must be implemented in good faith." This principle is a principle that the parties, namely the first and second parties must implement the substance of the agreement is based on a firm belief or conviction and in good faith of the parties. On in good faith, someone noticed attitudes and real behavior of the subjects and the assessment lies in common sense and justice, and made an objective measure to assess the state (an impartial assessment) according to the norms that objective. The element of in good faith in terms of making a contract can already be covered by the legal clauses element of the 1320 article. Thus it can be a contract was made legally. In a sense meet all legitimate requirements of the contract (among others in accordance with Article 1320 of the Civil Code).

The contract. made with in good faith, but rather in the implementation eg adverse deflected toward one party. In this case it can be said that the agreement has been implemented contrary to in good faith. The principle of this in good faith can be known when the agreement-making process at the stage of "negotiation" between the first and second parties. At this stage there will be a bargain between the parties, so that the bargaining process will be the subject of an agreement to behave or act that shows signs of good will or not. In addition, the presence of the bargain, it will easily find the word "agreed" and the fulfillment of the principle of justice between the parties. Application of the principle of in good faith is required at all stages, either before, during or after the process of the contract. It is intended that the implementation or fulfillment of the object of the agreement can be run smoothly, from pre- to post-treaty contract.

Conclusion

From these descriptions the above , it can be concluded as follows :

1. The principle of in good faith in the standart contract not be formulated in writing in the articles that include the right of PT Astra Sedaya Finance Branch Medan and consumer obligations. Therefore, the principle of in good faith in Article 1338 paragraph (3) of the Civil Code is born from contractual relationships there should be a balance of rights and obligations , causing as if the principle of in good faith seen in the standart contract does not exist .

2. The principle of in good faith in the financing contract with PT Astra Sedaya Finance Branch Medan is not implemented as standart contract in financing contract with PT Astra Sedaya Finance Branch Medan just load consumer obligations without discussing the terms or obligations arising from the financing contract with the consumer prior to formulating .

Suggestions

1. Should the government investigate and examine the conditions and rights arising from the standart contract in consumer financing contract before granting business licenses for finance companies because standart contracts made unilaterally by the company in this case has a different financial level with consumers tend misused certain parties, so that consumer interests can be protected.

2. It should be in researching and examining the terms of the standards set in the standart contract, note the position of balance between the companies and consumers so that the principle of in good faith in the implementation of the financing contract s can be implemented .

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THE ECONOMIC VALUE OF NATURAL RESOURCES AND THE PRINCIPLE OF LOCAL WISDOM AS ENVIRONMENTAL PROTECTION EFFORTS IN INDONESIA

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Abstract
One of the environmental managements should get the benefit of the economy, but in obtaining the benefits of the economic value it should not be compromising the value of local wisdom. Local wisdom as one of the principles in the protection and management of the environment as provided for in Article 2 L Law No. 32 of 2009. The principle of local wisdom has the intention that the protection and management of the environment should pay attention to the noble values prevailing in the system of community's lives.However there is a view is by maintaining the principle of local wisdom is one of the efforts in environmental protection in Indonesia, but otherwise to abolish the principle of local wisdom can get the benefit of the economy resulting environment becomes damaged.In some areas in the Territory of the Republic of Indonesia there are still a lot of people defending the values of local wisdom in order to protect and preserve the natural environment such as in the Community of Muna who looks that in life humans are tied with environment as a macrocosm system, then the Community of Cimangu in the Village of Gunung Malang West Java who maintain forest conservation, indigenous community of Badui located on the Hill of Kendeng Province of Banten who always maintain forests and pristine rivers, and Community of Colo, Kudus, Central Java with religious approaches, which focus on the environmental movement with local wisdom relating to local people's belief to preserve the environment. This shows that the principle of local wisdom is one of the strongholds for maintaining the economic value of natural resources as environmental protection efforts in Indonesia.

Keywords: Indonesia, Economic Value of Natural Resaurces, Local Wisdom, the Environmental Protection.

Introduction

Indonesia as an archipelago state with 13,466 islands is divided into 34 Provinces, 410 Regencies and 98 Municipalities and some of them have the richness of abundant natural resources. The richness of natural resources owned by the provinces in Indonesia is very varied, both living and non-living natural resources are as the buffer of environment. Living natural resources such as forests scattered in the areas of Papua, Sumatra, Kalimantan, Sulawesi and Java are diminishing. Likewise with non-living natural resources are scattered in the province areas; for example in the Province of Papua with natural resources such as gold ore, copper, coal, limestone, quartz sand, marble, granite, iron sand, nickel and chrome. Then, in the Province of Nangro Aceh Darussalam have mines, crude oil and natural gas, in the Province of Kalimantan have a gold mine, iron, plumbum and zinc, limestone, gypsum, sandstone, coal, silver, diamond, and then in the Province of West Sumatra there are coalmine, copper, plumbum and silver, in the Province of Central Java with crude oil mine, and in the Province of East Nusa Tenggara there are mines of manganese, chrome and nickel.

From the richness of living and non-living natural resources owned by the State of Indonesia all have very high economic value as a source of state revenues so that the protection and management should be carried out by observing the principle of local wisdom, principle of conservation and sustainability, integration, benefits , prudence, justice, and participatory, as stipulated in Article 2 of Act No. 32 of 2009.

As a mandate in the preamble of Act No. 32 of 2009 states that national development mandated in the Constitution of 1945 of the Republic of Indonesia that the implementation of the development is carried out sustainably and environmentally insight. From the mandate of the Constitution then the development process should not be sacrificed the environment.

But in the development process, it often becomes a debate of two groups of thinkers; that is, the group maintaining economic growth and the group maintaining ecology. For the group that maintains the economy has a reason that environmental damage and depletion of natural resources can be solved by technology while ecological group always put the environment and ecology remains intact. Of the two groups of thinkers when juxtaposed with the theory of environmental ethics, the group of thinkers that just maintaining economic, is anthropocentrism, means a theory of environmental ethics that sees human beings as the center of the universe system. Humans and their interests are considered as the most decisive in ecosystem structure and in the policies taken in connection with nature, either directly or indirectly, this theory was accused of being the main cause of the environmental crisis.[1]

For the group of thinkers that promotes ecology remains intact, when linked with the theory of environmental ethics includes the biocentrism theory, this theory means that humans have a moral obligation to nature. This obligation is sourced and based on the consideration that life is worth something for either human life or the life of other species.[2]

Between the economic value and the principle of local wisdom as efforts to protect the environment, then each still remains in his argument, but according to the author it tends dominantly to increase the economic value when compared to

[1] A. Sonny Keraf, *Etika Lingkungan (environmental ethicts)*, penerbit buku Kompas, Jakarta, 2002, p. 32.
[2] ibid, p. 51

maintaining the principle of local wisdom in preserving the environment. This is proved to some facts related to the high of environmental damage in Indonesia as a result of human activities solely to the pursuit of economic value, among others:[3]

- In Java and Kalimantan with the rate of deforestation reached 1.8 million hectares / year which resulted in 21% of the 133 million hectares of Indonesia's forests disappear. Forest loss causes environmental degradation, increasing natural disasters, and threats to the preservation of flora and fauna.
- 30% of the 2.5 million hectares of Indonesia's coral reefs damaged. Damage to coral reefs increase the risk of disasters on coastal areas, threatening marine biodiversity, and reduce the production of marine fisheries.
- The high of air pollution, water pollution, soil pollution, and pollution of the sea occur in Indonesia. Even in 2010, the Citarum River has been named as the Most Polluted River in the World by website of huffingtonpost.com. World Bank also put Jakarta as the city with the third highest pollutant after Beijing, New Delhi and Mexico City.
- Hundreds of rare Indonesian plants and animals Indonesia are threatened with extinction. According to the IUCN Red list, as many as 76 Indonesian animal species and 127 plants are in the highest threatened, that is, status of Critically Endangered, and 205 animal species and 88 plant species are categorized as Endangered, as well as 557 species of animals and 256 plants have status of Vulnerable.
- Some areas in Indonesia which contained a gold mine in Papua, crude oil mine in Sumatra and Java, tin mines in Bangka-Belitung, liquefied natural gas mine in Aceh and many other mines in the region are becoming increasingly depleted. Including Kalimantan with a vast and tremendous area of coal mines done by many investors as the research results of Hidayatullah Sidiq on calculating the economic value of coal mining environment in Samarinda, East Kalimantan, in which the benefit of economic value is greater than the production costs incurred.[4]

From those data it shows that the principle of local wisdom is increasingly marginalized although in some areas people still maintain the value of local wisdom, this is the result of uncontrolled economic forces of financiers, whereas Act No. 32 of 2009 has set the principle of local wisdom as one of the efforts to protect the environment.

STATEMENT OF THE PROBLEMS

From the description above problems discussed in this paper are:

1. Can the activities of the economic value of natural resources ensure the life of the local community or it is otherwise it will make the environment damaged ?
2. Is maintaining principle of local wisdom as one of the environmental protection efforts in Indonesia?

DISCUSSIONS

1. The Economic Value of Natural Resources in Environmental Protection in Indonesia

In Act No. 32 of 2009 on the Protection and Management of the Environment there is provision of article regulating environmental economic instruments, among others, in Article 42 paragraph (1), Article 43 paragraph (4), Article 55 paragraph (4) that state: "In order to preserve the function of the environment, the Government and Regional Government shall develop and implement environmental economic instruments". Environmental economic instruments include:

- Development planning and economic activities;
- Funding the environment; and
- Incentives and / or disincentives;

To implement the provisions of Article 43 paragraph (4) and Article 45 paragraph (4) of the Act, then the provisions of environmental economic instruments as referred to in Article 42 and Article 42 paragraph (1) to Article 42 paragraph (3) and Article 55 paragraph (4) is regulated by the Government Regulation. Regarding the formation of Government Regulation is part of a implementing regulation an Act, and in accordance with the provisions of Article 126 of Act No. 32 of 2009 declared that "the Implementing Regulations mandated in this Act set a maximum of 1 (one) year after the enactment of this Act".

[3] Uploaded on 4 July 2015, at 10.58, from http://alamendah.org/2014/08/01/*kerusakan-lingkungan-hidup-di-indonesia -dan-penyebabnya (invironmental demages In Indonesia).*

[4] Research Result of Hidayatullah Sidiq, http://Repository.Upnyk.Ac.Id/4296/1/Abstrak.Pdf ; *Perhitungan Nilai Ekonomi Lingkungan Pada Rencana Penambangan Batubara* (*Calculation of Environmental Economic Value on Planning of Coal Mining*), in CV Mada Perkasa Kota Samarinda Kalimantan, uploaded on 5 May, 2015, at 5.30.

Act No. 32 of 2009 has been enacted since October 3, 2009, while the Articles mentioned above in the formation of Government Regulation as its implementing regulations have not been made until now so that the making of Government Regulation has a delay of 6 (Six) years, then the Government Regulation which regulates environmental economic instruments became one of the causes for controllers in the setting of environmental functions, so that it becomes a necessity in a fast time to make a Government Regulation on environmental economic instruments. It is intended to:[5]

1. Integrating the economic value of the environment into planning and budgeting of the national development and economic activities;
2. Ensuring the availability of funds for the recovery and prevention of pollution and / or environmental damage; and
3. Changing the mindset and behavior of stakeholders to take into account the economic value of the environment into patterns of sustainable production and consumption.

Instrument of development planning and economic activities in relation to the environment, it must be done the preparation of the balance of both living and non-living natural resources and environment in every area of Regency / Municipality and Province, then the licensing process should be strict so that natural resources is maintained sustainably and not damage the environment.

For example, some regencies / cities in Indonesia, among others, in the Territory of Papua, Kalimantan, Sumatra, Sulawesi, West and East Nusa Tenggara, Nangro Aceh Darussalam, Java, each of which has a richness of non-living natural resources that are not renewable have suffered a tremendous environmental damage, occurred prolonged social conflicts such as drilling of PT. Lapindo Brantas in East Java, in addition excessive mining exploration conducted by PT. Newmont Nusa Tenggara, then an extension contract by the Government of Indonesia with PT. Freeport in Papua. This shows that the government does not have a strategic planning in managing natural resources, mostly dominated by foreign Corporation and it is necessary to manage the mining well and right in order to provide maximum benefits for the prosperity of the people of Indonesia. As mandated in Article 33 of the Constitution of the Republic of Indonesia, it states that the land, water and natural resources contained therein shall be controlled by the State and used for the benefit and prosperity of the people.

From exploration activities of natural resource in relation to economic development it does not affect the economic value of community significantly or promote the local area but it is adding a suffer of community poverty, causing disease, and damaging the quality of the environment that can not be returned into original condition. It is actually the duty of the government that any business activity that has an effect, then the Minister may carry out or assign an independent third party to audit the environment on expense of the responsible person for a business and / or activity, and the Minister announces the result of audit on the environment.

Therefore from some economic activities that have been done it does not give much economic prosperity for local people, but the environment is neglected due to any business activities conducted primarily only aims to pursue maximum profits, but funds for the maintenance or restoration of the environment if occurred a damage are not budgeted by responsible person for the business / activity. As in the activities of PT. Newmont Nusa Tenggara (NNT) has continued until today. Starting from tailings disposal activity to Senunu Bay, pollution of River of Sekongkang Sejorong Tongo, opening 198.65 hectares of protected forest, until excited case of divestiture of PT. Newmont Nusa Tenggara. The mining activities of PT. Newmont Nusa Tenggara has been operating for years, but poverty and malnutrition have overshadowed the citizens. The existence of PT. Newmont Nusa Tenggara, does not give added value (economic value) to poverty reduction. Precisely, Province of West Nusa Tenggara where PT. Newmont Nusa Tenggara is situated, is one of the poorest provinces in Indonesia with as much as 21.55%.[6]

Factually with such condition, the state has a responsibility in environmental protection as the provisions of Article 2 explanation of Act No. 32 of 2009 states:

a. State guarantees the utilization of natural resources will provide the maximum benefit for the welfare and quality of life of the people, for the present generation and future generation;
b. State guarantees citizens' rights to good and healthy environment
c. State prevents the utilization of natural resources resulting natural pollution and / or environmental damage.

From the provisions of that Article, the Government is obliged to provide guarantee for its citizens against all information relating to the environment continuously with the aim to support the implementation of the protection of life in a sustainability

[5] Exposure of the Assistant Deputy of Environmental Economy of Deputy of Ministry of Environtmental Affairs, *Environmental Management presented* at the meeting of Public Consultation in Gedung Manggala Wanabakti, Jakarta, January 2015 , uploaded http://apki.net/wp-content/uploads/2015/01/Paparan-ASDEP-EKLING-22-Jan-2015.pdf, on 6 January 2015, at 12.45

[6] http://borneomagazine.com/item/NEWS-*Dampak-Lingkungan-Yang-Diakibatkan*-PT-Newmont-Nusa-Tenggara.html, uploaded on 6 July 2015, at 15.00.

2. *Principles of Local Wisdom As One of the Environmental Protection Efforts in Indonesia*

The principle of local wisdom has been established in Article 2 letter L Act No. 32 of 2009, from the provisions of Article 2 it means that the protection and management of the environment should pay attention to the noble values that apply in the community life. It means that the principle is a general truth and should be implemented, so that the principle of local wisdom when linked in the context of environmental protection, means not allowed to leave the customs of local communities which have embraced and implemented by hereditary (continual) from generation to generation even if the rules were not written.

An important event associated with the recognition and strengthening of customary law society departs from the result of Earth Summit in Rio de Janeiro in 1992 with the issuance of the Rio Declaration on Environment and Development (1992). In 22nd Principle states that common law communities have an important role in environmental management and development because of their knowledge and traditional practices. Therefore, the State must recognize and fully support the entity, culture and their interests as well as provide an opportunity to actively participate in the achievement of sustainable development.[7]

Local wisdom in each region of Indonesia in the concern for the environment has a different wisdom, such as, for example, Community of Muna have environmental wisdom which holds that the human life is tied to the environment as a system of macrocosm. Flora and fauna nature is seen as part of a system of macrocosm together with humans. Other natures around humans also have rights and obligations as well as their own roles. Therefore, human beings have to make friends with other life and should not be arbitrary to environmental nature. For that case, the Community of Muna has their own values to set pattern of relationship between human and its nature that are arranged in customary norms. The Community of Muna is banned arbitrary to the environment because it violated customary norms. Trees should not be felled without any rules because there is supernatural life in the form of spirits. Similarly, with animals and certain objects, one of which is what is called KASASI that is both forest areas that have been processed or not, are prohibited to be processed or reprocessed except on the permission of SARANO WITE (Central Government of the Kingdom). The goal is to protect the habitat of wildlife such as deer, buffalo, cows, partridges and bees. People are very afraid of breaking the norms of this tradition because the forest is considered to have spiritual powers.[8]

Furthermore, local wisdom in Cimanggu is one of the villages located in the Village of Gunung Malang.[9] The village has local wisdom that is used to preserve the environment and increase agricultural production. Local wisdom or may be called traditional wisdom is a knowledge that are owned hereditary by farmers in processing their environment, that is, a knowledge of the behavior as a result of their adaptation to the environment that has positive implications for the environmental preservation.[10]

Local wisdom in Village of Cimanggu is a calendar system in agriculture, for example, the growing season calendar. This calendar system is a Sundanese dating system which is seen in its determination of the approximate position of the moon. For example, planting time is done during the prior month of Ramadan and is calculated from the first of Muharam. In the year of 1960s, Gunung Malang Villagers held a separate culture in processing their agricultural field. They did not know the conventional calculation month, but only to know the calculation of the months of Islam, and believed that there were only 30 days in a month. In determining the timing of planting calendar farmers generally use the moon as a guide, when the moon looks brighter light means showing the early date (date 1-10), first of the date set when the moon is directly overhead and when the moon is dark indicating ending month (date 17-30). Farmers in the Village of Gunung Malang have some kind of "inner knowledge" that can indicate when to plant, and when not to plant. When it is time not to plant, it means that all farmers should not plant simultaneously, if there is someone plants, it commonly occurs "catastrophe" as the farm affected by certain pests, or do not thrive.

Then local wisdom carried out by Community of Colo, District Dawe, Kudus, Central Java in maintaining the environment, through which they profess a religious approach, covering the earth alms tradition and Kupatan and there is also a tradition of utilizing forest products trust in the cycads tree. [11]The role of environmental protection carried out by the Community of Colo Village, there is economistic, that is, activities that focus on the environmental movement associated with the local wisdom related to the belief of local communities beyond the power of human who helped preserve the environment. The belief

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[7] Kearifan Lokal Masyarakat Adat Maluku Dalam Perlindungan dan Pengelolaan Lingkungan Hidup *(Local Wisdom of Custom Community of Maluku in the Protection and Management of the Environment)*, by Popi Tuhulele, uploaded on 6 July 2015 at 10.09, http://fhukum.unpatti.ac.id/artikel/lingkungan-hidup-pengelolaan-sda-dan-perlindungan-hak-hak-adat.

[8] https://sejarahwuna.wordpress.com/sejarah-kerajaan-muna/masyarakat-muna-memiliki-kearifan-lingkungan-yang-memandang-bahwa-dalam-hidup-ini-manusia-terikat-dengan-lingkungannya-sebagai-suatu-system-makrokosmos-alam-flora-dan-fauna-dipandang-sebagai-bagian-d/, uploaded on 6 July 2015, at 23.37.

[9] http://rikar08.student.ipb.ac.id/2010/06/19/kearifan-lokal-terhadap-pemeliharaan-lingkungan-hidup-kampung-cimanggu-desa-gunung-malang-kecamatan-tenjolaya-kabupaten-bogor/(et al)

[10] Lamech dan Prioyulianto Hutama. 1995 (et al), *Kearifan Tradisional Masyarakat Pedesaan Daerah Irian Jaya Di Kabupaten Jayapura dan Biak Numfor.*

[11] Hasil penelitian dilakukan oleh Hendro Ari Wibowo, Wasino dan Dewi Lisnoor Setyowati, uploaded on 7 July 2015 at 08.30 dari http://journal.unnes.ac.id/sju/index.php/jess/article/view/79/71.

of Colo Village about the flora in the area of Muria is their belief in the cycads tree, Meranti tree and Parijoto fruit are believed to have healing properties, as well as earth alms ceremony as a means of communication with nature.

In the area of Province of Banten, known to indigenous people of Baduy Tribe located in the Village of Kanekes, District of Leuwidamar, Regency of Lebak, in environmental conservation efforts undertaken by the Baduy community is still very dependent on and always keep the natural surroundings. Wisdom of local communities in managing natural resources, among others are done by the division of the territory into three (3) zones namely; reuma zone (settlements), heuna zone (moor and fief) and leuweung kolot zone (old forest). Baduy Community has a synergistic integrity in creating a sustainable life. Baduy view is relatively the same on social relations, economic, cultural, and environmental management. Customs as part of local wisdom are held very firmly by Baduy and a self defence in facing of modernization included in conserving the environment.[12]

From all the examples of local wisdom above has been shown us that the behavior and local values done every day by a particular local community groups (homogeneous) always abiding with the advices or watchword of his ancestors, because local wisdom is always been reflected in their habit of living in a society for a long time and hereditary and good to be maintained. Therefore it is naturally that the State of Indonesia accommodates local wisdom in an article in Act No. 32 of 2009 as Article 1 of general provisions to set local wisdom. In the history of human civilization, each country has the local wisdom, including Indonesia, which has tribes up of 1,128 scattered in the territory of the Republic of Indonesia[13] and each tribe has local wisdom in preserving the environment, but because of the development of modernization and technological era , then the local wisdom has shifted, partly due to the example of marriage between one tribe to another, then out of the local community, the region that his ancestors became the government's development projects, as well as private projects (construction industry), illegal logging in the forest region, as well as the examples above so that local people lose with the financiers, and finally local wisdom is increasingly lost.

Therefore, when the economic value is confronted with local knowledge has always been a contradiction, on the one side local wisdom hinder economic development, while on the other side the uncontrolled development of the economic value shifted local wisdom and damaged the environment. Basically if local wisdom is internalized, it will give perspective to mankind to do well and behave to care of nature for the survival of humans and other living things on the earth. Thus local wisdom has a good value of history and should be maintained from generation to generation in a certain community and situation to be the role models of the next generation.

Finally local wisdom will last when in the use of language, speech or communication, interaction, and community are fixed in a unity despite a pressure from outside the community.

CONCLUSIONS

1. The activities of economic value of natural resources cannot guarantee the life of the local community even it is otherwise the environment becomes damaged because in doing economic activities of natural resources, environmental audits and monitoring are not conducted openly and periodically as well as the principle of responsibility of the state that the utilization of natural resources will provide maximum benefits for the welfare and life quality of the people.
2. Basically, the principle of local wisdom is one of the strongholds for maintaining the economic value of natural resources as environmental protection efforts in Indonesia. With local wisdom in each region in Indonesia if it is done continuously and well it undoubtedly give enlightenment to the people to do well and behave to care for the environment and nature for the survival of humans and other living things on the earth

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Human Trafficking in South Asia: Application of Anti Trafficking Laws and The States' Duty to Protect Human Rights of The Victims

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ABSTRACT

Human trafficking, a neo-slave trade, is a common menace in South Asia. It means the illegal transfer of one person from one place to another place. Thousands of people have been subjected to cross-border trafficking over the years from less developed countries, mostly from Bangladesh and Myanmar, to comparatively developed countries like Indonesia, Thailand, and Malaysia by sea. Many of them died en-route due to starvation and torture. Many died in high sea being evicted by the coast guards from the territorial zones of the countries where the boats, carrying the victims of human trafficking, are destined to. Thousands are also trafficked to India, Pakistan and the countries of Middle- East. The victims are being subjected to sexual slavery, prostitution and forced labour. There seems to be some conflicts between the strict enforcement of the laws on prevention of unlawful entry by the foreigners in the countries where they are being illegally transferred and eviction of them therefrom and the international laws relating to upholding and protecting the human rights of every human being on earth. The human rights law have universal application. Almost all the member states of the United Nations that adopted Universal Declaration of Human Rights, 1948 and other human rights instrument like the ICCPR are promise-bound to protect some human rights of every human being irrespective of colour, race, sex, nationality and place of birth. This paper tries to understand the causes of alarming growth of human trafficking in this region. The study analyses the international conventions, regional conventions, and the domestic laws of the countries that deal with human trafficking. The study will discuss the duties of the concerned states under the international laws to protect the human rights of the victims of human trafficking especially the right to life and the right not be compelled to do any force labour.

Keywords: Trafficking, Prevention, Human Rights, Protection.

Introduction

Human trafficking is a 'social evil' that seems to be growing at an alarming rate throughout the world. This practice results in unimaginable human suffering and represents one of the most important human rights violations of our times, resulting in a form of 'Modern Slavery'. South Asia is one of the most vulnerable regions for trafficking because of its large population, large-scale rural-urban migration, the large population living in conditions of chronic poverty, and recurrent natural disasters. All these factors make people vulnerable and an easy target of traffickers. During distress situation, lack of shelter for girls is a great problem.

1.1 Definition

The word 'trafficking' means to transfer from one place to another. If the term is used in reference to women and children, the phrase, 'trafficking women and children' means illegal transfer of women and children from one place to another. Human trafficking is a complex phenomenon, resulting from the involvement of diverse national and transnational factors. Although trafficking in persons is often identified as a part of organized and/or cross-border crime, it also occurs within national boundaries - called internal trafficking. Human trafficking, whether internal or cross-border is inextricably linked with forced, fraudulent or involuntary migration/movement of people, and the end-object of this crime is sexual, labor, or other forms of exploitation. As such, unsafe/irregular migration always runs the risk of human trafficking. Human trafficking is, however, different from human smuggling, which involves international travel/movement and in which the smuggled migrant is not forcibly held once he/she reaches the destination country.

1.2 Development of International Convention against Human Trafficking

International pressure to address trafficking in women and children became a growing part of the social Reform movement in the United States and Europe during the late 19th century. International legislation against the trafficking of women and children began with the ratification of an international convention in 1901, followed by ratification of a second convention in 1904. These conventions were ratified by 34 countries. The first formal international research into the scope of the problem was funded by American philanthropist John D. Rockefeller, through the American Bureau of Social Hygiene. In 1923, a committee from the bureau was tasked with investigating trafficking in 28 countries, interviewing approximately 5,000 informants and analyzing information over two years before issuing its final report. This was the first formal report on trafficking in women and children to be issued by an official body (Nitzka Bercovitch, 1999).[1]

The League of Nations, formed in 1919, took over as the international coordinator of legislation intended to end the trafficking of women and children. An international Conference on White Slave Traffic was held in 1921, attended by the 34 countries that ratified the 1901 and 1904 conventions.[2] Another convention against trafficking was ratified by League members in 1922, and like the 1904 international convention, this one required ratifying countries to submit annual reports on their progress in tackling the problem. Compliance with this requirement was not complete, although it gradually improved: in 1924, approximately 34% of the member countries submitted reports as required, which rose to 46% in 1929, 52% in 1933, and 61% in 1934.[3] The 1921 International Convention for the Suppression of the Traffic in Women and Children was sponsored by the League of Nations.
In 1949, the first international protocol dealing with sex slavery was the 1949 UN Convention for the Suppression of the Traffic in Persons and Exploitation of Prostitution of Others. This convention followed the abolitionist idea of sex trafficking as incompatible with the dignity and worth of the human. Serving as a model for future legislation, the 1949 UN Convention was not ratified by every country, but came into force in 1951. These early efforts led to the 2000 Convention against Transnational Organized Crime, mentioned above. These instruments contain the elements of the current international law on trafficking in humans.
The United Nations Global Initiative to Fight Human Trafficking (UN.GIFT) was conceived to promote the global fight on human trafficking, on the basis of international agreements reached at the UN. UN.GIFT was launched in March 2007.

1.3 An Overview of Human Trafficking in South Asia

Women and children are sold, traded, and exchanged for sexual slavery and prostitution, and bonded labor across borders, such as from Bangladesh to India, Pakistan, and the Middle East; from Nepal to India; from Burma to Thailand; from Vietnam to Kampuchea; and from the Philippines to Japan.

According to Government of Bangladesh estimates, in 1996-97, 227,584 Bangladeshi's were legally employed overseas.[4] If data for illegal migration is difficult to gather, statistics for trafficking are even more intractable. Despite this however, figures have been put forward by several sources (government and NGO) on the victims of trafficking for Bangladesh. Some of this data is presented below:

- 200, 000 women and children are estimated to be trafficked to the Middle East in the last two decades. 200-400 women and children are estimated to be smuggled out each month to Pakistan, and in all 200,000 women have been trafficked to Pakistan over the last ten years.[5]
- It is estimated that 4,700 children have been rescued from traffickers in the past five years, and that 3,500 girls have been trafficked out of Cox's Bazar over the past ten years.[6]
- It is estimated that 200,000 Bangladeshi children work in the brothels of Pakistan.[7]
- It is estimated that there are between 150,000 and 200,000 street children in Bangladesh. They are engaged in numerous low-range remunerative activities as well as petty crime, substance abuse and prostitution.[8]

According to Article 34(1) of the Constitution of Bangladesh, "All forms of forced labor are prohibited and any contravention of this provision shall be an offense punishable in accordance with law." Other available statutes with direct implication to trafficking in women and children are: (1) The Penal Code 1860, (2) The Children (Pledging of Labor) Act 1933, (3) The Suppression of Immoral Traffic Act, 1933, (4) The Children Act, 1974, (5) The Cruelty to Women (Deterrent Punishment) Ordinance, 1983, (6) The Women and Children Repression (Special Provision) Act, 1995 (Resistance Against Trafficking in Women and Children in South Asia, 1997), and (7) Women and Children Repression Prevention Act, 2000.

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After the independence from British colonization in 1947, the Indian subcontinent was divided into two countries: India and Pakistan. Pakistan had two distinct geographic regions: East Pakistan and West Pakistan separated by 1,200 miles. Thus, many cross-border families were formed. During separation, many Muslim families from India migrated to Pakistan, particularly to East Pakistan. Again, many Hindus living in East Pakistan moved to India. On both sides of the newly-drawn border between India and Pakistan and India and Bangladesh, there are many 'enclaves'.[9] These enclaves are pockets of land belonging to a nation other than that which surrounds them. There are 111 Indian enclaves in Bangladesh and 51 enclaves of Bangladesh in India. Research carried out by the BNWLA has shown that these enclaves have been used as recruitment and collection sites by traffickers. [10]

It has been reported that there are about one million 'undocumented' Bangladesh women in Pakistan. A significant number of who are believed to have been trafficked. According to the UNIFEM, about 300,000 Bangladeshi children have been trafficked to brothels in India over a period of time.[11]

Over the last five years at least 13,220 children are reported as being trafficked out of the country and it was possible to rescue only 4,700 of them. It is believed that about 4,500 women and children from Bangladesh are trafficked to Pakistan annually. On the other hand, Bangladesh boys in the ages between 4-12 years are trafficked for camel racing in the Gulf; sexual exploitation of these boys by the employers in not uncommon.[12]

A recent Amnesty International report on Malaysia indicated Bangladeshis spend more than three times the amount of recruitment fees paid by other migrant workers recruited for work in Malaysia. NGOs report many Bangladeshi migrant laborers are victims of recruitment fraud, including exorbitant recruitment fees often accompanied by fraudulent representation of terms of employment.[13]

In Bangladesh, the procurement of women and children for the purpose of trafficking occurs in diverse methods. One of these practices is procuring young girls through marriage. For this purpose, men are being employed outside the country. They come back to their village homes to get married. After marriage, the young wife accompanies the husband to his place of work and no trace could be found of these young girls.[14]

Another way adopted by the traffickers entices young girls that they would provide them with jobs and better prospects in other countries. "What is alarming is that a large number of garment factories are now acting as recruiting stations for the traffickers".[15] Third method, sometimes, parents also sell their children to the traffickers on account of poverty and hunger. Kidnapping is another way that is being practiced for the procurement of women and children for trafficking.[16]

Bangladesh, India, Myanmar, Pakistan, Sri Lanka prohibit the selling and buying of a child under the age of 18 for prostitution in Articles 372 and 373 of their Penal Code. Prescribed penalties under these sex trafficking statutes ranges from 10 years' imprisonment to the death sentence. The most common sentence imposed on convicted sex traffickers is life imprisonment.
These penalties are very stringent and commensurate with those prescribed for other serious crimes, such as rape. Article 374 of Bangladesh, India, Myanmar, Pakistan, Sri Lanka's Penal Code prohibit forced labor, but the prescribed penalties of imprisonment for up to one year or a fine are not sufficiently stringent.[17]

Its high-profit, low-penalty-nature makes human trafficking attractive to criminal gangs. The crime of trafficking is mainly committed against persons who are socially and economically vulnerable. Economic underdevelopment generates huge exodus of men and women to affluent countries. As far as trafficking in women and children is concerned, it necessarily involves a gender dimension and a negative consequence on the rights of women and children as almost all the women-victims are trafficked for the immoral purposes of flesh trade or child-victims are sold as suppliers of human organs.[18]

3 Consequences of Trafficking

Trafficking is a violation of human rights, and has various consequences at the individual, family, community and country levels. The trafficked women and children are forced and sold as sex workers, domestic workers, laborers and other type of exploitative works. The specific consequences are stated below.

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9 Enclaves are pockets of land belonging to a nation other than that which surrounds them. There are 111 Indian enclaves in Bangladesh and 51 enclaves of Bangladesh in India.

10 BNWLA stands for Bangladesh National Women Lawyers Association.

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18 South Asia in Action: Preventing and Responding to Child Trafficking, Summary Report, Advance Version, UNICEF, Florence: August, 2008.

1.1 Violations of Human rights

The main consequence of trafficking is the violation of basic human rights of women and children. A few of the fundamental human rights of the trafficked people that are risked and violated are discussed below.

1.1.1 Right to life in a secured environment

Article 6 of ICCPR conform the right to life and survival and Article 17 assures the right to privacy and its' protection by the law. According to the Article 9 of ICESCR, everyone has the right to social security, including social insurance. In the Article 11 of Bangladesh's constitution it is stated that "the Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured." Human trafficking is the violation of all this rights of a human being.

1.1.2 Right to Health

Victims of trafficking work under conditions which are hazardous to their mental and physical health. The trafficking of young women into prostitution has a formidable impact on HIV transmission. Studies have shown that brothel sex workers are most likely to become infected during the first six months of work. Another study reported that about 80% of the street child prostitutes were suffering from problems relating to reproductive organs, such as vaginal oozing, vaginal itching. Children and women trafficked for purposes other than commercial sex, for instance, domestic and industrial work may also have an increased risk of HIV infection because of their exposure to instances of forced sex and perhaps also the potential initiation into substance misuse, including contact with intravenous drug users. The provision of health care for these women and children is often sporadic at best. Serious illnesses often go untreated. Unwanted pregnancies and high-risk abortions are also common and may have lethal consequences.[19]

1.2 Legal effects

The legal consequences for trafficked persons vary depending on the legislation in the country of destination and the country of origin. In the vast majority of destination countries, trafficking is primarily seen in terms of illegal migration and prostitution. Since trafficked persons rarely have either travel documents or residence permits, the law enforcement authorities focus on the victims rather than the traffickers. Victims may be arrested and deported while the perpetrators go unpunished and continue to operate.[20]

1.3 Communal effects

The effects of trafficking in persons on society have not yet been sufficiently analyzed. However, there seem to be negative repercussions. Trafficking manifests and perpetuates patriarchal attitudes and behavior and undermines efforts to promote gender equality and eradicate the discrimination of women and children. Trafficking in persons is also closely intertwined with other criminal activities such as drug dealing, illegal gambling and money laundering.

The specific consequences are given below:

I. The young women are being victim of deception with the false hope of employment and marriage without dowry and ultimately many of them are involve in sex trade.
II. Many of the women and children are compelled to forced marriage, forced begging, camel jockeying due to coercion.
III. Women and children are subject of forced labor and slavery like practices.
IV. Many children are being victim of debt bondage labor.
V. Probability of HIV/AIDS due to expansion of sex industry.
VI. In many times trafficked victims are killed for organ harvesting.[21]

1.4 Social effects

Trafficking into the sex industry leads to stigmatization of the victims and their families. This makes it hard for the victims to return to their families, who may not welcome them. It may also be hard to get acceptance and support from the community at large. It may be even harder if the victim is believed to suffer from HIV.[22]

2. Anti-trafficking arrangements in South Asian countries

2.1 Prevention

[19] Trafficking of Women and Children in Bangladesh: An Overview, ICDDR,B Special Publication No. 111, Dhaka: 2001.
[20] *Ibid.*
[21] Trafficking of Women and Children in Bangladesh: An Overview, ICDDR,B Special Publication No. 111, Dhaka: 2001.
[22] *Ibid.*

Trafficking in persons particularly in women or children is the worst form of human rights violations and a heinous crime committed by the organized syndicate. This is a billion-dollar enterprise next only to narcotic drugs and arms trafficking. Trafficking in women and children is not a new phenomenon either within the South Asian region or globally but from all the given evidence it appears that trafficking in women and children witnessed alarming escalation in recent years. Bangladesh has been marked by its role as "sending" country or country of origin.[23]

South Asian countries like Afghanistan, Bangladesh, Bhutan, India, Maldives, Myanmar, Nepal, Pakistan and Sri Lank have signed following International Instruments. The governments of those countries are pressured by the international community to take necessary steps in order to prevent Human Trafficking:

I. The Government of Afghanistan, Bangladesh, Bhutan, India, Maldives, Myanmar, Nepal, Pakistan and Sri Lanka have ratified the Conventions on the Rights of the Child (CRC) in the early 1990s.
II. The governments of Afghanistan, Bangladesh, Bhutan, India, Maldives, Myanmar, Nepal, Pakistan and Sri Lanka have ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), 1981.
III. The Afghanistan and Bangladesh have not ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2002. Besides this, Bhutan, India, Maldives, Myanmar, Nepal, Pakistan and Sri Lanka have ratified this Protocol.
IV. South Asian countries are signed and ratified the South Asian Association for Regional Cooperation (SAARC) Convention on Prevention and Combating Trafficking in Women and Children for Prostitution.
V. The Government of Bangladesh is reviewing the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons; Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime 2000, which calls for the prevention, suppression and punishment for trafficking in people.[24] Afghanistan, India, Maldives, Nepal, Pakistan, Sri Lanka have ratified the Convention on United Nations Convention against Transnational Organized Crime.
VI. Afghanistan, India, Sri Lanka have ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.
VII. Bangladesh, India, Maldives, Nepal, Pakistan, Sri Lanka have ratified ILO Forced Labor Convention, 1930.
VIII. Afghanistan, Bangladesh, India, Maldives, Nepal, Pakistan and Sri Lanka have ratified Abolition of Forced Labor Convention, 1957.
IX. Afghanistan, Bangladesh, India, Maldives, Nepal, Pakistan and Sri Lanka have ratified Worst Forms of Child Labor Convention, 1999.
X. Afghanistan, Bhutan, India, Maldives, Myanmar, Nepal, Pakistan don't ratify the International Convention on the Protection of the Rights of All Migrant Workers and their families, 2003. On the other hand Bangladesh, Sri Lanka ratified this Convention.

4.2 Protection

4.2.1 Rescue and Recovery of Trafficked Persons

As mentioned earlier, the law enforcing agencies, like Police, BGB, BSF, Pakistan Rangers, Nasaka and Coast Guards of those countries have been given strict instructions to rescue and recover the trafficked persons and apprehend the traffickers. The Deputy Commissioners and the Superintendents of Police have also been tasked to rescue and recover the trafficked persons. Because of the measures put in place, 543 trafficked persons were recovered from 15 June 2004 to 15 February 2007. Of them, 257 are women and 261 are children.[25]

4.2.2 Rehabilitation/Reintegration of Recovered Persons

The members of law enforcing agencies, the Deputy Commissioners, the Superintends of Police and NGOs have been tasked to rehabilitate the recovered trafficked persons through social reintegration process. The recovered trafficked persons are rehabilitated in the following two ways, (i) the trafficked persons are sent to their parents or guardian after due verification and proper documentation and (ii) if parents or guardians are not found immediately, the trafficked persons are sent to the nearest government or NGO-run safe homes (shelter). Some initiatives have been taken by respective GO / NGO in their safe homes for the welfare of the trafficked persons, while waiting for the reintegration with their family/ society.

[23] Responses to Human Trafficking in Bangladesh, India, Nepal and Sri Lanka, United Nations Office on Drugs and Crimes, Regional Office for South Asia, New Delhi: 2011.
[24] National Plan of Action for Combating Human Trafficking 2012 – 2014, Ministry of Home Affairs, Government of People's Republic of Bangladesh, Dhaka: January, 2012.
[25] National Plan of Action for Combating Human Trafficking 2012 – 2014, Ministry of Home Affairs, Government of People's Republic of Bangladesh, Dhaka: January, 2012.

These are physical and mental treatment, psychosocial counseling, shelter, food, clothing, and legal aid, training on skills development for economic and social reintegration.

Of the recovered victims during 15 June 2004 to 15 February 2007, (a) 484 persons were rehabilitated by being sent to their parents and guardians after proper verification and documentation, (b) 11 persons were sent to the safe homes of the Ministry of Social Welfare and the Ministry of Women and Children Affairs, and (c) 39 persons were sent to the safe homes of NGOs.[26]

4.2.3 Repatriation of Trafficked Persons

When any information regarding trafficked victim is received through foreign mission of Bangladesh or other organizations including NOGs, the Ministry of Home Affairs takes necessary steps for quick and smooth repatriation of such victim. Recently, UNICEF-Bangladesh has taken initiatives to hold a bi-lateral meeting between India and Bangladesh for repatriating the Bangladeshi children who were trafficked in India.[27]

4.2.4 Follow up of Recovered and Rehabilitated Trafficked People

Due care has been taken to see that trafficked persons once recovered and rehabilitated do not become unfortunate victims of trafficking again nor do they feel neglected or be left without attention and care. The Deputy Commissioners (DCs), Superintendents of Police (SPs), the Officers in Charge of Police Stations (OCs), representatives of NGOs and different committees at various administrative units are involved in the monitoring of rescue, repatriation, rehabilitation and reintegration. They have been advised to regularly monitor the condition of recovered and rehabilitated trafficked persons and report back to MOHA. A Community Care Committee for Reintegrated Camel Jockeys has also been formed to prevent them from being re- trafficked, to facilitate their education, and to be vigilant about the social and economic security of the child.[28]

4.3 Prosecution

4.3.1 Legal Reforms

Afghanistan, Bangladesh, India, Maldives, Nepal, Pakistan, Sri Lanka have several laws governing children's and women's rights but they are not consolidated in one statute. Instead, they are scattered in various laws and statutes, such as Constitutional provisions, the Penal Code. South Asian countries have made significant and noteworthy changes in their legal provisions to address the issue of trafficking, exploitation and violence against women and children.

4.3.1.1 Penal Code, 1860 with Amendments to Section 366A and 366B in 2001???

The Amendment of section 366 now prohibits inducing a girl under 18 years of age to go from any place or to do any act with the intent that she will be forced to or seduced into having illicit intercourse. Section 366B prohibits imposing a girl below 21 years of age with the intent that she will be forced or seduced into having illicit intercourse. [29]

?4.3.1.2 Cruelty to Women (Deterrent Punishment) Ordinance, 1983

The Ordinance contains specific penalties for trafficking in women with a provision of imprisonment that could extend up to 14 years.[30]

?4.3.1.3 Women and Children Repression Prevention Act, 1995 (Special Provision)

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26 National Plan of Action for Combating Human Trafficking 2012 – 2014, Ministry of Home Affairs, Government of People's Republic of Bangladesh, Dhaka: January, 2012.

27 *Ibid.*

28 National Plan of Action for Combating Human Trafficking 2012 – 2014, Ministry of Home Affairs, Government of People's Republic of Bangladesh, Dhaka: January, 2012.

29 National Plan of Action for Combating Human Trafficking 2012 – 2014, Ministry of Home Affairs, Government of People's Republic of Bangladesh, Dhaka: January, 2012.

30 *Ibid.*

The Women and Children Oppression Act of 1995 (Special Provision), is a modification of the 1983 Cruelty to Women (Deterrent Punishment) Ordinance. In the new Act, crimes related to children are tied to those related to women. This Act specifies (section 8) that, trafficking a woman for prostitution or unlawful or immoral purposes or import or export or buying or selling or renting or engaging in any other form of transportation of women, is subject to life imprisonment and fine. Section 9 of this Act stipulates that kidnapping a woman for illegal or immoral purposes such as, prostitution, non-consensual marriage or forced/falsely enticed intercourse is an offence punishable by life imprisonment, 10 years rigorous imprisonment and fine. Section 12 of this Act states, that a person engaged in the act of illegally importing, exporting, buying or selling of a child, keeping a child or transferring a child to another is subject to the death penalty or life imprisonment. Section 14 of to Act makes accomplices to nay of the above offences liable to the same penalties as the principals.[31]

?4.3.1.4 Women and Children Repression Prevention Act, 2000 [Amendment in 2003]

This contains specific penalties for trafficking in women and children with a provision for death sentence or life imprisonment; and Amendment to Women and Children Repression Prevention Act, 2003. In this revision a child has been defined as a person of the age of 16. At present all offences relating to trafficking in women and children are tried under the Act of 2000, as amended up to 2003.

Besides these laws:

- The Suppression of Immoral Trafficking Act, 1993, provides stringent penalties for forcing a girl into prostitution.
- The Anti-terrorism Ordinance of 1992 makes all types of terrorism including the abduction of women and children a punishable offence.
- The Children Act of 1974 and 1933 (Pledging of Labor), seek to protect children from exploitative and hazardous conditions.
- The Penal Code of 1860 contains strict provisions and penalties for kidnapping.

4.3.2 Special Tribunals for prosecuting the cases relating to violence against Women and Children including trafficking

Under Women and Children Repression Prevention Act 2000 (as amended in 2003) 42 Special Tribunals have been established in 33 districts of the country and a special Judge has been posted to each tribunal for trying cases only relating to violence against women and children including trafficking in women and children. 42 Special Public Prosecutors have been designated in 42 tribunals for conducting these cases. A Deputy Attorney General has been designated for dealing with cases in trafficking in women and children at the national level. This initiative was taken to facilitate the quick disposal of cases related to trafficking in women and children.

Conclusion

Trafficking is today a major social and political concern both globally as well as nationally. It has also become the fastest growing criminal enterprise in the world. Bangladesh is a poverty stricken country, human trafficking is increasing at an alarming rate. However, concerted efforts are there on the part of the Government, the international agencies, the donor community and the NGOs to combat the problem. Trafficking in women and children is a violation of several human rights including the very right to life, the right to liberty and human dignity, and security of person, the right to freedom from torture or cruelty, inhuman or degrading treatment, the right to a home and family, the right to education and proper employment, the right to health care and everything that makes for a life with dignity. Trafficking in women and children is on the rise. And yet, the re-addressed mechanisms are woefully inadequate and the way the various governmental agencies have dealt with this gross violation of human rights has left much to be desired.

Rescue is a thorny issue. It has its limitations and unacceptability, largely due to the attitude and violent behavior of the law-enforcing agencies. Although the police rescue many women and children but what happens to them is largely unknown. Often the rescue processes are violent, aggressive, and 'male dominated.' Sometimes the minors are sent either to state-run remand homes or to an NGO shelter. Most are unable to go back to their home because of a whole series of problems, and when they are released, they are again at risk of being picked up by the traffickers. 'Repatriation' means voluntary return to the country of origin of the person subjected to trafficking across international frontiers. The minors have no choice; they have to be taken back to their place of origin, but an adult woman has the right to choose to stay in the country if she so wishes. The choice of women is not even considered, because the focus has always been to protect the interest of State over and above the interest of women. 'Reintegration' means social and economic integration acknowledging her right to self-determination.

Efforts have been made during the last decade by the UN, other international agencies, international and local NGOs and governments to highlight and address the issue by reaffirming policy commitments and strengthening legislation and law enforcement, as well as by supporting the victims. During the last few years a series of broad programs have been developed. Most countries have ratified the UN Convention on the Rights of the Child and the UN Convention on Elimination of All Forms of Discrimination against Women, thereby committing themselves to respect, protect, promote and fulfill the human rights of women and children.

31 *Ibid.*

In South Asia, many international NGOs have incorporated women and children specific programs related specifically to addressing issues of trafficking in their activities. These are: Save the Children Alliance, The Asia Foundation, Plan International, Action Aid, etc. In addition, some major INGOs and donor organizations such as CIDA, DANIDA, SIDA, OXFAM, CEDPA, Population Council, US AID, Red Barnet, etc. are involved in anti-trafficking programs.

Besides, UN Task Force, Office of the High Commissioner for Human Rights (OHCHR), UNDP, UNICEF, UNIFEM, ILO–IPEC supports NGO program, International Organization of Migration (IOM), UNFPA and WHO are involved for combating the trafficking of women and children.

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The Utilization of Fish Landing Port For Fishing Fleet/Fish Transporting Fleet Based on Fishery Law

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ABSTRACT

The problem raised in this study is fish landing ports in Bengkulu city are not used by fishers as they have to according to Fishery Law. Fishers choose to land their catch to their own dockings which make it hardly for officers to record data of the catch which is very important in deciding what to do in maintaining fishery sustainability or in another word to keep their business in fishery long lasts. This study aims to (1) inventory regulations related to the utilization of PPI to see the law in books regarding the requirement to land the catch on PPI; (2) evaluate the constrains that make the law is not effective in the society. The method used is normative juridical, legal resources were collected by documentation study. Then, observation and in-depth interview were conducted by involving informants consisted of fishers and apparatus handling the compliance of this matter, decided by purposive sampling. After that, all the data collected were analyzed with qualitative method and legal interpretation as well. The result shows, first, rules regulating PPI utilization in Bengkulu city is set out in District Regulation No. 11 Year 2011 on Specific Licenses Retribution requiring the owner of the fleets (as a compulsory retribution) to have a business license. Violation of this will subject to administrative and criminal sanction. Second, the law is ineffective because of lack of supervisor of fishery; legal structures that don't have enough legal education resulting in disobedience always be understandable and unpunishable as it should be; culture to disobey the law raised from low law enforcement and lack of knowledge from fishers reflected in data showing only 10 % of owners having licenses. From the results it is strongly suggested that first, government should educate apparatus legal education and fishers as well as the main stake holder in fishery business which can be held with socializations on the importance of fish landing port to sustain their business; then assure that the sanction for those who dissobey have to be enforced.

Key words: Fish landing ports, legal education, law enforcement, sustainable.

Introduction

Indonesia as an archipelagic nation is one of the countries with the largest number of islands (17,508 islands) and of 81,000 km coastline and about 3.1 million km² extensive sea, or 62% of the territory. The vast ocean water is rich in the types and potential of fisheries, where the common fisheries potential of 305 660 tons/year as well as the potential of marine approximately 4 billion USD/year. In 2011, production of Indonesian catching fish production was increase significantly, from5,039,446 tonnes in 2010 to 5,345,729 tons in 2011. By contrast, in Bengkulu it fell from 44.241 tons in 2010 to 39.860 tons in 2011.

Not only been experienced by Indonesia, and by the smallest nations such as the Marshall Islands, Kiribati and Tuvalu, offshore marine resources represent almost the sole opportunity for substantial economic development, it's even also felt by big countries such as France and Spain where they precisely learned from Philippines. The world's fisheries are perceived to be in crisis, leading to livelihood and nutritional insecurity in fisheries-dependent areas of developing countries. In fisheries, Indonesia became the second largest fishing nation after China. Unless accompanied by a sustainable management the increasing intensity of fishing will lead to the extinction of the fish. Consequently, responsible management becomes one of the key answers to the challenges of sustainable fisheries development.

With of 387.6 km ² coastal sea area, no wonder if Bengkulu people tend to choose fishing for a living. This trend is even increased due to the price of fish has increased as well. Fishermen Bengkulu also varies from small to modern categories. Recognizing the fact that many Indonesian people living on coastal areas and into fishing, to accelerate the growth of coastal areas and coastal resources optimally, Government improves facilities in the field of fisheries by building a fishing port which is expected to become a hub of business activities in the fisheries system.

Juridically, fishing port is defined as a place consisting of land and surrounding waters with certain limits as a system of government activities and business activities, used as a fishing boat rests, anchored and/or unloading fish that equipped with the safety of shipping and activities supporting fisheries. It is noted that fish landing is an early stage of a series of activities carried out before the fish finally distributed. Fish landing is an activity of unloading the fish caught from fishing fleets and/or fish carrier fleet at ports listed in fishing license and fish transporting license, both processing and non-processing.

As stated in Fishery Law, fish landing has to be done at fish landing port which is pointed in fishing licence or fish transporting license. This article contains element of coercion, it can be seen from the presence of administrative sanctions-warning, suspension, or revocation of a license if it is not implemented. The nature of force is an element of the law in order to achieve its

goal of order and justice. The law also aims to protect or restrict a person's interests by allocating a power to him for acting in the interests of the power. The allocation is practiced in a measured scope of power.

Fishing activity in Bengkulu city is concentrated in Pulau Baai port, which is located approximately 20 km south of the capital city of Bengkulu. The port is a major port as a supporter of economy in the region supported hiterland areas along the western coast of Sumatra. In addition to Pulsu Baai, there are two other fish landing ports are Pasar Baru and Tapak Padri. In this article, the term used is fishing fleet/fishing transport fleet because fishing fleet can be operated as fish carrier fleet and it is allowed under Act No. 45 Year 2009. Both types of fleets are also burdened with the same obligations in terms of landing fish. Fishing fleets landing on Pulau Baai varied ranging from fishing boats weighing up to 10 GT until 30 GT.

This article does not use the term fisherman boats because this term is not contained in the Fisheries Act. Fisherman is interpreted as anyone whose livelihoods are fishing, so the term is too general to be used in this study. Furthermore, the obligation of fish landings in the port is charged to owners of fishing fleets and fleets transporting fish, not the fishermen.

If connected with law in books, both the fishing fleet and fish carrier fleets owner is subject to the same obligations, which they need to land the fish on the port which has been set in SIPI and/or SIKPI. However, if observed, in the region adjacent to PPI Pasar Baru are small fishing fleets anchored on the shore and on the land side there is outside the PPI we can see fish selling activity. Besides, local fishermen land their fish at their own dock and fish traders buy fish directly to the fleet.

What have been done by local fishermen, unload the fish not at fish landing port, hasn't arose a conflict. However, their practice make it difficult to keep tabs on the amount of fish caught, what type of fish caught, while the data is necessary for the supervision and control of the fisheries source in order to avoid over fishing and illegal fishing. Illegal and unreported fishing contributes to over exploitation of fish stocks and is a hindrance to the recovery of fish populations and ecosystems, will directly affect the degradation of fish resources Bengkulu City.

Because of the difference between law in books and law in practice, it is believed that this study is important to conduct in order to inventory regulations related to the utilization of port and to evaluate the constrains that make the law is not effective in the society.

Method

This study used yuridical normative method with statute approach. The main legal source is in the form of legislation. Interviewed will be conducted with informant from formal legal officers (whose duties and functions related to the fishing port) to complement legal resource. Besides, observation in das sein held at Pulau Baai port by interviewing the owner of the fishing fleets (purposive). Administrative or legal apparatus that includes a formal leader institution leader Marine and Fisheries Agency and the Head Pulau Baai port were asked for information as well. Required legal materials were collected by literature studies conducted with both on line and off line. After that, they were analyzed by using grammatical, historical and authentic interpretation. Interpretation of the results were compared to each other to find the answer of the problems.

Result and discussion

Definition and Classification of Fishing Fleet

Fishing fleet is a unit of fish capture that has important role for fishermen, both for transportation mean from fishing base to fishing ground and as a place to collect the fish. It has features in some aspects as velocity (speed), manuverability, seaworthy, navigable area, soutness of hull structure, engine propulsion, fishing equipment that is different from other common fleets. Development of fishing fleets is very diverse, starts from traditional with only based on the knowledge of heredity, to modern that have taken advantage from technological advances.

Furthermore, shapes and types of fishing fleet are different because of differences in purpose of fishing effort, target species in fishing effort and water conditions. Therefore, the classification of fleets fishing boats also vary both by means of ship propulsion, fleet size, fleet function, group type fishing gears, and according to the scale of fishing effort.

FAO classifies selective fisheries for some countries classify fisheries in Indonesia in two main categories, namely: small-scale fisheries; using a machine outside <10 HP or <6 GT with 1 lane area (4 miles) of coastline, and is using the machine outside <50 HP or <25 GT with 2 lines operating area (4 miles - 8 miles), and (2) which is a large-scale fisheries fishing industry, using the machine in <200 HP or 100 GT area operasi.3 lines and 4 (8 miles-12 miles and / or> 12 miles).

According to the definition of fishing boats set out in Article 1 point 9 of Fisheries Law, the fishing fleets can be a ship, boat or other floating device that is used to fishing, support the fishing operations, fish breeding, transportation of fish, fish processing, training fishery, research/ exploratory fisheries.

Definition of Fishing Port

According to Lobis, the fishing port is a blend region between land and sea, used as the base of fishing activities, has various facilities start from the fish landed untill they are distributed. Detailed of Aspects of the fishing harbor according to the

Directorate General of Fisheries are:

a. Production: Fishing port as a place for fishermen to carry out its production activities, ranging from supplies to meet the needs of fish in the sea untill unloading their catch.

b. Processing: fishing port provide the means necessary to process their catch.

c. Marketing: fishing harbor is the center point of initial collection and marketing of their catch.

From Article 1 point 3 Fisheries Law, it can be noted that the port is used as the governmental activities and business activities fishery. This means the fisheries business activities should remain regulated, supervised, controlled and monitored so that it becomes sustainable fisheries. Thus, the port is expected to be a control of number and type of fish caught, but it can prevent the fishing protected fish, that is the philosophy of why the fishermen have to be landed the port.

Regulations on Utilization of Fish Landing Port (PPI) in City of Bengkulu

a. **Fisheries Law**

Act No. 31 year 2004 stated that Governments organize and conduct training management of fishing ports. Furthermore, Article 48 regulates any person who benefit directly from the resources of fish and the environment in and outside of the fishing ground are charged of fishery retribution and include in non-tax revenues, but small fishermen are not subject to this. The results of the retribution will be used for fisheries development and conservation of fisheries and environmental.

b. Regulation of Ministry of Marine and Fishery Affairs No. 8 Year 2012 on Fishery Harbor

It consists of regulation on fishing port classification; management of fishing ports; requirements and / or technical standards in the planning, development, operation, management, and supervision of fishing ports; working area and the operation of the fishing port and inland waters covering certain parts of the working area and the operation became fishing ports. This of course means to optimize the potential of the existing fishing in waters where the national long-term development of Indonesia in the field of marine geared to improve the welfare of poor families in coastal areas through developing small-scale productive economic activity that is able to provide employment opportunities to the wider poor families.

c. District Regulation of Bengkulu Province No. 2 Year 2012 on Spatial Plan of Bengkulu Province 2012-2032

In this regulation is said that the regulation over fishing port of Bengkulu province refers to spatial planning in order not to collide with each other across sectors, with due regard to sustainability and environmental capacity, and vulnerability to disaster areas. Article 54 states that the structure of one embodiment of a sustainable space is to make improvements to Ocean fishing ports; and Article 57 paragraph (4) establishes the development of fisheries areas is done through the improvement of infrastructure in the fishing port city of Bengkulu, North Bengkulu, Mukomuko district, Seluma District, South Bengkulu District, Kaur, and Central of Bengkulu. Of this regulation can be seen that Bengkulu Local Government has set a plan to make improvements to PPI Baai Island into Ocean Fishery Port.

d. District Regulation of Bengkulu Province No.10 Year 2011 on Retribution of Services

Charges for services are district retribution as a payment of services or of special licenses provided by local government to adhere to the principle of commercial as it can basically also be provided by the private sector. One of them is the fishing harbor services levy. This levy is a payment for services provided by the fishing harbor, is owned and / or managed by the local government. This levy is included in the harbor service, including other facilities in the fishing port are provided, owned and / or managed by the local government. In the case of port, DKP as a working unit that serves as treasurer of the receipt of income levy, while Revenue is coordinator levy harbor. If the cumpolsary levy doens't pay on time or pay less than it should be, the administrative sanctions of 2 % (two percent) interest per month of the levy payable or less paid and charged with using STRD should be fulfill by him. Amount of port land rent is a IDR 40.000 meters per year, while the port warehouse rent is IDR 2.500.000 , - per year.

e. District Regulation of Bengkulu Province No. 11 Year 2011 on Specific Licensing Retribution

Retribution on specific retribution is a district retributin as a payment for services or certain special permits provided and / or administered by District Government for the benefit of private persons or entities. These licenses are given in order to develop, set, control, and supervise of activities, use of space, use of natural resources, goods, infrastructure, facilities, or certain facilities in order to protect the public interest and environment. One type of it is retribution on fisheries bussiness which is the payment for granting license to an individual or entity to perform activities of fishing bussiness and fish breeding. Compulsory levies in this retribution are individuals or entities pursuant to legislation.

Of the legislation that has been mentioned in the use of PPI Pulau Baai, fishing fleet owners as the direct benefit taker of fisheries sources have an obligation to pay a fee for licensing of fishing bussiness. District regulation No.11 Year 2012 on Specific Licensing Retribution regulate that anyone or body doing business both catching and aquaculture fisheries must have licenses, except fishermen and fishing fleets under 5GT. The arrangement of the license is at Department of Marine and Fishery Affairs Province for fleets weighing 30 – 60 GT, and at Departement of Marine and Fishery Affairs City for fleets weighing less than 30GT. Sanctions for fleets owners who do not pay on time or less pay is the payment of interest of 2 % per month of the levy payable or paid or charged.

Implementation of Article 41 of Fishery Law

a. Technical and Operational Criteria Fishery Port

In order to be optimally utilized fishing port must have the technical and operational criteria as stipulated in PERMENKP No. 8 Year 2012 on Fisheries Harbor. PPI Pulau Baai port facilities, breakwater on the right side is not in a good condition. Local pier is broken by earthquake.

b. Obligation to Land the Fish at Fish Landing Port

Article 41 pharagraph (2) of fishery law set out that every fishing fleets and fish transport fleets shall land the fish catch in the fishing port set in SIPI and/or SIKPI. Article 41 A states Every person who owns and / or operates fishing fleets and / or fish transporting fleets that does not load and unload the fish caught in the fishery port will be subject to administrative sanctions such as warnings, license suspension, or revocation of license. The significance of this requirement is that there is a fishing port and the operation of government functions to support activities related to the management and utilization of fish resources and the environment ranging from pre-production, production, management to marketing.

Permen KP No. 8 Year 2012 on Fishery Port explained that the function of government to the fishing port is a function to carry out the arrangement, guidance, control, monitoring and safety and operational safety of fishing boats in the fishing port. Among these functions, the function implementation and monitoring of fish resources is the most crucial government functions relating to the order and discipline of the ship.

c. Control on Fish Landing

From the definition of control by Prayudi, M. Manulang, and Saiful Anwar, knownn that control is intended to support the smooth implementation of activities that can be realized efficiency, effectiveness, and appropriate according to plan and in line with it, to prevent early mistakes in the implementation. The results of monitoring can also be used as the basis for refinement routine plan and subsequent plans.

In the field of fisheries, surveillance has an important role and must be considered because the fish resources (SDI) despite marine renewable natural resources should be managed and utilized rationally, optimally, efficiently, and responsibly to utilize all the functions and benefits of a balanced manner so that it can be capital for sustainable development. Results or income derived from the utilization of fish resources are reinvested to develop the recovery efforts, rehabilitation, and provisioning for the benefit of present and future generations, in order to be optimally utilized for the welfare of the nation.

In accordance with the function and role of the PPI, port manager is required to be able to optimize the management of the facilities available for the benefit of continuity of fishing activities and also be able to adjust the capacity of existing facilities. With the development of fishery production, with services provided, it is expected to increase various aspects of business fishing activities, whether conducted by the fishermen and fish management.

Based on Fishery Law, control of the fish landing provided in Article 66 of Fisheries Law regulating fisheries supervisor assigned to oversee the orderly implementation of the provisions of the legislation in the field of fisheries. Supervisory fisheries referred in Article 66 is the civil servants who works in the field of fisheries are appointed by the minister or a designated official. Supervisory fisheries as referred to in paragraph (1) may be educated to be civil servants Investigators Fisheries. Supervisory fisheries as referred to in paragraph (2) can be defined as the functional supervisor of fisheries officers. The scope of the regulatory region of the fishery under Article 66 B, while the supervisory authority of the fisheries regulated in Article 66 C.
District regulation of Bengkulu Province No.07 Year 2008 on Organization and Administration of District Offices of Bengkulu Province states that in the fisheries sector, the central government through the co-administration can assign tasks to local government. In Bengkulu province the body is Department of Marine and Fisheries which duty is assisting the Governor in carrying out their duties affairs of regional autonomy in the area of marine and fisheries. The scope of the task DKP is all the effort and planning, processing, evaluation and preparation of technical policies and services in the field of marine affairs and fisheries, technical guidance and coordination in the field of marine and fisheries agencies and the scope of cross-district / city, functional position coaching group, coaching Technical Implementation Unit of the Department, namely the port.

In District Regulation of Bengkulu Province No. 11 Year 2011 on Specific Licensing Retribution, the Governor or the competent authority verify compliance of the fulfillment of a levy in order to implement this regulation. The owner have to show the fleets being examined and or lend books and records and other related documents, and give opportunity to the designated officer to enter the place or room that may be necessary and provide assistance in order to smooth the examination.
Fishing fleets owner who do not meet the obligation to pay the retribution and cause financial losses is considered do a violation that punishable imprisonment for a maximum of 3 (three) months or a fine not exceeding three (3) times the amount of levy payable.

d. Governor Regulation on Establishment of Organization, Job Description and Functions of tecnical implementation unit at the Office and Board (UPTD) of Bengkulu Province

One of UPTD Bengkulu province is The Hall of Fishery Port. The Head of the hall duty is to carry out the management and maintenance of fishing ports, providing port services, implementation services and facilities. From the three regulations we see that Government gives the duty to control to the district government. The district followed it up by setting District Regulation No. 7 Year. In the field of fishing ports, the Governor issued the regulation over it. It is clear that in controlling the fish landing, the supervisor from DKP in coordination with the Head of the Port to monitor the activities of unloading by fishing fleets/fish transporting fleet.

e. Fish landing at Pulau Baai Fishery Port

Landing the fish is a must for fishing fleets/fis transporting fleets. Fishing fleets that load and unload the fish is not only form Bengkulu but also from ourside Bengkulu such as from Padang and Sibolga, weighing from 4 to 98 GT GT.
Data from PSDKP unit Bengkulu on departure and arrival of fishing fleets from July 2013 to September 2013 shows that fishing fleets anchored at the port were 90% weighing under 30GT. Furthermore, from the same source is also known from the total of 241 fishing fleets only 2.9% had licenses. Comparing with the previous data, the fishing fleets that were supposed to land at the PPI should be more than that, but the data shows only 70% of the fishing fleets landed there.
There are several reasons of why fishing fleets choose to land and unload on their dock. First, due to the PPI facility defunct, second there is not quite large area. However enumerators of DKP still try to get data on outcomes and types of catches though their reluctance is often seen to be recorded. Head of PSDKP unit explained that the control is difficult because the number of supervisors is fewer (only 4 persons) than the number of fishing fleets going in and out of the port. While Head of the hall fishing port stated that controlling is not a part of his job, but data from supervisor from DKP will be used as report resource.

Conclusion

Rules regulating fish landing port utilization in Bengkulu city is set out in District Regulation No. 11 Year 2011 on Specific Licenses Retribution requiring the owner of the fleets (as a compulsory retribution) to have a business license. Violation of this will subject to administrative and criminal sanction. Second, the law is ineffective because of lack of supervisor of fishery; legal structures that don't have enough legal education resulting in disobedience always be understandable and unpunishable as it should be; culture to disobey the law rose from low law enforcement and lack of knowledge from fishers reflected in data showing only 10 % of owners having licenses. From the results it is strongly suggested that government should educate apparatus legal education and fishers as well, as the main stake holder in fishery business by holding socializations on the importance of PPI to sustain their business. Then, assure that the sanction for those who dissobey have to be enforced.

Recommendation

1. DKP increase the number of fisheries inspectors
2. DKP increase admnistratif surveillance and sanctions in the form of a written warning, revocation of permission to ship owners that do not land the catch in PPI Baai Island.
3. DKP disseminate these rules to the ship owners through counseling forum.
4. Bengkulu Regional Government made a special regulation governing the landing of fish at fish landing ports for ship owners.

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LEGAL RESEARCH METHODS IN EFFORTS TO APPROACH SETTLEMENT LAW OF BIRTH INCONSISTENCY FINANCIAL SERVICES AUTHORITY

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ABSTRACT

FSA Act was enacted on November 22 since mandated by Article 34 of Act No. 23 of 1999 concerning Bank Indonesia showed the tug where the Financial Services Authority which will serve to organize system of regulation and supervision of integrated financial services sector. In the development of Act 23 of 1999 amended by the enactment of Act No. 3 of 2004 is a consequence provisions relating to the supervision of financial services institutions are experiencing changes.There are some inconsistencies between the provisions of law underlying the establishment of the FSA, and the provisions contained in the FSA itself. Basic setting is the 1945 establishment of the FSA and the Bank Indonesia Act. This becomes a problem due to the formation of a juridical FSA will greatly affect the duties of Bank Indonesia, which will ultimately have an impact on the objective of Bank Indonesia to maintain and stabilize the rupiah. Research goal is to find the issue of legal inconsistencies emergence FSA Act. This phase is done by finding the ratio legis and the basic ontological settings associated with the emergence of the FSA Act. The research method is used, among others, that this study is a kind of normative research using secondary data and information sources as material to analyze the problems. The method of data analysis used is qualitative data analysis methods. Legal inconsistencies genesis of FSA Act can be concluded from Contitution of 1945 and The Bank Indonesia Act. This phase is done by finding the ratio legis and the basic ontological settings as sociated with the birth of the FSA from Contitution of 1945 and the Bank Indonesia Act . Legal inconsistencies between Constitution of 1945 and FSA Act can be concluded from the 1945 Constitution that give independence of Bank Indonesia , in the other side FSA Act obscures the meaning of Bank Indonesia independence . Legal inconsistencies between the Bank Indonesia Act and the FSA Act is also apparent from the mandate of the Bank Indonesia Act only divert the supervisory duties of Bank Indonesia while the FSA Act gives authority to FSA itself not only supervising but also making regulation.

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Key words: philosophical, the Financial Services Authority, inconsistencies

Introduction

At first the legal basis for the establishment of a financial services supervisory agency hereinafter in Act No. 21 of 2011 referred to the Financial Services Authority (FSA) is explicitly stated in Article 34 of Act No. 23 of 1999 and its account of Bank Indonesia. In developing of Act No. 23 of 1999 amended by the enactment of Act No. 3 of 2004. Bank Indonesia consequences provisions relating to the supervision of financial services institutions are experiencing changes. Changes in the provisions contained in Act No. 3 of 2004 is compared to Article 34 of Act No. 23, 1999, the period of the establishment of the Financial Services Supervisory Authority. The provisions of Article 34 Act No. 23 of 1999 specifies that the financial services supervisory agency will be set up no later than December 31, 2002. In the new provision is in Article 34 of Act No. 3 , 2004, the provisions regarding the establishment of the Financial Services Supervisory Authority established no later than December 31, 2010. The postponement of the deadline for establishment in Act No. 3 of 2004 was due to the readiness of the human resources and infrastructure of these institutions to accept transfer of bank supervision from Bank Indonesia.
In fact there are legal inconsistencies from birth of FSA .Legal inconsistencies can be sees from Constitution of 1945 and the Bank Indonesia Act . inconsistence of legal form of philosophical clashes between 1945 and FSA Act, and between the Bank Indonesia Act with the FSA Act would interfere implementation tasks and objectives set forth in the Act of FSA. Urgency of this research is legal inconsistencies in the appearance of the FSA Act from 1945 Constitution and the Act of Bank Indonesia . It can not achieve the goal of the birth of the Financial Services Authority. A special purpose of this research is to find a method most appropriate approach to be able to understand and address the issue of legal inconsistencies in the appearance of the FSA Act.The findings were targeted in this study is the first phase is to find the issue of legal inconsistencies genesis of FSA Act . This phase is done by finding the ratio legis and the basic ontological settings associated with the birth of the FSA that the 1945 Constitution and the Act Bank Indonesia**.**

Research design

Literature review

Basic Law of the Financial Services Authority

At first the legal basis for the establishment of a financial services supervisory agency (LPJK) hereinafter in the Act No. 21 of 2011 referred to the Financial Services Authority (FSA) is explicitly stated in Article 34 of the Act No. 23 of 1999 and a description of Bank Indonesia, which reads as follows:

(1) The task of overseeing the Bank will be carried out by the regulator for the financial services sector that is independent and established by law.
(2) The establishment of supervisory board referred to in paragraph (1) shall be implemented no later than December 31, 2002.

Article 34 of the Act no. 23 of 1999 and an explanation of the wills that the Financial Services Supervisory Authority is the desired supervisory institution located outside the government that is both independent and accountable to Finansial Supervisor intitusion and the House of Representatives and remove provisions relating to the implementation of bank supervision tasks in coordination with Bank Indonesia and ask for an explanation and information from the Indonesian bank. Bank Indonesia will conduct macro affairs of supervisory. Financial Services Supervisory Authority carried out no later than December 31, 2002.In the developing of the Act 23 of 1999 amended by the enactment of Law No. 3 Year 2004. Applicabiality consequences provisions relating to the supervision of financial services institutions are experiencing changes. Changes in the provisions contained in Law No. 3 2004 compared to Article 34 of the Act No. 23 of 1999. The period of the establishment of the Financial Services Supervisory Authority. The provisions of Article 34 from the Act No. 23 of 1999 specifies that the financial services supervisory agency will be set up no later than December 31, 2002. In the new provision is in Article 34 from the Act No. 3 of 2004, the provisions regarding the establishment of the Financial Services Supervisory Authority established no later than December 31, 2010. The postponement of the deadline for establishment in the Act No. 3 of 2004 was due to the readiness of the human resources and infrastructure of these institutions to accept transfer of bank supervision from Bank Indonesia.

Legal Inconsistencies genesis of the Act of FSA

Legal inconsitencies between 1945 Contitution and the Act of FSA

The annual session of the People's Consultative Assembly has produced the 1945 Constitution and its amendments. This means that the 1945 Constitution that now there are 1945 who experienced changes that are tailored to the development of community life. 1945 Constitution that there had been used as a norm which is the basis underlying legislation. This means that the regulations under the Contitution of 1945 is not allowed to conflict with laws and regulations thereon. Amendments that occurred in the 1945 Constitution, resulted in changes associated with the presence of the Central Bank stated in Article 23 D of 1945 Constitution and its amendment. The article mentions among other things that the State has the composition of the Central Bank and the position, authority and responsibility Bank Indonesia and independence regulated by law. The provisions of Article 23 D of 1945 Constitusion and its amendment is basically want the presence of an independent central bank intervention regardless of any party in carrying out its duties and getting its purpose. The consequences of the provision for an independent central bank which is outlined in the amendment of the 1945 Constitution and that regulations under the 1945 Constitution and the amendment shall not contradict or should refer to the provisions of the 1945 Constitution and its amendment (Muhammad Nurliff, 2001). Right now in Indonesia there are law that regulates banks, namely the Act No. 10 of 1998 and the Act No. 23 of 1999 concerning Bank Indonesia last by Act No. 6 of 2009 concerning Government Regulation in Act No. 2 of 2008 concerning the Second Amendment Act No. 23 of 1999 concerning Bank Indonesia to become law.

Based on the above can be assessed that the inclusion of an independent central bank that carry out functions in the field of monetary policy is very relevant for the set in the constitution. It is also based on that role and position of the central bank that perform various functions including a function issue and circulate the currency, monetary policy function, the function of regulation and supervision of the banking sector and the smooth functioning of payment systems, must have, or based on a firm foundation. Position the central bank is so strong in the constitution is based on the idea that the role of the Central Bank is very important in the system of administration of the state, therefore it is considered to be very precisely locates the position of an independent central bank in a state constitutional amendment in Indonesia. It is intended that the central bank has a strong foundation in carrying out tasks and objectives for the implementation of the tasks and the achievement of Indonesian bank then of course it brings an enormous influence on the economic fundamentals in Indonesia.
The problems that arise with regard to the inclusion of an independent position of the central bank in 1945 Constitution which has the consequence that the amended regulations governing banks should refer to the 1945 Constitution or the constitution. In other words, whether the legislation in the field of banking today already provide independent position in its provisions. Settings Indonesian bank independence in the 1945 Constitution as amended, of course, gives extraordinary powers to the Bank Indonesia in implementing the tasks and objectives, on the other hand large enough authority, of course, give so great a responsibiality as well to Bank Indonesia in its implementation.

Based on the above description it can be seen that the mandate of Article 34 the Act of Bank Indonesia concerning Bank Indonesia becomes law mandates that the task of supervising the banks will be carried out by the supervisory board for the financial services sector would potentially cause problems for the independence of the central bank is given to the effect that Indonesian banks will be able to achieve its objectives.

Provisions concerning the duties and authority of the FSA will affect the position of Indonesian bank independence as stipulated in the Banking Act.The fact that t unindependence is being factor for Bank Indonesia to be one of the triggers for the banking crisis which continued in the 1997 economic crisis. It appears that Bank Indonesia does not have the authority to authorize the establishment of the bank and also does not have the authority to impose sanctions for banks. It sparked many banks that are not healthy triggering the economic crisis. Unindependence of Bank Indonesia becomes one factor in the Bank Indonesia can not perform his duties properly, so aim to maintain rupiah stability becomes fail . Hence, Bank Indonesia was given independence given to the banking law and the law on Bank Indonesia. Seen from understanding the independence of Bank Indonesia, which basically gives independence in performing its tasks then the FSA Act which gives authority for the FSA to carry out the regulation and supervision of the banking sector, it is in its implementation will certainly reduce the authority of the central bank in the sector regulation and supervision of banks is an important instrument in achieving the goal of Bank Indonesia to maintain and achieve stabilitylity in the rupiah(Ec Abdul Mongid, 2010*)*. Being a lot of questions when the mandate to form the FSA is also mandated by law that gives independence of Bank Indonesia. With the reduction in the duty of Bank Indonesia , regulation and supervision transferred to the FSA would create problems. While the bank under the supervision of the central bank allows policy coordination between the monetary and banking sector more smoothly. Accessing to information banking conditions before deciding on the central bank's monetary policy. In terms of payment systems, will increase the stability of the payment system because Bank Indonesia is also the organizer of the national payment system. Associated with the liquidity crisis, the presence of Bank Indoensia as a supervisor will ensure the availbility of liquidity for banks in the event of a liquidity shortage that is expected to reduce systemic risk because of the speed of decision making (crisis prevention). But for developing countries where banks are the main financial institutions in the financial system, the benefits of the efficiency of supervision does not seem to be obtained.

Legal inconsistencies between the Act of Bank Indonesia and the Act of FSA .

Article 34, paragraph 1 Act No.3 of 2004 says that the task of supervising the banks will be carried out by the regulator for the financial services sector that is independent, and is formed by legislation. Explanation Article 34 reads task of supervising the banks will be done by the regulator for the financial services sector, in carrying out its tasks, this (Supervisory Board) coordination and cooperation with the Central Bank that will be regulated under the Act. The supervisory agency may issue regulations relating to the implementation of bank supervision tasks in coordination with Bank Indonesia and demand an explanation from the Indonesian bank, information and data necessary macro. The function will be held on schedule set by Bank Indonesia. It means that the task is transferred from Bank Indonesia to FSA is the task of watching while the set remain on Bank Indonesia . On the other hand the FSA Act article 6 and article 7 mandates that task was transferred from the Central Bank regulation and supervision duties.

Inconsistencies can also be assessed from the explanation of Article 34 of the Bank Indonesia Act said that FSA has an obligation to report to the BPK and the Parliament. On the other hand, Article 36 paragraph 6 of the Act reads FSA's annual activity report to the President and Parliament.

Research Methods

a. Types of research

This research is the study of law in the realm of normative / doctrinal. Doctrinal legal research is an effort to inventory the positive law, the discovery of the basic principles and philosophy of positive law and efforts to find legal *in- concrito*(Soetandyo Wignyosoebroto, 1994). Normative legal research is a process of finding the rule of law, principles of law and the doctrine of legal doctrine in order to address the legal issues at hand. Legal issues that are found will be studied at the level of dogmatic law, legal theory and legal philosophy.

b. Approach

This research uses staute approach to seek the ratio legis and ontological basis of each chapter and the law. The historical approach (historical approach), in this study is used to seeing the development of thinking with regard to the rationale of each shaper Act

c. Concept

1. Inconsistency: not aligned.
2.The Financial Services Authority: an independent agency and free from interference by other parties, which has the functions, duties, and authority of regulation, supervision, inspection, and investigation as referred to in this Act (Article 1 Act of FSA)

d.The type of data

The type of data in this research is secondary data or literature data or legal material. Legal material consists of primary legal materials, secondary and tertiary.

a. Interviewers

Informant in this research is legal expert Banking and Financial Services Authority of the Party and the Party of Constitutional Law expert.

f. Data Collection Technique

Data collection techniques in this study conducted by literature study both the primary legal materials, secondary law, and tertiary legal materials and interviews with sources that will complement the secondary data.

g. Data analysis
Once the data is collected, the next step is to process and analyze the data. All existing legal materials obtained from the research needed to address the problems. All the data in the form of legal theory, social theory, materials related to the development of thought realm of legal philosophy of law studies and data obtained from sources the information is collected and systematized, then described and analyzed. The data obtained will be analyzed using qualitative analysis.

The Results of Research and Discussion . .

In the first stage the first year of the study found the issue of legal inconsistencies genesis of the Act FSA. This phase is done by finding the ratio legis and the basic ontological ((Peter Mahmud Marzuki, 2005) settings associated with the birth of the FSA that the 1945 Act and the Act of Bank Indonesia.

Ratio legis and basic ontological provision granting independent status in 1945 as the basic law of Bank Indonesia Act.

Secondary data obtained from the position of the independent central bank granting the backdrop of lack of independency of Bank Indonesia provisions set forth in Act No. 7 of 1992 on Banking. The lack of independency of Bank Indonesia contained in banking law in 1992 that led to the financial crisis is so severe that occurred in 1997. Legally one of the Bank Indonesiaggest causes of this financial crisis is are provisions in the Banking Act 1992 which authorizes the finance minister to give permission the establishment of the bank. On the other hand the finance minister is assistant to the president in the government system in Indonesia. The authority is so great that provides distortion and conflict of interest is so great. As a result, many banks are standing by did not meet the requirements, will have difficulty in operating the bank itself. Many banks closed as due to liquidity problems that exacerbate the monetary krissi as a result of the global crisis at that time led to a prolonged economic crisis in Indonesisia. From description above can be assessed that the Indonesian bank independence is a very important position that Bank Indonesia as the central bank can carry out their duties properly into something that is important to be able to achieve the goal of maintaining stability in the rupiah. In other words that the position of the intended independence is independence in the conduct of their duties of Bank Indonesia as stipulated in article 7 of the Act No. 23 of 1999, Bank Indonesia has the following tasks:

a. Define and implement monetary policy;
b. Organize and maintain smooth operation of payment systems
c. Regulate and supervise the Bank.

Seeing the urgency of the independence of the central bank independent position regulated under the 1945 Constitution in Article 23 D as a result of Amendment IV of the Constitution of 1945. From the description above can be assessed ratio legis or reason of the provisions of Article 23 D that the 1945 amendment to IV give independent to the Central Bank is that central banks in carrying out their duties duties no intervention from any institution. The task of organizing and supervising a task that should not be any intervention from any party. Ratio legis of the provision is based on historical considerations in the setting of the Act No. 7 of 1992.

Ratio legis and ontological basis of Article 34 of Act No. 23 of 1999 and Article 34 of Act No. 3 of 2004 as the basis for the birth of the FSA.

Basic ontological is the philosophical foundation of a law as a whole.

Basic ontological laws which can be seen from the General Explanation of Act No. 23 of 1999 and General Explanation of Act No. 3 of 2004 concerning the change of Law Decree No. 23 of 1999 concerning Bank Indonesia. A common explanation of Act No. 23 of 1999, essentially said that the background replacement legislation governing the Central Bank of Act No. 13 of 1968 is, first economic development when it contains many structures and systems weaknesses shown by the lack economical situation, prudential banking fraud , and weak law enforcement. Second, the rapid development of the international economy towards the global economy demanding rapid adjustment. Third. Role of Bank Indonesia in Act No. 13 of 1968 which helped the monetary council to determine monetary policy becomes irrelevant for now. Therefore, Act No. 23 of 1999 provides that the independent role and position for Bank Indonesia in carrying out its duties are set monetary policy, payment systems in organizing and regulating and supervising banks independently, free from any interference whatsoever in the line of duty.

With a historical approach, it can be seen that Act No. 23 of 1999 was formed due to the prolonged banking crisis that led to the financial crisis, one of the factors that led to the financial crisis from the aspect of the role of Bank Indonesia position. Bank Indonesia position is not sourced from the independent Central Bank Act 1968 and Act No. 7 of 1992 on Banking, which give a gap outside interference in this case the finance minister as the assistant to the president to determine licensing and giving witness the establishment of a bank, this means providing space for government intervention in the task of supervision and regulation Bank Indonesia. As a result, many banks are normatively not meet the requirements in the permanent establishment is

licensed by the finance minister and ultimately the bank experiencing operational problems and liquidated. The ontological basis of Act No. 23 of 1999 associated with the FSA is considering the importance of central bank independence in carrying their duties without interference by other parties the formation of Act No. 23 of 1999 provides for the independent position of Bank Indonesia in carrying out its duties and its goal to maintain rupiah stability.

General explanation of Act No. 3 of 2004 is the ontological basis of changes in Act No. 3 of 2004 is the maintenance of rupiah by Bank Indonesia will determine the sustainability of development in Indonesia should be backed up with monetary policy the precautionary principle, the payment system is fast, accurate, and safe, as well as the banking and financial system that is healthy and efficient. Mechanism of monetary policy formulation should be coordinated with the formulation of policies on the fiscal and real sector, the progress of the international financial system that is increasingly competitive and integrated has formed a global economy which facilitates the movement of capital flows is accompanied by increasing competition. To address the above challenges, there should be an adjustment mechanism of monetary policy formulation and institutional restructuring of Bank Indonesia as the responsible authority monetary policy. This step is necessary to strengthen accountabilility, transparency, and credibilility of Bank Indonesia without diminishing the independence of the country. From the last sentence can be interpreted grammatically that the strengthening of Bank Indonesia from the aspect of accountability, transparency and credibilility of Bank Indonesia conducted without diminishing its independence Indonesian bank. That is the meaning of independence in question is the meaning of independence is what is stipulated in the provisions of the Banking Act and Act Bank Indonesia itself, namely independence in performing their duties . With a historical approach, the ontological basis of such provisions are some of the issues arising from the implementation of Act No. 23 of 1999, especially the position of Bank Indonesia's independence in carrying out their duties can be further optimized with the addition of provisions Bank Indonesia tasks in implementing the monetary policy should be coordinated with the formulation of policies in fiscal and real sector. Likewise, the establishment of the supervision that would be able to oversee the performance of Bank Indonesia. The establishment of a fixed supervision of financial services may assign tasks mandated to Bank Indonesia's supervision is part of the reason for this change, postponed until 2010 formation. There are inconsistencies. Forming of FSA will take divert task oversee as part of the meaning of independence itself, whereas the explanation sentence saying "This step is necessary to strengthen accountabilility, transparency, and credibilitylity of Bank Indonesia without decreasing meaning of independence of the country." Inconsistency seen that formation course FSA would reduce the independence of Bank Indonesia to conduct surveillance. So that the meaning of independence will be different from the meaning of independence after the formation of the FSA.

The ratio legis Financial Services Authority formation can be seen Article 34 of Act No. 23 of 1999 along with an explanation and Act No. 3 of 2004 and its explanation.

Article 34 of Act No.23 of 1999 on Bank Indonesia provides the basis that one of the tasks of Bank Indonesia as stipulated in article 8 of Act No. 23 of 1999 will be transferred to the supervisory agency for the financial services sector is the task of overseeing. By using the grammatical interpretation of the ratio legis of the provisions of article 34 of Act No. 23 of 1999 can be seen further from the explanation of Article 34. Explanation of Article 34 reads:Paragraph (1) The financial services supervisory board will be formed to supervise the banks and other financial services companies, including insurance companies, pension funds, securities, venture capital, and corporate finance, as well as other entities organized bdan management of public funds.

This institution is independent in carrying out its duties, the government and required to report to the Agency Pemerikasa Finance and the House of Representatives In performing the duties of this institution (Supervisory Board) coordination and cooperation with Bank Indonesia as the Central Bank will be regulated in the Act the establishment of supervisory institutions in question. The supervisory agency may issue regulations relating to the implementation of bank supervision tasks in coordination with Bank Indonesia and demand an explanation from the Indonesian bank, information and data necessary macro. The function will be held on schedule set by Bank Indonesia.

Ratio legis provisions of Article 34 of Act No. 23 of 1999 can be seen from the explanation provides an understanding that one of the tasks of Bank Indonesia as the central bank as stipulated in article 8 of Act No. 23 of 1999 which is a task in Article 8 section c that Bank Indonesia's task is to regulate and supervise the bank with the financial services supervisory agencies overseeing tasks will be transferred from Bank Indonesia to the Financial Services Supervisory Authority. It can be interpreted that the task is transferred from Bank Indonesa to FSA is the task of overseeing. As mentioned above said that the financial services supervisory agency will also supervise the financial institutions that are not banks or companies other financial services companies, including insurance companies, pension funds, securities, venture capital, and corporate finance, as well as other agencies that organize management public funds.

Subsequent developments can be seen that the provisions of article 34 of those changes with the Bank Indonesia Act , namely the Act of the Republic of Indonesia Number 3 of 2004 on the Amendment of the Act of the Republic of Indonesia Number 23 of 1999 concerning Bank Indonesia. The provisions of Act No. 3 of 2004, among others, said that the elucidation of Article 34 paragraph (1) shall be amended as specified in the description, and the provisions of Article 34 paragraph (2) shall be amended, so that the whole of Article 34 reads as follows:
(1) The task of overseeing the Bank will be carried out by the institution supervision of the financial services sector are independent, and established by law.
(2) The establishment of supervisory agencies referredin paragraph (1), will be implemented no later than 31 December 2010.
Explanation Article 34 of the Act No. 3 of 2004 reads as follows
Paragraph (1)Financial services supervisory agency will be established to supervise the Bank and companies of other financial

services sector, including insurance companies, pension funds, securities, venture capital, and corporate finance, as well as other agencies that organizes the management of public funds. This institution is independent in carrying out its duties outside the government and required to report to the Audit Board and the Board of Representatives. In performing its tasks, this (supervisory board) coordination and cooperation with Bank Indonesia as the Central Bank Act will be regulated.. The supervisory agency may issue regulations relating to the implementation of the Bank's stewardship in coordination with Bank Indonesia and Bank Indonesia asked for an explanation of the information and data necessary macro.

Paragraph (2) The transfer of the bank supervision function of Bank Indonesia to the supervisory board for the financial services sector is done in stages after the fulfillment of the requirements which include infrastructure, budget, personnel, organizational structure, information systems, documentation systems, and various implementing regulations in the form of legal instruments, and reported to the Board of Representatives folk. It 's means that the provisions of Article 34 paragraph 1 of Act No. 3 of 2004, unchanged from the provisions of Article 34 paragraph 1 of Act No.23 of 1999 which essentially say that the task of supervising the banks which is the task of Bank Indonesia will be conducted by the supervisory board for the financial services sector that is independent, and is formed by legislation. Changes that occuris in article 34 paragrap 2 of Act No. 3 of 2004 which determines that the establishment ofthe financial services supervisory agency will be implemented no later than 2002 as mandated by Article 34 of Act No.23 of 1999 but it will be formed no later than December 31, 2010.

Legal inconsistencies in the form of philosophical clashes between Constitution of 1945 and the FSA act and between the FSA Act and Bank Indonesia Act will interfere with the implementation of tasks and goals set forth in Law FSA .

From the description above can be assessed that there is a philosophical clash

a. Between 1945 Constitution and the FSA Act. As described at the beginning of the description in the results of the study that Article 23 D provide insights that can be studied from a historical approach that is independent status for central banks is a matter that must be given due to some event prior to the amendment of this Constitution, banking institutions experienced a banking crisis that one of them due to the position of Bank Indonesia as the central bank is not independent. Understanding yourself is the sense in which the independent Bank Indonesia as the Central Bank was given independence in carrying out their duties in achieving the task of maintaining the stability of the rupiah. The FSA Act provides power to the FSA to conduct supervision and regulation of banking institutions which is one of the tasks of Bank Indonesia, which must be independent of any party as mandated by the Constitution of 1945. Thus, the provisions of the FSA is not sincronize with philosofi making of FSA and meaning of the Constitution desired independence 1945 with historical approach and grammatical interpretation is done.

b. Between the FSA and Bank Indonesia Act there is a philosophical clash can be seen in Article 6 of Law FSA said that FSA regulation and supervision duties to:
a. financial services activity in banking sector
b.financial services sector activities Capital Markets: and
c. financial services sector activity in insurance, pension funds, Financing Institutions, and other financial services institutions.
Furthermore, in Article 7 describes the authority of the FSA in the conduct regulation and supervision in the banking field. FSA has the authority:

a. institutional arrangements and supervision regarding bank include:
1. The permit for the establishment of banks, opening bank office, the basic budget, work plan, ownership, management, and human resources, mergers, consolidation and acquisitions of banks, as well as the bank's license revocation; and
2. The business activities of the bank, among other sources of funds, provision of funds, hybridization product, and activity in the service sector;

b. regulation and supervision of the bank's health that includes:
1. liquidity, profitaBank Indonesiality, solvency, asset quality, capital adequacy ratio minimum, lending limits, the ratio of loans to deposits, and bank reserves;
2. The bank statements relating to the health and performance of the bank;
3. The debtor information system;
4. The testing of credit (credit testing); and
5. The bank accounting standards

c. regulation and supervision of the bank's prudential aspects, including:
1. The risk management;
2. The governance of the bank;
3. The principle of know your customer and anti-money laundering; and
4. prevention of terrorism financing and banking crimes; and

d. Bank supervision .
From the description may be assessed by grammatical interpretation that the FSA Act article 6 and article 7 mandates that task was transferred from the Central Bank regulation and supervision tasks while the base of the formation of the FSA is the Bank Indonesia Act. While Article 34 of Bank Indonesia says only supervision task will be given to FSA.

Conclusion

Legal inconsistencies genesis of FSA Act can be concluded from Contitution of 1945 and The Bank Indonesia Act. This phase is done by finding the ratio legis and the basic ontological settings as sociated with the birth of the FSA from Contitution of 1945 and the Bank Indonesia Act . Legal inconsistencies between Constitution of 1945 and FSA Act can be concluded from the 1945 Constitution that give independence of Bank Indonesia , in the other side FSA Act obscures the meaning of Bank Indonesia independence . Legal inconsitencies between the Bank Indonesia Act and the FSA Act is also apparent from the mandate of the Bank Indonesia Act only divert the supervisory duties of Bank Indonesia while the FSA Act gives authority to FSA itself not only supervising but also making regulation.

Recommendation

Cooperation and clear regulation of divison tasks between Bank Indonesia and the FSA

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Warehouse Receipt policies as Object Banking Credit Guarantee : Efforts to Support Economic Development in Indonesia

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ABSTRACT

In the business world, the technical term warehouse receipt. Warehouse receipt is a document proof of ownership of the goods stored in the warehouse which was published by the business warehouse (Article 1 (2) of Law No. 9 of 2011 on the Amendment of Act No. 6 of 2006 on Warehouse Receipt System (SRG)). Warehouse receipts provide economic benefit to farmers, because the warehouse receipt can be transferred, traded as a document of the shipment, it can even be used as a bank credit collateral. In banking practices in Indonesia, the use of warehouse receipts as collateral for bank credit is not interested farmers and the banking community itself, especially if it occurs bad credit no representative institutions. The purpose of this research is to build an ideal system that enforces the use of warehouse receipts as a bank credit collateral object in a policy (regulation) as an effort to support economic development in Indonesia.

Keywords: Policy warehouse receipts, bank credit guarantees, economic development

Introduction

In the concept of the welfare state, the state is responsible for presenting the social welfare of its citizens as a right of citizens, requires the state to support economic development. In the face of increasingly fierce competition in the era of globalization required the readiness of the business as part of efforts to confront the competition necessary instrument in structuring trade finance system.

In the context of empowerment and guidance to farmers and small and medium enterprises that are agriculture-based, warehouse receipt is one solution to obtain financing with guarantee commodity stored in the warehouse. Expected with the Warehouse Receipt System can improve the productivity and quality of products produced by farmers, as well as setting planting schedules and marketing strategies. (Explanation of Law No. 9 of 2011 on the Warehouse Receipt System).

Philosophy birth of Law on Warehouse Receipt System aims to improve the welfare of society with social justice based on Pancasila and the Constitution of the Republic of Indonesia Year 1945. The warehouse receipt system as described in Article 1 (1) UUSRG (Act No. 9 of 2011 on the Amendment of the Law number 6 of 2006 on Warehouse Receipt System) is an activity related to the issuance, transfer, underwriting, and transaction settlement Warehouse Receipt. Warehouse receipt (Article 1 (2) UUSRG) is a document proof of ownership of the goods stored in the warehouse of published by business Warehouse.

Warehouse Receipt as one credit guarantees are classified into the collateral material that meets the characteristics of collateral material, among others, have a direct relationship on certain objects, can be defended against anyone, always switch the object and can be moved. Underwriting agreements warehouse receipts as required in Article 14 paragraph (1) of the SRG is accesoir agreement, that agreement is supplemental and is associated with the principal agreement. Basic treaty of the warehouse receipts guarantee agreement is an agreement credit between the debtor and the bank.

Warehouse Receipt System Setup certainly intended to overcome the problems that occur in the farming community, however, although already twice made changes have not touched the farmers and the banking community to utilize the warehouse receipt system as a bank credit financing documents. Warehouse receipt can be used as loan collateral if it meets the conditions stipulated in the Act SRG include warehouse receipts issued by the business warehouse that has obtained the approval of the Supervisory Board, warehouse receipts can only be burdened with the debt guarantee, the recipient should inform the security

interest agreement binding the Warehouse Receipt as the guarantee rights to the Registration Center and business warehouse, as well as the imposition of rights guarantee against warehouse receipt is made by the Deed of Guarantee rights.

This study grouped in the realm of socio-legal studies is a non-doctrinal research that examines the law by using the approach of science of law and social sciences. Social research in this study to examine aspects of unlawful external as social and cultural aspects. The results of research in the Department of Industry and Trade of Central Java province has played an active role in the socialization of the Warehouse Receipt System Program and Financing SRG (Warehouse Receipt System) since 2011 has been done, but in 2013 stopped, because many obstacles in the implementation of SRG. The sample in this study is accredited Warehouse District Government Grobogan-Purwodadi become one of the pilot projects of the Warehouse Receipt System Warehouse 14 SRG in Central Java also has not shown any activity the use of warehouse receipts as collateral for loans. Various factors and constraints in the implementation of warehouse receipt system both in terms of farmers, government and banking. From the government side, among others, have not been synergy between the relevant institutions, pricing policies are not the same grain, costs incurred farmers and transport. From the banking side, Bank Indonesia particularly concerned with the warehouse receipt system associated with levels of inflation and the lack of understanding of the warehouse receipt system either from banks themselves or the farmers, causing farmers to sell grain directly to the employer and the absence of operational costs in the warehouse receipt system (research, Sri Mulyani, Eny Patria, Setiyowati, 2015). Reconstruction of the warehouse receipt system is an ideal setting as the object of bank credit guarantee highly desirable in order to support economic development.

Warehouse Receipt Policy as Credit Guarantee Banking in the Perspective of Economic Development

Understanding the policy (policy) by Harold D. Lasswell and Abraham Kaplan is an achievement of the program objectives, values and practices that are directed (a projected program of goals, values and practices).[1] Implementation of a policy concerning the public interest is based on the authority that belongs to the policy-makers. Rating wisdom can include wisdom about the content, policy implementation and policy impact. These three elements are largely determine the success or failure of an implementation.[2]

In the context of the policy of the warehouse receipt in Law No. 9 of 2011 on the warehouse receipt based on the basic principles or principles that animate the legal system. Principles or principles governing warehouse receipts, essentially contains the fundamental values that go into the articles of the Law on Warehouse Receipt System to direct the goals to be achieved by legislation Warehouse Receipt System. Warehouse Receipt usage policies as an object of bank credit guarantees set forth in Article 4 (1) of Law No. 9 of 2011 on the Amendment of Act No. 6 of 2006 on Warehouse Receipt System, is an important and effective instrument that facilitates the provision of credit for businesses, especially farmers and businesses with little collateral harvest inventory or goods stored in the warehouse. The development of these macro credit guarantees involving local government bureaucracy (implementor) with the target group (target group) both farmers, banking and warehouse manager. However, in practice difficult to implement due to the complexity of the issues that arise related to high operational costs in the warehouse receipt system.

Actually, the idea of the birth policy of using warehouse receipts as collateral object of bank credit provide value benefits to the welfare of farmers. As adherents of utilitarian Jeremy Bentham argued, that a law should be able to provide the greatest possible happiness for the great majority of society. But the value of certainty and value the user has not touched the fairness of the policy. As Gustav Radbruch view that has made a major contribution on the ideals of law (Idee des Rechts), supported by the presence of three basic values (*Grundwerten*), justice (*gerechtigkeit*), usefulness (*Zweckmaeszigheit*) and legal certainty (*rechtsscherkeit).*

Economic development , as part of national development is one of the efforts to achieve a just and prosperous society based on Pancasila and the Constitution of 1945. The national development essentially is a series of continuous development effort covering the whole life of the community, the nation and the state to carry out the task of realizing the goal national embodied in the 1945 Constitution, which protect all the people and the country of Indonesia, promote the general welfare, the intellectual life of the nation, as well as participate in implementing world order based on freedom, lasting peace and social justice.
Economic development is defined as a series of businesses in an economy to develop economic activities , so that the infrastructure more available , more and more companies and growing , the higher the level of education and technology is increasing. The implications of this development is expected to be increased employment opportunities, increased income levels, and prosperity of society is becoming increasingly high.[3] There are three important elements related to economic development, namely :[4]

1.Development as a process, which means that development is a step that must be followed by every society or nation
2. Development of an effort to increase the per capita income.
3. The increase in income per capita should take place in the long term .
Economic development , as implied in the preamble of the 1945 Constitution, one of its objectives is " to promote the general welfare." Orientation welfare in economic development is also clearly affirmed in the provisions of Article 33 and Article 27 of the 1945 Constitution which by some experts say as cues, that are constitutional, in fact Indonesia has been since the beginning

[1] Harold D. Lasswell dan Abraham Kaplan, *Power and Society*, New Haven: Yale University Press, 1970, hal. 71
[2] M. Irfan Islamy, *Prinsip-prinsip Perumusan Kebijaksanaan Negara*, Bumi Aksara, cet VIII, 1997, Jakarta, 1997, hal. 20
[3] Sadono Sukirno, *Ekonomi Pembangunan Proses, Masalah, dan Dasar Kebijakan*, Edisi Kedua, Cet.ke-3, Jakarta: Kencana, 2006, hlm.3
[4] Id.wikipedia.org/wiki/pembangunan_ekonomi, diakses 12 Desember 2012

of the offer concept of the welfare state (welfare state),[5] however, in contrast to the state western welfare which is a variation of the capitalist economic system, the welfare state, Indonesia is a country with a democratic economic system that is to say, the power of capital and capital owners are not considered to be the most powerful, the people are the highest authority.[6] In the people's economy, people's economy becomes concern basis of any effort to achieve justice.

Infrastructure in economic development is the availability of facilities and infrastructure needed businesses in economic activity. Facilities and infrastructure in an economic perspective, namely the existence of a competitive market, regulatory certainty and consistency in economic conditions, as well as financial institutions to support economic activity. Warehouse Receipt policies have not been effective, less local government play a role in encouraging the implementation of warehouse receipt system. The absence of synergies between relevant agencies, local governments and the private sector as well as the perpetrators of the warehouse receipt system is also not maximized, and yet the formation of the deposit Insurance Agency Rules (LPS) in case of a warehouse receipt collateral execution.

Policy use of warehouse receipts as credit guarantees have not touched the community of farmers and banks to extend credit because credit terms to subsidize interest with collateral warehouse receipts specified in the Minister of Finance No. 171 / PMK.05 / 2009 on Warehouse Receipt Subsidy Scheme, which is still limited magnitude credit limit of a maximum of 70 % of the value of the warehouse receipt ; The amount of the ceiling set by the bank or financial institution with a maximum ceiling of Rp 75,000,000.00 (seventy five million dollars) per farmer ; The maximum ceiling based on the number of Farmers Farmers Group, Cooperative and Farmers Group Association; The maximum ceiling may be reviewed at any time based on analysis of the feasibility of the proposed farming (research Sri Mulyani et al , 2015).

Likewise, the obstacles encountered in the provision of credit through the Warehouse Receipt: first, costs to be incurred by the owner of the commodity is relatively larger. That is because the number of agencies involved in the warehouse receipt system makes cost overruns. Secondly, the quantity of commodities relatively smaller farmers, so that if in the warehouse receipt-it is not worth the costs. Third, there is no party that serves as a watchdog. Fourth, the quantity of the independence and professionalism of the conformity assessment institution also needs to be improved. In addition to constraints on the banking side, the pattern of financing through the warehouse receipt system is also not optimal enforced because they lack understanding of the community and businesses (banking). To reduce the risk of loss, fire, flood, etc., then the goods stored in the warehouse are insured. Likewise, to minimize the risk of failure of the debtor to make payments, then the insured is the credit. With the transfer of risk to the insurance company, then there are additional costs that insurance costs should be borne by the farmer (Research: Sri Mulyani, Eny Patria, Setiyowati, 2015).

Warehouse Receipt as Object Banking Credit Guarantee in Law No. 9 of 2011

Warehouse Receipt settings as loan collateral object has not provided a clear interpretation , caused by several things: some legal regulations related to the implementation of warehouse receipt can not provide legal protection, because of the legal culture is not supportive ; in substance law, setting the warehouse receipt in its implementation can not provide legal protection and legal certainty. Law No. 9 of 2011 on the Amendment of the Law No. 6/2006 on Warehouse Receipt System can not provide clarity. In the legal structure does not yet support the implementation of warehouse receipt arrangements, because it is still weak institutions related to warehouse receipts.
Aspects of the laws governing the substance of the warehouse receipt as collateral rights in Law No. 9 of 20011 on the Amendment of Act No. 6 of 2006 on Warehouse Receipt System can be seen in the table below :[7]

Table 1 : Substance of Warehouse Receipt as collateral in Act

The substance	Article	Description / Payload
The principle of material	Article 4 (ayat1)	Warehouse receipt can be transferred, pledged as collateral for debts, or used as a document of the shipment.
principle Acessoir	Article 12 (ayat1)	Warehouse receipt collateral agreement is an agreement on a treaty follow-up of debt .
The principle of preference	Article 12 (paragraph 2)	Each warehouse receipt can be issued only one guarantee burdened with debt.
principle Trust	Article 15 (paragraph b)	In certain cases the relationship between the holder of the warehouse receipt and creditors

[5] See look : Mubyarto, *Membangun Sistem Ekonomi*, Yogyakarta:BPFE, 2000, hlm. 281.
[6] *Ibid*., hlm. 281-281.
[7] Sri Mulyani, *Konsep Resi Gudang Sebagai Surat Berharga Dalam Perspektif Jaminan Kredit Perbankan:Perlindungan dan Kepastian Hukum*, Jurnal Supremasi Hukum FH Universitas Bengkulu Nomor 2 Volume 22, Agustus 2013, hal.214-215

		based on trust, creditors felt no need to hold the security interest and the release of the security interest. In this case, creditors no longer hold, rights guarantees and collateral warehouse receipts handed back to the Warehouse Receipt Holder.
Material definition	Article 1 (ayat 5)	Any moving objects that can be stored in a certain period of time and publicly traded .
binding of loading	Article 14 (ayat 1)	Imposition of Rights guarantee against warehouse receipt is made by the Deed of Guarantee Rights
Warehouse Receipt - registration guarantees the principle of publicity	Article 13	Rights receiver collateral warehouse receipts must notify binding treaty rights warehouse receipt as collateral to the Central Register and the business Warehouse
The transfer of warehouse receipt Guarantee	Article 8 (ayat 1) Article 11	The transfer of warehouse receipt in the name of an authentic deed is done . The transfer of warehouse receipt can occur because : - inheritance ; grants ; buying and selling and or other causes that justified the law
Execution rights	Article 16 (ayat 1) Article 16 (ayat 2) Article 16 (ayat 3)	If the giver Rights injury Guarantee promise, guarantee the assignee has the right to sell the object of collateral for its own power by public auction or direct sales . Recipients security interest has the right to take over the receivables settlement proceeds referred to in paragraph (1) after deducting the cost of sales and management costs Sales collateral objects referred to in paragraph (1) may only be carried out on the knowledge of the provider of security rights .

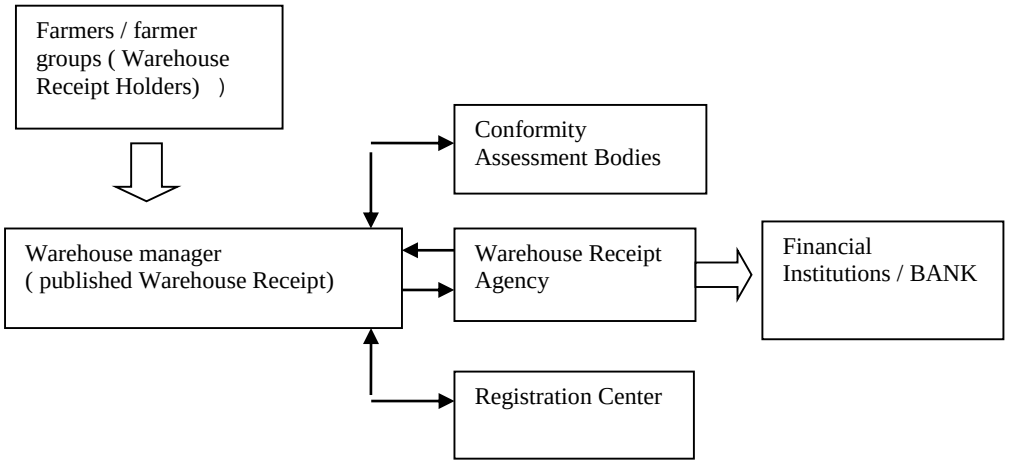
Source : excerpted from Act 11 No. 9 20011 on the Amendment of Act
No. 6 of 2006 on Warehouse Receipt System

Ideal Warehouse Receipt System Settings As Object Banking Credit Guarantee

The formulation of the ideal system of warehouse receipts as collateral arrangement of bank credit by developing the concept of "protection", through reform of the cultural aspects of the legal system or legal culture, structure, and substance of the law. As Lawrence M.Friedman the opinion that the concept of law as a system, sub-system consists of legal substance, legal structure and legal culture.[8] Ideal system settings object warehouse receipts as credit guarantees in order to support economic development that is setting a comprehensive, systemic both from the aspect of legal culture, legal structure and the substance of the law. From the aspect of the functioning of the legal culture of law as a means of education and training or community (in this case the banking community) to develop new values warehouse receipts as a valuable letter so that a change of mindset, attitudes and behaviors that support the development of laws that should guarantee the Warehouse Receipt built on the values of Pancasila and the Constitution of the Republic of Indonesia, 1945. From the farming community awareness of the importance of the warehouse receipt grown to provide benefit to the welfare of farmers. In structure or institutional, to provide certainty and legal protection for economic actors to set up several institutions associated with the existence of warehouse receipt. Substantially, there must be consistency both of law and of Bank Indonesia Regulation governing the banking practice. There must be clarity of meaning warehouse receipts as a valuable letter is proof of ownership of objects of agricultural products stored in warehouses accredited.
Aspects of the legal structure of the warehouse receipt system can be seen from the parties involved in the agreement guarantees through the Warehouse Receipt System . Parties involved in the warehouse receipt system is as follows:[9]

[8] See, Lawrence M. Friedman, 1977, *Law and Society, an Introduction*, Printice Hall, New Jersey, hlm. 7.

[9] Op.cit, Sri Mulyani, 215



Source : Law on Warehouse Receipt

Based on the legal structure of lending through SRG (Warehouse Receipt System) as mentioned above illustrates that so many parties involved that can cause the failure of the policy itself which aim to provide the benefit and welfare for the farmers in accessing credit for their business activities. Although the actual with the policy SRG provide protection and legal certainty for the community, but instead becomes ineffective implementation. As Gustav Radbruch express purpose enacted legislation in order to provide certainty, fairness and expediency. Ideally that SRG program is effective, the farmers become members of the Koperasi, Koperasi that bridge farmers to store in warehouses RG unhulled rice hereinafter find again farmer credit (max 75%). Farmers still have unhulled rice until the credit is paid off or farmers sell unhulled rice after 6 months from the original storage. SRG subsidy operational costs borne by the state, so that farmers have awareness utilizing SRG to improve their welfare.

In the legislation, the implied warranties of Article 1131 of the Civil Code and Article 1132 of the Civil Code , in the explanation of Article 8 of Law No. 7 of 1992 and Act No. 10 of 1998. The concept of assurance is to ensure fulfillment of the obligations that can be assessed with the money raised from a legal agreement.[10] Legal guarantees in Indonesian civil law in general in Article 1131 of the Civil Code. Thus, it means that the whole thing if the debtor can not meet its debt obligations to creditors, then the material belongs to the debtor will be sold to the public and the sale of such objects is divided among the creditors by the large individual receivable in accordance with Article 1132 of the Civil Code .

Legally, the function will guarantee legal certainty repayment of debt in the credit agreement or the certainty of debts or realization of an achievement in a treaty, while economically, the function is to provide security guarantees repayment of the loan, as the driving motivation of the debtor, related to the implementation of banking regulations and has a market value (marketable).[11] In the explanation of Law No. 9 of 2006 on Warehouse Receipt System, intended to provide legal certainty, ensure and protect the interests of the community, the smooth flow of goods, cost efficiency distribution of goods, and be able to create a business climate that could be driving the pace of national development. Warehouse Receipt System benefits, if well managed will create food security in which the public will not be a shortage of food, because the quality of grain stocks in store in accredited warehouses and can be sold during the dry season arrives.

Conclusion

Warehouse Receipt usage policies as an object of bank credit guarantees provide benefits to farmers and banks as credit.Yet channeling institution in its implementation has not been effective, because many of the factors and obstacles that surrounded him. On the substance of the law, there is no clear concept governing warehouse receipts pledged as collateral for loans. Likewise, it does not yet support the implementation of the legal structure of warehouse receipts as collateral arrangement credit, because it is not available legally viable infrastructure, such as legal framework, the market price is not clear. Still weak institutions related to the management of the warehouse receipt. Essence guarantees provide protection and legal certainty will be repayment of a debt as defined in Article 1131 of the Civil Code. Cultural factors greatly affect the legal existence of warehouse receipts as collateral for loans when the lack of awareness among farmers to store in warehouses accredited unhulled rice.
The concept of ideal settings warehouse receipts as credit guarantees can be developed is setting warehouse receipts as collateral for bank credit both comprehensive and systemic aspects of legal culture, legal structure and substance law. The need further socialization and assistance in the implementation of the policy of using warehouse receipts as collateral object credit in an effort to support economic development in Indonesia.

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MEDIATION AS AN EFFECTIVE TOOL FOR RESOLVING SPORTS DISPUTES

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ABSTRACT

The relation to the infinite variety issues sprouting in sports or lex sportiva, like lex mercatoria in the early centuries, has now come of age and even begun a maturing process in the past thirty-five years or so. Lex sportiva now straddles sports management, sports medicine, tort, criminal law, employment contract, competition law and a host of multifarious activities related to sports. This has catapulted a host of legal issue and problems, demanding urgent legal solutions to actual or potential disputes. This paper briefly discusses the nature and development of lex sportiva, and how it is able to resolve sports disputes. Resolving sports dispute via the tiresome, dilatory and expensive process of litigation is most unsuitable. Arbitration may not be equally a satisfactory solution. The paper strongly advocates the far the most effective and resolution friendly mode of settling sports disputes is mediation. In support it highlights numerous advantages mediation has to offer.

Key words: Alternative Dispute Resolution; Mediation; Arbitration; Litigation.

Introduction

The rule of law in sport is as essential for civilisation as the rule of law in society generally. Without it, generally anarchy reigns. Without it in sports, chaos exists.[1] In Malaysia, Asean, Britain, Europe and elsewhere, there are many reasons for law's intervention in sport. The commercialisation of sport presents a palpable need for regulation. Many 'problems' in sports such as drug abuse, violence and match-fixing cry for legal regulations. This interaction between the sports world and the normative order redefine a distinct *lex sportiva*. The analogy with *lex mercatoria* (merchant law) allows sports law to develop distinctiveness and an incremental formation. It encourages sports bodies to reconsider their own rules and mode of governance in the light of the dominant legal norms. Thus this process of acculturation allows and promotes a convergence between *Lex Sportiva* and the dominant legal norms.

The analogy between *lex mercatoria* & *lex sportiva* or sports law is especially relevant: both respect a degree of autonomy, both acknowledge cultural specificities, both are part of a pluralistic and complex normative rule structure and both acknowledge the need for international emphasis in terms of legal regulation. *Lex mercatoria* or law of merchant was the legal doctrine developed in the middle ages by special local courts in Britain and elsewhere. The merchant courts had judges and jury who were merchants themselves and would apply the *lex mercatoria* as opposed to local law. An analogy can be made with the courts for arbitration for sport, and a view that it is developing a specific doctrine of international sports law. Before discussing the modes of resolving disputes sprouted by *lex sportive*, it is useful to explain what is *lex sportiva* or sports law.

Sports law deals with state interests and resolution of conflicts according to general legal norms. Sports maintain internal rules and structures to regulate, play and organise competition. In sports law, a wider legal system impinges on this traditionally private sphere and subjects the politics of the sport game to the politics of the law game. The result is a double drama and the deep human concern for play combines with the concern for social justice. Sports law addresses basic ethical issues of freedom, fairness, equality, safety and economic security. The subject matter of sports law include state control and the subsidy of sport, right of assess, disciplinary powers and procedure, commercial and property rights, employment relations and compensation for injuries. Sports law is grounded in the material dimensions of sport.[2]

An Australian writer says that: 'Sports law' is one of those fields of law which applied law as opposed to pure or theoretical law. Rather than being a discipline with a common law themes, such as criminal law, equity or contract law. Sports law is concerned with how law in general interacts with the activity known as sports. Hence, the label applied law.[3] The more progressive practitioner observers have acknowledged the importance of recognition of sports law. "The law is now beginning to treat sporting activity, sporting bodies and the resolution of disputes in sport, differently from other activities or bodies. Discrete

doctrines are gradually taking shape in the sporting field; English courts are beginning to treat decisions of sporting bodies as subject to particular principles."[4]

Clearly, therefore, from its nascent beginnings about thirty-five years ago, *lex sportiva* or sports law like *lex mercatoria*, has come of age and is here to stay in the milieu of sports. The offshoot is that like all discrete areas of law, *lex sportiva* generates sports disputes, calling for resolution through the various modes of settling them.

Research Objective and Methodology

This paper seeks to briefly explore the possibilities of using, instead of the traditional forms of litigation and arbitration, alternative forms of dispute resolution, especially mediation as a popular and effective means of settling disputes generally, and it is also gaining favour, as a means of settling sports disputes or sports-related disputes.. This research adopts library based research, using printed and digital materials available in the library, including statutes, cases, books, and journal articles.

Trend in Mediating Sports Disputes

Needless to say because of the global dimension of sport and sports disputes, the approach inherently is less insular and more comparative.[5] At the outset, to cast the subject into proper context, it is instructive to acquaint oneself with the approach taken by the courts generally relating their involvement in sports disputes. In England, traditionally, the courts do not generally intervene in sports disputes. They prefer to leave matters to be settled by the sports bodies themselves regarding them as being "far better fitted to judge than the courts".[6] In a similar tone, Lord Denning MR stated succinctly that "justice can often be done in domestic tribunals better by a good layman than a bad lawyer."[7] However, the courts will intervene when there has been a breach of the rules of natural justice[8] including cases of restraint of trade, where livelihoods are at stake.[9] North American shares the same position.

In the United States, sports disputes are regarded as private matters. The stance of the US courts are reflected in *Tony Harding v United States Figure Staking Association* [1994] 851 F Supp 1476 - "The courts should rightly hesitate before intervening in disciplinary hearings held by private associations…in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in serious and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies. Even then injunctive relief is limited to correcting the breach of its rules. The court should intervene in the merits underlying the dispute". The US courts are willing to hear sports disputes only between sports bodies in accordance with Federal law, and in breach of contract cases.

In Canada, the stand is graphically illustrated in 1996 in *Mc Caig v Canadian Yachting Association and Canadian Olympics Association*[10] to hold a second regatta to select the 'mistral class' sailing team to compete in the 1996, Sternly remarking: "the bodies which heard the appeals were experienced and knowledgeable in the sport of sailing and fully aware of the selection process. The appeals bodies determined that the selection criteria had been met…[and] as person knowledgeable in the sport,…I would be reluctant to substitute my opinion for those who know the sport and knew the nature of the problem".

This short survey clearly shows that the court does not object to sports disputes being resolved by alternative dispute resolution modes. Malaysia and Singapore being actively involved in sports are likely to adopt the above stance. Before we examine the nature of the ADR in its sporting milieu, it will be useful to know what ADR is and why it is favoured and grown in importance. Essentially, ADR is any process that leads to the resolution of a dispute through the agreement of the parties without the use of a judge or arbitrator.[11]

Alternative Dispute Resolution has sprung out of the need to provide the parties to a dispute with an alternative to litigation as a means of settling disputes. Litigation has come to be regarded, especially by businessmen sports bodies, as expensive, inflexible and a dilatory method of dispute settlement. In fact, litigation because of these factors has created litigation fatigue. Arbitration originally seen as welcomed embracing by the commercial community as a quicker and less expensive ways of settling disputes is also now regarded as suffering defects, and litigation fatigue. The English and Malaysian courts have responded by promoting attempts to settle cases in the early stages of the litigation process as part of the recent reforms of the Rules of Civil Procedure introduced in 1999.[12]

Lord Woolf in the 'Access to Justice: Final Report' lucidly observed: Gladiatorial style litigation is losing its appeal. In its place, mediation – a conciliatory way to tackle disputes outside the courtroom is finally taking off. (Emphasis supplied).[13]
In fact, to encourage attempts at mediation, the courts may impose an adverse order for costs on party refusing to mediate who is considered to have acted unreasonably. The cultural shift' was reflected in the words of the Lord Chancellor, Lord Irvine, that "there is no doubt that ADR can provide quicker, cheaper and more satisfactory outcomes than traditional litigation – I want ADR to achieve its full potential". And mediation appears to be the most effective mode of settling disputes in sports law disputes.

It is useful to note that the interesting case of *Lennox Levis v The World Boxing Council and Frank Bruno* [1995 – unreported], the UK High Court ordered Levis to try to settle the dispute with Bruno and the WBC over a fight with Mike Tyson, as required by the WBC Rules, by compulsory mediation, which the judge considered would be "a proper independent process of mediation". Like many other innovative business practices, ADR originated in the United States and had quickly spread around the world including Malaysia.

As has been put by a leading ADR body, "all disputes, whether in difficult business negotiations or full-scale litigation, can become a strain on resources, sapping money, time and management focus and destroying important commercial relationship". It has been strongly espoused that ADR offer these advantages: (a) speed, the process can be set up quickly and normally last only one or two days; (b) it is cost-saving; in fact costs a fraction of litigation; (c) unlike litigation, ADR is confidential thus avoiding an unwanted and many a time unwanted publicity; (d) very much different from court hearing, the parties themselves remain in full control of the ADR process and any settlement agreed. If no settlement is reached, the parties retain their rights to sue. In fact, the ADR process is conducted on a 'without prejudice' basis; (e) under ADR, commercial focus is maintained. The parties' commercial and/or personal interest influence the outcome, thereby, allowing more room for making more creative settlements; (f) Businessmen relations, ADR modes being closer to business negotiations than adversarial courtroom procedures can be better preserved and restored; and (g) independence in the sense that parties can benefit robust and confidential analysis of their positions by a bona fide independent mediator.

In fact, ADR can be used in conjunction with litigation and arbitration and in national and international disputes. It can also be deployed in almost any area of law and business. But Lord Irving, a former British Lord Chancellor, had observed: "ADR is not a panacea, nor is it cost-free. It is widely believed by ADR group, CEDR and other service providers". The most popular form of ADR is mediation, with high success rates. Mediation is also taking off in the rest of Europe, which is "more receptive to mediation because on the whole, the continent is less adversarial [with] fewer large law firms with strictly litigation departments (and) lawyers [who] do both corporate and litigation".[14]

The Value of Mediation in Sports Disputes

Most professional and those concerned with disputes arising out of sport generally agree that mediation as a dispute resolution mechanism enjoys the following advantages:

(i) it is quick and it can be arranged within days or weeks rather than months or even years as in the case of litigation. It can be conducted in a very short time;
(ii) it is less expensive, as the mechanism often results in quick settlement saving management time and legal costs;
(iii) mediation is conducted privately in camera, and confidential, avoiding adverse publicity and unwanted parties such as journalists or competitors are not present;
(iv) the mechanism spans wider issues, interests and needs; underlying issues and hidden agendas are exposed making creative solutions possible to satisfy the needs of all the parties;
(v) because mediation is informal, it results in a common sense and straightforward negotiation;
(vi) mediation allows the parties to retain control; the parties participate in the decisions, rather than control being handed over to an arbitrator or a judge; and
(vii) the process is entirely 'without prejudice'.

The parties have nothing to lose as their rights are not affected by mediation. Meaning, litigation can be commenced or continued if the mediation fails to make an agreed settlement. The value of mediation as an effective tool of alternative dispute resolution particularly in sports disputes has been graphically and neatly described as follows: "mediation differs from other alternative dispute resolution methods such as arbitration because the outcome or solution is not imposed. It has to be concluded voluntarily by the parties on either side. The mediator facilitates by evaluating the dispute and proposing solutions but does not make a judgment as happens in an arbitration or expert determination. This means the parties own the outcome, it is their problem and also their solution, therefore, they are more likely to get an outcome that they can live with"[15] (emphasis added). It appears these reasons result in a high rate of success in disputes relating sports.

The Notion of Mediation

Mediation as a dispute resolution mode is not new; it has been on for centuries. People have been mediating i.e. trying to reconcile differences between individuals and groups for thousands of years. The Quran, the Bible and other ancient texts are replete with examples. However, in the last thirty-five years or so, mediation as a method of settling commercial disputes has become popular in business community and has attempt on it certain feature and characteristics. Mediation in the shipping industry too is frequently employed and highly developed. It is also widely effective and successful. The mode will be effectively useful in settling disputes in the area where sports is commercialised.

So useful has mediation been found as an alternative dispute resolution model that many learned books have been written and numerous seminars conducted on the theory of mediation and underlying principles of negotiations including manuals written on its practical application to a variety of disputes and issues. Therefore, it is clear that mediation if not a science, is certainly an art, advocating a need for mediators to be properly trained in it.

Mediation is a voluntary, non-binding, 'without prejudice' process that uses a neutral third party (mediator) to assist the parties in disputes to reach a mutually agreed settlement without having to resort to litigations, i.e., a court. It differs from litigation and arbitration, in that a binding decision is not imposed on the parties by a judge or an arbitrator. The essential advantage of the mediation process is to allow the parties to work out their own solution to their dispute with the assistance of the mediator.
As can be seen, mediation is a logical or natural extension of the most common method of settling disputes, negotiation. But many a time, negotiations either break down or cannot be begun for many reasons. Here, mediation gives the parties in dispute the option to start or continue negotiations in a controlled setting should the mediation be not successful, the parties are still free to go to court or arbitration. So nothing has been lost.

Common Misconceptions about Mediation

There appears to be a notion that agreeing to mediation is in fact an admission of failure. This is far from the truth. Because negotiations break down for many reasons, and so too in mediation, the parties they are given the opportunity of keeping the negotiations going. The negotiations have not concluded until mediation has been attempted putting the dispute into the hands of a mediator does not involve any loss of control by the parties. In fact, the control remains with the parties because the mediator has no authority to render any decision or force any settlement. The settlement is only reached if and when the parties consider that the settlement suggested is fair and reasonable.

Mediation does not create extra work for the parties in dispute. On the contrary in the long run mediation saves times. Of course, the parties do have to invest some time and effort in the mediation, but vast majority of cases submitted to mediation are settled, save further time. Even in the minority of cases in which mediation does lead to settlement, the time spent on the mediation reduces the time needed for preparing for trial. Neither does mediation create extra costs. Mediation in fact, reduces costs related to litigation through early settlement of the dispute. It also reduces the trial preparation time required in those cases, which do not settle.

Many people are reluctant to use mediation because they labour under the misconceived notion that an opponent during the mediation stand to gain more information about their case (fishing for information). However, in the mediation process, each party is completely in control of the information disclosed. If a party does not wish the "opponent" to know something they can keep it to themselves or disclose it to the mediator in confidence. Of course, if the information is something which might persuade the other party to accept a settlement, or something they will find out about later on through discovery, there is little, in those specific situations, to be lost by disclosing that information.

The parties are entirely free to choose the mediator, and most mediation session is quick, lasting a few hours or a few days, though the mediator will continue to work with the parties as long as they wish to continue with the mediation. It has been said that arbitration rather than replacing litigation tends to lead to litigation. Mediation, on the other hand, is not just an extra step in the dispute resolution process, it is usually the final step as most cases get settled. In fact, nothing is lost if mediation is not successful. As the mediation process is conducted on a 'without prejudice' basis, the parties are free to go to court or arbitration. It is as if the mediation did not take place. Nothing revealed in the mediation can be used by either party, and neither can the mediator be required to give evidence on behalf of either party in any subsequent litigation or arbitration proceedings.

Relevance and Application of Mediation to Sport Disputes

The most important advantage of using mediation to settle sports dispute is the process preserves and even restores personal and business relationship. The sports world is a small one, everyone seems to know somebody.[16] Relationships and even reputations are, therefore, more important and worth preserving. As a well-known mediator lucidly said 'mediation allows legal disputes to be resolved within the family of sports'.[17]

As the mediation process is not adversarial, there is no winner and therefore no loser. In fact, at the most the parties share the pain. Mediation reopens lines of communications which have often broken down, requiring the parties to co-operate with one another in finding a solution to their problems, thus providing the opportunity for co-operative problem solving. Through careful probing by the trained mediator, the actual underlying reasons for the particular dispute can be identified and addressed. This goes a long way towards finding an appropriate solution to the parties' problems.

Needless to say, dispute settlement through litigation and arbitration is backward looking, the decision or award being reached on the basis of past historical facts and background. Mediation, on the other hand is more flexible than traditional form of litigation or even arbitration, which are often technical and specialised. There are no set rules of procedure or evidence to get in the way. The approach is informal and flexible. Mediation is swift, which is a particular advantage to sports persons, who have pressing events and other commitments and commercial deadlines.

In fact, this was one of the factors why a dispute in 1999 between Frank Warren, the well-known boxing promoter, and Richie Woodhall, the former WBO super middleweight world champion was successfully resolved by mediation. Woodhall started his proceedings in the [English] High Court in 1999. The dispute had all the markings of a full blown legal fight in the courts with lots of blood on the wall and the full glare of the media. As such, it would not only be time consuming and expensive to both parties, but also potentially damaging to their reputations. Woodhall was anxious to get back to the ring, and if he were to continue to be of any value to Warren, he needed to fight his mandatory defence to his world title within a short period of time. All these circumstances promoted the question whether the court was the best forum in which to resolve their bitter dispute. It was decided to refer the dispute to mediation, which hastily arranged and conducted by CEDR. And within 72 hours later, the dispute was resolved, and happily Woodhall signed a new deal with Warren and continued to box for him. Mediation in fact is now the process adopted in many other sports cases. Clearly, mediation was an immense success in the Woodhall/Warren case and many other areas of sports law. But it is also useful to remember that mediation does have some limitations.

Conclusion

It is the research finding that of the various form of ADR available, conciliation, mini-trial, neutral evaluation, mediation is proving to be a popular and effective means of settling disputes generally and it is also gaining favour, as a means of settling sports disputes or sports-related disputes. The reasons are cogent. As mediation is confidential, there is no official record or transcript of the process. It is not possible to have a 'blow by blow' account of what was said, the arguments adduced, why a

settlement was reached and what were its terms. There are sporting and commercial deadlines to concentrate the minds of the parties and act as an impetus to reaching a compromise. Finally, there is also a pressing need for the parties not to 'wash their dirty linen in public'. The upshot is that mediation is really suited to situations where disputes arise quickly and needs to be resolved quickly and the business of sports certainly fits into this category. Mediation can have real benefits, not only in terms of saving of management time and money, but also, in the preservation of on-going relationships between the parties. These relationships are fundamental to any business but particularly so in the sporting context.[18]

Mediation as a mode of settling sports disputes is not a panacea. It works in most cases, but it does not work in some cases. Being not a legally based process, mediation is not suitable in those cases in which a legal precedent or injunction is required. It is not appropriate where a sports body needs to make a public example of another party to the dispute to act as a deterrent to others. Being a voluntary and non-binding process until a settlement is agreed, written down and signed by the parties; it is not suitable either in those cases where the parties are not interested to settle by mediation or extra-judicial means. In fact, mediation is unsuitable for resolving doping and other disciplinary cases. However, mediation may be useful for dealing with commercial fallout from such cases, for example, claims for financial compensation for losses suffered as a result of wrongful 'conviction'.

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POLICE CULTURE IN CONSTRUCTING INVESTIGATION TRANSPARENCY (A STUDY IN THE REGION OF POLICE IN CENTRAL JAVA, INDONESIA)

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ABSTRACT

The transparency of police investigation is important for the justice seeker to get an access of justice. The police legal culture, which has reticent and militaristic characteristics, affects the reality of investigation transparency done by Indonesian police officers. This article also analyzes the dilemma faced by the police in defining and bringing the investigation transparency into reality. The article presents qualitative research which has the source of justice seeker, like victims, suspects, Non-Government Organization as the legal associate, National Police Commission (KOMPOLNAS), and from the police's side in Central Java Region on 2008 to 2010. This research has purpose to examine how the police could bring the investigation transparency into reality and analyze various social context on police legal culture in bringing the transparency into reality. Based on the analysis done on the interaction of distillation between norms and facts of the investigation transparency. The interpreters with their tradition regarding the interpretation in hermeneutic circle resulted either subjective or objective perspective as follows: the definition of transparency by police referred to the notification of the investigation results, which is informative, limited, secretive, procedural, and prone to investigation failure; whereas the society referred transparency to opened, egalitarian, honest, fitted to social justice, opened justification, and fulfilling rights for access to justice. In the practice, police has been following legalistic practice than service to the people, protagonist style, has 'administrative responsibility' than 'substantial responsibility,' legal accountability than public accountability, and merely following the procedures. The findings suggest the police legal culture in bringing investigation transparency into reality should be reformed towards justice, civility, and integrity as this will enhance the society's respect on more humane and just image of the police.

Key words : police culture, investigation transparency

Introduction

Victims, suspects, or society, or commonly known as the justice seekers, are considered as the external party (outsiders) of the investigation. Police, as the internal party (insiders) of the investigation, has domination or full authority of the investigation, more information, more power, and more practical concerns on the investigation compared to the outsiders. Some factors such as the information gap, participation, and private concerns have caused both parties of having different perspectives. As the society hopes that the police would represent their interest, they demand transparency in investigation. Thus, the justice seeker aspires that the police have the legitimacy and trustworthiness from the justice seeker society.

Investigation transparency is the openness from the investigators in their interaction with the justice seeker society while conducting the investigation, for example by giving information and being open towards criticisms. By practicing investigation transparency, the society hopes that the police would have the accountability to serve and to protect the society, as they were sworn to.

As mentioned earlier, the idea of investigation transparency was based on the society's mistrust on legal upright in conducting investigations. As quoted from the Evaluation of Indonesian Police Bureaucracy Program, Indonesian Police also admitted that there was mistrust from the society towards the Police Department of Indonesia (Progress report of Indonesian Police Bureaucracy Reformation Program, 2009, pp. 47-48).

In Indonesia, justice seeker society still has negative perspective about the police image. They question the police work such as why the investigation takes such a long time, sometimes even years. The study conducted interview with the justice seeker society in order to acquire perspectives of victim, suspect, lawyer, National Police Commission, or the legal associate from the Non Government Organization (LRC KJHAM, YLBHI-LBH Semarang). The interview results showed that the justice seeker society considered the police investigators of being reticent and resistant towards the inputs and criticisms when the justice seeker society tried to find justice by handling their cases. For example, in investigating corruption case in Central Java, KP2KKN declared that the investigation was still uncertain; thus, the investigators' accountability was unknown. In an interview, the victim, suspect, lawyer, LRC KJHAM, YLBHI-LBH of Semarang declared that they often faced challenges in accessing justice. The society expects that investigation transparency would allow the equal justice from the police and based on the demands of the society.

From the perspective of the police, investigation has become the investigators' domination and authority. Based on the interview with Central Java Police Department investigator in Salatiga on September-November of 2009, the police have their own reason why they could not really convey the investigation transparency as demanded by the society. They based their reason on investigation secrecy and that no one could intervene with the investigation. They were concerned that if they revealed the investigation process to the public, it would cause failure in their investigation. As the police have full authority to do the legal upright task, they can only disclose the investigation results to the public. Transparency demand in investigation process could be considered as high risk for law enforcement process.

The research problems were presented within 2 things that had juridical, sociological, and philosophical implications:

a. Why has the investigation transparency construction not formed the police accountability according to substantial justice yet?
b. How do we construct the investigation transparency to create police accountability in doing the investigation?

Methods

The study is a socio-legal research with qualitative approach. The primary data were acquired by conducting department interview with the justice seekers such as the victims, suspects, lawyers, Non-Government Organizations (LRC KJHAM (Legal Resource Centre Gender and Human Rights Justice) KP2KKN (committee of investigation against corruption, collusion, and nepotism), LBH (Legal Assistance Institution) of Semarang), Indonesia Police Department, and KOMPOLNAS (National Police Commission). The research was conducted from 2008 until 2010 within the legal area of Central Java Police Region Indonesia. In order to set the validity of the data, it needs the examination techniques based on some criteria (i.e., credibility, transferability, dependability, and confirmed-ability)

Police legal culture

Police legal culture is the way of thinking owned by the Police. This culture becomes the base of their attitude and norms taken in their perspective on legal aspect (legal substance) and bureaucracy (legal structure). The police culture becomes the police perspective in facing both external factors (i.e., from the legal side, bureaucracy, country, society) and the internal factors, which influence their perspective or mental activity on the legal consideration and moral consideration internalized by the police. That is why police culture has an important role in investigating and digging the meaning of investigation transparency from the police, and even becomes the mind-set of the police in confronting the demand and restriction existed in the legal aspect, bureaucracy, and society.

Police culture, as declared by Peter Manning, has the role of 'speak core skills, cognition, affect and accepted practices, rules and principles of conduct that are situationally applied, and generalized rationales and beliefs. Simon Holdaway locates police culture in o residual core of beliefs and values, of associated strategies and tactics relevant to policing …. a principal guide for the day-to-day work of the rank and file officers.

Robert Reiner speaks of a 'cop culture' that has developed as a patterned set of understandings which help to cope with and adjust to the pressures and tensions which confront the police (Robert Reiner in Smith & Natalier, 2005, p. 88)
As quoted by Janet Chan (1996), Cain, Manning, and Holdaway defined police culture as the concept of police culture originally emerged from ethnographic studies of routine police work, which uncover a layer of informal occupational norms and values operating under the apparently rigid hierarchical structure of police organizations. Further, this definition was elaborated into "police cultural practice results from the interactions between sociopolitical context of police work and various dimensions of police organizational knowledge.

Therefore, Chan (1996) explained that police culture should not be understood as some internalized rules or values independent of the conditions of policing. Police culture results from an interaction between the field of policing (in either social, political, economic, or legal context of police/minority interaction) and the various dimensions of police organizational knowledge.
Smith and Natalier (2005) affirmed on elaborate consensus of police culture that:
The police need to be constantly on guard against the possibility of violence. A defensive mentality comes from the accountability of police work. Unlike most other occupation, the police are continually at risk of reprimand from superiors… Moreover, showing emotion or becoming too close to the public is seen weakness within police culture (p.89).

Investigation Transparency in the Police Culture

Basically, there are two dominant characters from the police culture: 'isolation' and a 'them-versus-us' world view. However, as explained by Miller and Hess, the isolation and them-versus-us world view conflicts with a community-oriented philosophy of policing (Miller & Hess, 2002, p. 35). As affirmed by Mc. Erlain that stated that police culture was "Code of Silence" (Mc.Erlain in Miller & Hess, 2002, p. 34), it could be said that police culture is clannish, secretive and isolated. Furthermore, it was mentioned that policemen become even more silent, secretive, and sensitive to criticism. The secrecy, with which they hope to protect themselves and is used as an adjusting mechanism, only widens the gap between themselves and the community. However, secrecy that originally starts as a protective reaction to citizen hostility, can also serve the corrupt police officers (Trojanowics & Dixon, 1974, p.141).
Linda and Karen clearly stated that from the ethics policy point of view, in order to maintain public trust, police must be men and women of good character who hold foremost the ideals of fairness and justice (Trojanowics & Dixon, 1974, p. 45). Therefore, as stated in this study, transparency and accountability are the legal needs of the justice seekers and become the standards of society

assessment towards Indonesian Police's work. If we relate the research to the investigation transparency concept by Stephanos Bibas and Fred D. Agostino, then the meaning of police transparency includes 'accessibility', 'intelligibility' and 'open justification' aspects (Agostino, 1996, pp. 58-60). The justice seekers believe that investigation transparency is the police investigation done with fully openness, honesty, and fairness towards the police's reaction against the victim's report, conducting investigation processes correctly, and fulfilling the hope of justice from the justice seekers. However, in practice, the police often place the victims as 'forgotten persons'.

Police accountability is not merely limited to the legal administration accountability/administrative responsibility, but also includes the substantive responsibility that requires the police to be honest and connect the fact with the law (PutraJaya, 2005, p.118) and the internal accountability, public accountability, plus external accountability (Osse, 2007, pp.189-190; Stenning, 1995, pp. 3-14; Walker, 2005, pp. 7-8). Police accountability has two basic dimensions. On one level it refers to holding law enforcement agencies accountable for the basic services they deliver. Crime control, order maintenance, and miscellaneous services to people and communities. At the same time, however, it also refers to holding individual officers accountable for how they treat citizens, particularly with regard to the use of force, equal treatment of all groups, and respect for individuals.

Discussion

Based on the retrieved data, it showed that there was no transparency in the police department and it had been hard for them to receive inputs or criticisms. As the result, it was difficult for the society to get 'access to justice and fair treatment' from the police. Sometimes, police officers become inhumane by provoking and intimidating the other parties during the investigation. This was mainly caused by the mindset that they acted as the authority of justice, instead of servant of justice.

In 2009, KP2KKN observation noted there were 425 assumed corruption cases in Central Java; 289 were new cases and the rest were extended cases that were still in legal process. The Reports of Monitoring and Evaluation of corruption cases and their legal treats in Regencies/Cities in Central Java in 2009 (documentation of KP2KKN) stated that 179 assumed corruption cases remained unsolved and some were unprocessed by related institutions (police and prosecution counsel).

We could also examine the society's mistrust from the complaints received by police department. The document from Dumas Polda Jateng (Dumas of Central Java Region Police) noted that there were 441 cases in 2007, 232 cases in 2008, and 345 cases in 2009 on people's complaints on the police work submitted through Itwasda Jateng (Police Internal Supervisor in Central Java).
Based on the legal assistance from YLBHI-LBH (Legal Assistance Institution) of Semarang for the justice seeker society (suspects and victims), and from the conducted observation, it was noted that the society deductively assessed the police's work during 2007 and 2008 as being secrete due to the characteristics of being discriminative, corruptive, and full of intimidation. According to the society, those characteristics reflected the situation of law enforcement that influenced police's attitudes of being not transparent in the investigation.

The same situation also happened to KOMPOLNAS (National Police Commission) in 2009, as the record showed people's complaints in all districts of Polda (Regional Police) in Indonesia. There were 1386 complaints specifically related to the investigation handled by Criminal Detectives and 1466 complaints in general towards the police units including those of Criminal Detectives. As categorized by KOMPOLNAS, 239 authority misuse cases, 8 cases of assumed police corruption, 1151 poor services cases, 48 discrimination cases, and 20 wrong discretion cases.

Based on the findings about the police interpretation , it was clear that the norms the police adopted were rooted from the ratiocination of a craftsman who merely applied law in the legal literal way. This judgment was based on the interpretation of the police, which was influenced by Criminal Procedure of Law that actually had some weaknesses in accommodating the investigation transparency. Therefore, the police interpret investigation transparency as the form of providing information on the investigation result for the actor, victim, or society. There could not be complete disclosure or open justification in investigation transparency as the police believed that they could not reveal all the information due to concern of investigation failure and to avoid intervention in their investigation process. Thus, the interpretation of transparency for the police was closer to investigation administrative procedural aspect only, as a legal accountability form, they loosely interpreted investigation transparency in in a positivism paradigm frame.

However, according to Scholten, law is a part of human spiritual life, individualism, and within togetherness (Scholten, 2005, p.18). The positivism point of view created a justice output that aimed a procedural justice, similar with the reference on autonomous legal role from Nonet and Selznick that emphasized intensely on formality for the sake of institution integrity, which was in this case, investigation integrity of the police. In Nonet and Selznick's Autonomous Law, procedure is the heart of the law, orderliness and fairness are the main purpose of legal order, instead of substantive justice. In the way of autonomous law like modern bureaucracy, it impulses a narrow point of view on the officers' obligation and the legal institution interprets its authority in a restricted way, avoids the policy issues, conceals under neutrality, and avoids initiatives (Nonet and Selznick, 1978).

The findings showed that the experience of the justice seekers on the construction of investigation transparency, interpreted that the police interpretation of transparency, either their interpretation on the norms or the fact manifestation, was still far from the society's expectation. The essence was that the society lack of trust on the police because they believed that the police did not quite serve and protect the people as they were sworn to. Police's responsibility was considered as the responsibility on the law, not the society. This was irrelevant with the opinion from Thomas A. Johnson, Gordon E. Misner, and Lee P. Brown, which stated that in democracy, the police "act as the agents of the public" (Johnston, Misner, & Brown, 1981, p. 31), considering that

the police also maintained the investigation integrity that would also restrict the investigation transparency to give information for the public about the investigation.

Both parties had different concept of transparency, in which the legal concept of police interpretation of transparency tended to emphasize the integrity of police authority, whereas the interpretation in the social concept of the justice seeker society was the emphasis on the openness. In interpreting the transparency, the police used the rational modern legal system, yet the public had different perspective. The public had their own of justice, which was apparently different from the police's rational modern legal system.

When it was related to the concept of investigation transparency by Stephanos Bibas and Fred D. Agostino, the police interpretation of transparency in legal concept did not include 'accessibility' and 'open justification' aspects (Agostino, 1996, pg.58-60). The investigator interpreted transparency as conveying information with the characteristics of procedural informative, that meant had no connection with justification process from the justice seeker society at all. The information conveyed in the investigation transparency was not directed to achieve better substantive outcomes (Bibas, 2006, p. 140; Bedner and Jacqueline, 2010). Therefore, the police interpretation of investigation transparency until now did not guarantee a way out for the justice seeker society to have an access to justice, since the police considered that the information of the investigation result was "taken for granted," by closing all access to police openness of public justice. The characteristics here, in the manifestation turned out that the police merely used as the guidance for the most influential thing for themselves.

Apparently, the interpretation of investigation transparency norms by the police in the characteristics of police behavior beforehand had some impacts. On the public side, there were lacks of optimum things such as the victim's rights to participate and to be listened to his/her opinions, the suspect's right to defend him/herself, the victim and suspect's right to get credit and respect, the victim and suspect's right to get fair and honest information on their justice, and the public's right to execute public supervision.

The occurrence happened because the police had a dilemma between their role and interest in implementing the transparency and accountability of legal upright investigation that was a process to construct abstract ideas of law into reality, whereas the police work was a legal upright work in optima forma. Through the police, the legal goal was realized, which was to protect and serve (Rahardjo, 2002, pp. 30-32, 203). In the Act No. 2 in 2002 about Indonesian Police, the Indonesian Police main task in article 13 is to maintain the public safety and orderliness, to uphold the law, to give protection, guardianship, and service for the public. Satjipto proposed that the police doctrine in the world is "protecting the society." The doctrine followed by Indonesian Police that is 'to protect and to serve'.

The justice seeker society assessed that the attitude of being secretive and self-defense from the police bureaucracy were often visible in the investigator's attitude. Although their uncooperative behavior did not clearly define the scope of responsibility, the public believed that this reflected the attitude of secretiveness from the police bureaucracy. The public also perceived that their complaints were not responded quite well as the police response was just within the procedural range, people felt they were being unfair. So far, the police received the complaints and then they only told about their work normatively, so the complaints did not represent adequately to evaluate the police.

As demanded by the people, investigation transparency should start from the moment police report was taken from the victim. It begins from the early stage of victim protection towards the reaction from victimization event occurred to get feedback through the criminal judicature. Consequently, the transparency should be reflected in 'selected law violation' towards the reported case. The Police was the entrance gate into criminal judicature system. Secondly, this selected law violation continued through the work of the legal upholders, which were related to the confronted case characteristics and the interactions among the actor, victim, and other parties including the lawyer that was involved as the instrument of law.

The interpretation of investigation transparency by the investigator was overwhelmed with the police culture in playing its role and the culture was their 'way of thinking'. Within the police department, they faced complex dilemmas and tensions in the interpretation process. The first one was the tension in executing the police's double roles. In one side they had the role as the legal upholder who must strictly maintain the legal integrity with no compromise and keep 'the investigation secrets'. On the other side, they had to play as the orderliness guardian who must manage the task in a dialog-responsive way with the public. In the next evaluation, it was also found that there was a limitation of public information openness as stated in the Law No. 14 of 2008. The Law stated that the law enforcer had the rights to keep the information if they could hinder the investigation process such as revealing the identity of the informant, the reporter, the witness, and or the victim who noticed the crime, revealing the criminal intelligent data, related to the plan of prevention and handling of all types of transnational crime, endangered the safety and life of the law upholders and or their families, and or endangered the security of the tools and equipment and or infrastructure of the law upholders.

Furthermore, the police department was an institution with double paradigm. The first paradigm was the authority in connection with the role to uphold the law, where the relationship between the police and the public had 'top-bottom' characteristic. The second paradigm was horizontal characteristic, which meant that there was a partnership or parallelism with the public related to the legal task to guard, to protect, to serve the public.

The second tension in playing the double roles as mentioned above, the police officers had some pressures coming from external factors and internal factors within the police department. The external factors included legal factor such as the police rules (norms of transparency), bureaucracy factor from the demands of the police department itself, , the justice seeker society factor

that was differently polarized in the interests of the victim, the actor, and NGO, or general public interest. The internal factor was the personal strength factor within the police department itself (legal paradigm of the police individual and personal charges). As they confront the public and regarding their work, the police officers faced many choices to interpret and to take certain action regarding investigation transparency. The police department had many interests to take into consideration, as we could say, of the conflict between individual and general public interest, and between legal justice and legal assurance.
One of the transformation challenges within the police was how to become 'civil police' in this democracy era. Civil police had to place themselves proportionally; when to act as a strong hand of society and when to act as a soft hand of society, especially in implementing the investigation transparency.

Their choice of when and where they should act accordingly was also an interesting subject to be analyzed. This was done to know how to construct the interpretation of investigation transparency from the police, to direct towards police task accountability 'to serve and to protect' headed to the substantial justice.

As police officers, investigators would always face three norms that slant the police, which became the sources of all practices of the police. They are:

a. 'Paramilitaristic' police, which is the opposite of civil police.
b. 'Reactive/traditional' police confronts with progressive police.
c. 'Antagonist' police versus protagonist police.

As proposed by Mc Erlain who stated that police culture was "Code of Silence" (Miller & Hess, 2002, p. 34), the characteristics of police officers often being clannish, secretive, and isolated. Skolnick added that "police work constitutes the most secluded part of an already secluded system" (Scolnick, 1966, pp. 12-14).

The militaristic characteristic of police officer was said to have some weaknesses. They were the dependency towards authoritarian, lack of innovation, tend to be closed, which stifles innovation, unable to cope with environment changes, lack of motivation that actually still referred to the old concept in Classical organization model police (Trojanowicz & Dixon,1974, p. 222)

It was correct to say that police work attracts people with a strong authoritarian bent. According to Packer, "the enforcement of criminal law is inherently coercive… police work seemed more repressive rather that permissive, intolerant rather than tolerant, conforming rather than non-conforming" (Packer, 1968, p. 284).

As categorized by Satjipto Rahardjo, police officers tend to had a protagonist attitude (2002, p. 32). The resolution the police tried to find for the public dissatisfaction often placed the public in the helpless position in front of the police.

Conclusion

1. The meaning of investigation transparency until nowadays is different between the transparency meaning of the social view/the bottom up view's of law from the justice seeker society and the police's investigation transparency meaning. The society expects more than informative transparency that ends in the administrative responsibility only, instead, they expect transparency that directs to the substantial responsibility based on the openness. On the police's side, transparency has limited meaning on the investigation result and not meant to be spread towards the justice seeker society, so it becomes procedural. The restriction of transparency is on the investigation technique or tactic and the investigation plan. In the existing condition, the investigation secrecy becomes the reason for not doing the transparency, because it will cause some constraints in the investigation if broken. The police have been resistant and unopened. Nowadays, "isolation" attitude and the position of justice seekers in the confrontation of being less powerful remained the dominant features of police culture.

2. As the study suggested, investigation transparency was needed to be developed more in the police culture and it will lead to some thoughts of:

- Reopening investigations, with the limitations of investigation techniques and that of the usages had to be kept secrets.
- *Proactive efforts to reduce misconduct by the police officers.*
- Permanent external monitoring to supervise police task and recommendations for changing the police policies, either to change or to bring policy review.
- Police attitude of being transparent through an open law.
- Proposing a value-oriented legal scheme.
- Opening the screen of closed ideology and clarifying the legal judgment by the police.
- Rejecting dogmatic stiffness and absolutism within the bureaucratic-centered mechanism.
- Law to humanize humans.
- The fulfillment of social values complained to the police in interpreting the transparency.
- The way of following more humane and responsive laws by the police with the consideration of conscience.
- The change of law interpretation into a more balanced model between people's interests (i.e., actor, victim, or individual) and the country, society, and the legal integrity that represented the country's interest.

We could conclude that reforming the police department by transforming the police reputation to the direction of fairness, civility, and integrity in order to be more respectful towards people's expectation would create more humane and just police.

The needs for internalization of humanity and fairness value within the Police Department, either as individual or as an institution, would bring the police into an ideal role model in order to fulfill people's expectation and hope for protection and service towards the achievement of substantial justice. The internalization efforts of these values could be constructed through Police Education that directed towards Protagonist, Progressive, and Responsive paradigms. The implementation of this program is hoped that the police mental activity-related work would reinforce the moral ethics consideration from the police.

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Thailand Australia Free Trade Agreement: Sustainable Trade for Thailand

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ABSTRACT

Thailand, as a major trading nation, has been entering into trade agreements for centuries. In ancient times trade was informal and people to people. It gradually became more formal. The early trade agreements with European nations definitely advantaged them and disadvantaged Thailand. The question is: has the current emphasis on free trade agreements really benefited countries like Thailand or are one or both parties to the agreements suffering as a result? This is based on the premise that lesser developed countries will lose benefits when they trade with developed countries. The consequences are very much dependent on the degree of commonality in the economies of the partner countries. One of the social impacts of any change in the economic structure of a country is the dislocation that this causes to some sectors of the economy. Is social dislocation an unavoidable outcome of a sustainable economy or should the focus be on ensuring the sustainability of all sectors of the economy? The Thailand Australia Free Trade Agreement (TAFTA) addresses this issue by allowing Thai industry time to adjust to the changed trading environment and provides Thailand with the opportunity to learn about Australia's trading system and use it as a stepping stone to meeting the standards of doing trade with other countries. TAFTA can be a model for other developing countries including other ASEAN members as they develop future Free Trade Agreements. Another interesting issue is how the parties to a Free Trade Agreement, who are also members of the World Trade Organization (WTO), can develop an agreement that meets all of the rules and regulations of the WTO.

Key words: World Trade Organization, Free Trade Agreements, sustainability, economic impact, legal framework, Thailand.

Introduction

As international trading has become more extensive and complex it has become more rules and treaty based under the oversight of the World Trade Organization. In addition countries are entering into bilateral and plurilateral free trade agreements. It is important to ascertain whether or not such agreements favor developed countries and whether or not a free trade agreement can lead to sustainable and how this might be achieved. This paper focuses on the Thailand Australia Free Trade Agreement (TAFTA).

Thailand has a long trading history and entered into its first treaty with a western power in 1516. This was followed by treaties with other European powers which often favored the trading partner rather than Thailand. Thailand's modern trading history commenced with its foundation membership of the WTO in 1995.

This paper describes the evolution of Thailand's international trade relations culminating in its membership of the World Trade Organization followed by its successful negotiation of its first free trade agreement with a developed country – the Thailand Australia Free Trade Agreement (TAFTA).

Initially the paper reviews the historical basis of Thai trade commencing with the uneven treaties with the European powers culminating in the Bowring Treaty of 1855 with Britain. It then looks at the progressive changes in the patterns of trade between 1850 and the end of World War II. This is followed by a discussion of Thailand's postwar development and its commitment to the global trading system through foundation membership of the WTO.

This is followed by a discussion of the legal framework of TAFTA looking at key concepts such as the free movement of goods and services, the standstill agreement, rules of origin, national treatment and most importantly for Thailand – the transitional period. This is followed by the critique offered by the scoping study commissioned by the two countries.
Finally, the paper describes some of the benefits of TAFTA that have accrued to Thailand through TAFTA and concludes that there has been a significant positive impact on the trade in services between the two countries.

History of Thailand's International Trade Relations

Early European trade

Thailand's modern economic development commenced with the foundation of Ayutthaya as its capital in 1351. At this time it was already a river trading center where people congregated together for trade and worship. Ayutthaya remained the capital for 417 years during which there were 33 kings and five dynasties – all absolute monarchs (Syamananda, 1993). The first treaty with a European country was a treaty of friendship and commerce with Portugal in 1516. In return for guns and ammunition, the Portuguese were allowed to reside at Ayutthaya and other trading centers where they purchased agricultural products. Commercial ties then followed with countries such as Spain in 1598, the Dutch in 1604, Japan, England in 1612 and France. Most of the ties such as those with England and Spain did not result in long term trade for Thailand.

Thailand was colonized by Burma twice during this period. The first was 1569 to 1590 and the second was in 1767 which ended in the sacking of Ayutthaya and the establishment of a new capital down river at Krung Thonburi by King Taksin following his defeat of the Burmese (Syamananda, 1993).

The history of Ayutthaya shows the importance of international relations and international trade to Thailand's economic development as its leaders were receptive to utilizing the resources including skills brought by foreign powers, commercial operations and individuals.

When King Rama I (1782 to 1809) succeeded King Taksin he moved the capital across the river to Rattanakosin (Bangkok). King Rama I was faced with a major war with Burma and trade with the west was suspended and did not recommence as the western powers were preoccupied with their own affairs. Under Rama II (1809 to 1824) the relationship with western countries was restored and Portugal was invited to establish an embassy in Bangkok becoming the first western country so to do (Syamananda, 1993).

When John Crawford was sent by the East India Company to negotiate a trade treaty, trade was a royal monopoly as all goods belonged to the absolute monarchy with taxing and trading outsourced to Chinese merchants and tax-farmers who applied significant mark-ups (Syamananda, 1993). Unsurprisingly, the British were unhappy with the price of goods procured by this method and desired a commercial treaty which was more advantageous to them. The negotiations with Crawford broke down because the Thais required arms and ammunition in return for trading facilities; and Thailand's insistence on a large sugar sale to Britain.

King Rama III (1824 to 1851) had a special interest in commerce (Syamananda, 1993). During this period the monarch established very strong trade relations with China. He also allowed Christian missionaries, especially from the United States to enter Thailand. The next king, Rama IV (1851-1868), further developed the relationships with foreign powers and the focus moved from international trade, alone, to trade development and security of its borders as Rama IV was of the opinion that Thailand would be unable to resist invasion by the European powers. Diplomacy was considered to be critical.
These early contacts opened the country to western ideas and helped Thailand to develop a tradition of trading with both European and Asian partners. The turning point came with the signing of the Bowring Treaty.

Bowring Treaty

In 1851 Thailand invited the British to negotiate a treaty of commerce and friendship (Terwiel, 1991). At the same time they had opened their economy to European traders but there had been little interest. The Thai economy was still suffering from an economic downturn and the isolationist policies at the end of the previous king's reign.

On 18 April 1855 Thailand and Britain signed the Bowring Treaty (Keyes, 1989). The Treaty provided Britain with extraterritorial rights over British citizens (Bowering Treaty, 1855), removal of all restrictions on trade and for the fixing of very low import and export duties. "From the time of the treaty on, Siam was increasingly integrated into an international order dominated by Western powers. This process led to Siam's transformation into a modern nation-state." (Keyes, 1989). With the removal of barriers on trade, the Crown was forced to find new methods of raising revenues through direct taxation and indirect taxes on opium, gambling, spirits and lotteries.

1850s to World War I

Between 1850 and 1907 rice exports increased from 5% to 50% of the total crop due to an increase in acreage as well as intensifying production on existing fields (Keyes, 1989). Over 80% of the rice exports went to Thailand's traditional markets of Hong Kong and Singapore (Owen, 1971). Rubber, tin and teak were also major exports. There was a sharp decrease in textile production as cloth and western goods came onto the market. The pattern for modern trade had been established.

Trade led to considerable improvements in infrastructure, particularly in Bangkok. The new jobs created in Bangkok were overwhelmingly filled by Chinese immigrants who came to Thailand as non-agricultural laborers and traders. This was similar to other societies of countries in Southeast Asia as Thailand was becoming part of an international economic system, but "in other fundamental ways it evolved differently because, unlike those other societies, it was transformed politically by an indigenous elite rather than by Western colonial rulers" (Keyes, 1989).

The Bowring Treaty was in effect for 70 years and was withdrawn under the reign of King Rama VI in 1925 (Syamananda, 1993). This was no doubt due to the government's weakened financial situation as the result of extensive infrastructure spending as well as extravagant spending by the monarch (Paitoonpong & Abe, 2004).

Keyes (1989) considers that "Thailand's relations with foreign countries have, since the Bowring Treaty ... been shaped by two major concerns: the integrity of the nation-state and the development of international trade. These concerns have always led Thailand to orient itself toward those powers that were felt more likely to ensure the country's security and to provide markets for Thai products and sources for those goods Thailand wished to import."

Little has changed since Keyes comment. Even in 2015 Thailand's concerns are still integrity of its borders and international trade. Thailand has an ongoing border dispute with Cambodia, in particular at the Temple of Preah Vihear (Khmer) / Prasat Phra Wihan (Thai) where there are periodic military skirmishes (Sothirak, 2013).
Thailand between World War I and World War II

Thailand signed a number of treaties with western countries in the period 1920-1925 (Keyes, 1989). In essence, these treaties abolished extraterritoriality in Thailand placing foreign nationals under Thai law and, subject to a few restrictions, each party was free to fix customs duties.

The year 1932 was a turning point in Thai history when the "new elite" of government, military and naval officials conducted a coup against Rama VII (Wright, 1991). As a result of the coup the absolute monarchy was replaced by a constitutional monarchy. To avoid a potential civil war the king introduced the Constitution, abdicated on 2nd March 1934 and moved to Britain. Since 1932 Thailand has been a constitutional monarchy operating under 17 different constitutions and since May 2014 under a military junta (Constitutional History of Thailand, 2015).

Post war development

After the war Britain and France demanded that Thailand return all territories taken during the war and the separate 1940-41 Indochina war with France and pay war reparations (Keyes, 1989). The United States had never accepted the Thai declaration of war and used its good offices with Britain and France to assist in the Thai negotiations and minimize their demand for reparations, especially in the light of the pro-Ally actions of the Free Thai Movement during the war. This was the start of special relationship between Thailand and the USA that, it is claimed, led to marked changes in Thai Society from mid-1950s to mid-1970s and laid the platform for their later free trade negotiations of the 21st Century.

By negotiation with its previous treaty partners, Thailand was able to preserve its pre-war status and joined the United Nations Organization in December 1946 (Syamananda, 1993).

In 1948 Thailand was seen externally as unstable, lacking efficient administration and its published figures for rice production bore no relation to actual production (Cooper, 1995). At times politics and trade are difficult to separate. Developing and maintaining a good relationship with a powerful country can result in close trade relations. The United States saw both political and commercial benefits in closer ties with Thailand. From 1950 the U.S. provided considerable military and economic assistance to Thailand to ensure that Thailand remained a firm ally (Randolph, 1986). With development came a considerable increase in U.S. - Thai trade. Thai exports to U.S. increased ten-fold between 1986 (USD 1.74 billion) and 1996 (USD 11.34 billion) (U.S. Department of Commerce, 2015). The value of trade doubled again by 2006 (USD 22.47 billion) and increased at a much slower rate between 2006 and 2014 (USD 27.12 million). The balance of U.S.-Thai trade significantly favors Thailand. Even in 2012 the U.S. was Thailand's third largest export market with 9.9% of the export trade and fifth largest import partner with 5.3% of the Thai import market (Central Intelligence Agency, 2015).

The United States commenced stationing military aircraft in Thailand in 1964 and developed strike bases for attacks on Vietnam, Laos and Cambodia. This involvement continued until 1973 when Thailand requested the U.S. to remove its military bases. This was a period of economic development with industries associated with the war in Indochina (Keyes, 1989).

In the late 1950s, Thailand launched into development on a strategy of agricultural-export-led growth (Phongpaichit & Baker, 1998). In 1951 agriculture accounted for 50.1% of the Gross Domestic Product (GDP), industry 18.3% and commerce 18.0% (Chamarik, 1983). By 1960 agriculture had dropped to 39.8%, industry had increased to 26.2% and commerce had dropped to 15.2%. In 1970 agriculture had dropped further to 28.3%, industry further increased to 31.6% and commerce rose to 19.1%. It terms of value, therefore, there was a gradual move from an agrarian based economy to an industrial-based economy.

As late as the early 1980s, the government's policies still favored agriculture and import substitution. Between 1985 and 1990 there was a ten-fold inflow of private capital. The years 1990-1991 saw rapid change in the management of the Thai economy. The cabinet reduced tariffs, introduced a Value Added Tax, reduced many trade controls and reformed corporate and income tax structures. Exchange controls were also abolished (Phongpaichit & Baker, 1998).

This is an important period in the development of Thailand's modern trade as it laid the foundations for its sustainable growth. Thailand saw the benefits in identifying and supporting key entrepreneurs to develop Thai businesses mainly in the services sector: telecommunications, real estate, construction, entertainment and media (Lauridsen, 2008). As most of these areas were financed by domestic capital and local services they were protected by strict foreign competition and security laws. In addition the collective interests of big business were protected by delaying privatization of state enterprises where they would be competing against the supported big businesses, delaying the setting up of regulatory authorities and easing the conditions on concessions (Phongpaichit & Baker, 1998).

This period saw the commercial, and then political activities, of Thaksin Shinawatra who would later become Prime Minister and the key promoter of the Thailand Australia Free Trade Agreement and similar agreements. Thaksin saw both economic and foreign policy objectives in pursing bilateral free trade agreements (Pongsudhirak, 2013). The then current (external trade) account was adverse and Thailand needed policy innovations and structural adjustment to maintain its competitiveness as international trade was essential to its prosperity. Thaksin recognized that the World Trade negotiations were going to be a very slow process before there would be a positive outcome, hence his support for FTAs in preference to the WTO negotiations. It is important that Thailand must continue to innovate and adjust to remain competitive even today.

The down-side of the rapidly growing economy was that the illegal economy flourished. It is estimated that the illegal economy in the years 1993-1995 constituted between 8-13% of the Gross National Product (GNP) (Phongpaichit, Piriyarangsan & Treerat, 1998). The largest contributor was gambling then prostitution, drugs, diesel oil, labor and contraband arms.

Thailand and the World Trade Organization
Thailand was a Founding Member of the World Trade Organization (WTO), having signed the Marrakesh Protocol and become a member on 1st January 1995. One of the issues that developing countries like Thailand face when they join multinational trading organizations is the push by the developed countries, for the developing countries to change their domestic laws to harmonize with those of the developed country. Sometimes this can be an obstacle to development, as is the case, for instance, with changes to intellectual property laws.

Like all of the signatories, Thailand has to meet a number obligations and duties under the WTO treaty. Where necessary, Thailand was committed to amend its laws to meet the requirements of the Protocol and to ratify the agreement. The most tangible changes were in the area of intellectual property rights which were part of the discussions under the Uruguay Round and became the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the Marrakesh Agreement establishing the World Trade Organization. In addition, Thailand was required to reduce tariffs, increase quotas and reduce both domestic and export subsidies.

Although both Thailand and Australia are members of the WTO they both saw a mutual advantage in entering into a Free Trade Agreement which offered additional benefits to each party. The Thailand Australia Free Trade Agreement (TAFTA) was the first free trade agreement that Thailand, as a developing economy, entered into with a developed economy.

Summary

Thailand has been negotiating trade agreements for centuries where it saw such an approach in its economic interest. Regardless as to whether Thailand was ruled by an absolute monarch, democratically elected government or a military junta, primacy was given to the integrity of its borders and the development of international trade. Negotiations were always driven by the need to export Thai goods whilst protecting local producers.

This same situation applies today and is the driver for Thailand's membership of the World Trade Organization and its negotiation of bilateral and plurilateral free trade agreements. The Thai economy has, of course, changed over that period from an agrarian to an industrial base. Much of that changed has occurred over the last 40 to 50 years.

Legal Framework of TAFTA

Harmonization of laws

As part of its obligations to the WTO, Thailand is required to harmonies its laws to meet the continuing requirements as new WTO agreements are proposed. This meant that, as Australia and Thailand were already members of the WTO, no additional changes to the laws of either country were required. It is important to note, however, that Thailand had introduced major changes to its laws in the ten years between joining the WTO in 1995 and commencement of TAFTA on 1st January 2005.

Abolition of trade restriction

The movement of goods and services, free of tariffs and quotas, is the most important outcome of a free trade agreement. Whilst this is the ideal, an FTA agreement often sets out an extended timetable to achieve such an outcome and often continues with some tariffs and quotas.
Under TAFTA, the parties made a mutual commitment to eliminate both tariff and non-tariff trade barrier for the products that originate in the country of the parties. However this measure cannot function immediately. It has to be brought in over time to

prevent dislocation and disruption to local firms. The agreement allows each party to maintain their rights to apply taxes on the products of other countries who are not the party of the agreement.

The reason TAFTA contains a commitment to eliminate duties on goods is to grow the economy of each country through trade; at the same time meeting the requirements of Art. XXIV (8)(b) of GATT 1994.

It was necessary for TAFTA to be comprehensive and have substantial coverage of all trade. One of the principles of TAFTA is to provide support to the parties to promote their goods. In contrast, if the parties to TAFTA only allowed a limited number of products under TAFTA, it likely to result in protection rather than open and free trade and it would be an obstacle to the functioning of TAFTA.

All products of Thailand and Australia were contained in the Schedules to the agreement with a timetable to eliminate duty and quotas. It is called a negative list because all products are included unless they are explicitly excluded.

However Thailand and Australia were concerned that the agreement could have some negative effects. Negative effects could result especially in the case of sensitive products. For sensitive products both countries agreed to extend the period to eliminate duties. The lists of sensitive products are included in Annex 2 of the Agreement. This delay will provide time for their domestic producers to prepare to cope with TAFTA. Moreover the very sensitive products such as agricultural products have special safeguard measures to protect domestic farmers from damage. This allows duty to be applied if such products reach their quota in the country in any year.

Standstill clause

Under this principle a state is not allowed to increase any existing barrier to trade. As a result a party cannot increase an existing customs duty or introduce a new tax on the original goods. This principle is set out in Article 203(2) of Thailand Australia Free Trade Agreement. Moreover the parties have a commitment to function under Art. VIII (1) of GATT 1994.

Australia agreed to reduce duty on 83% of total product categories to 0% when the Agreement came into force. The products in these lists included items such as small passenger vehicle, pick-up trucks and canned pineapples. The rest of the products on the lists were reduced, as agreed to 0% by 2010 and 2014. The duties on textiles and tuna were removed in 2010 and on garments were removed in 2014.

Thailand agreed to reduce duty on 49% of its total product categories when the Agreement came into force the products that are in these lists included vegetables and fruit, food, jeweler, cars and pick-up trucks. The rest of the product lists which were progressively reduced to 0% by 2010 included canned tuna, textiles, footwear, spare parts, and plastic products. The sensitive products such as agricultural products and some industrial products will be reduced to 0% in 10 years, 15 years or 20 years. Under the sensitive lists Thailand has the ability, under TAFTA, to invoke a Special Safeguard measure to protect these sensitive products as well.

Rules of origin

The origin of goods is an important issue regarding the Thailand Australia Free Trade Agreement and for other trade partners. It is covered in Annex 4.1 of the Agreement. Without clear rules of origin third parties could take unfair advantage of the parties to TAFTA. Under the Agreement, the principle of Rules of Origin the parties will classify goods according to the following classification as: Wholly Obtained Goods which are goods which come from raw materials or from natural resources of the territory of the party. The products of this group are provided a special privilege under TAFTA and include products that have never been processed; Change in Tariff Classifications which refers to the products made from materials that come from a third country and must be processed in the country of one of the parties. The process used on the raw material must result in the finished product having a tariff classification different from the raw material. Such an item is considered to be a product of the processing party; and Regional Value Content which refers to products that are not under the scope of Annex 4.1 of TAFTA but have been agreed by the parties. Such products must contain a specified minimum level of material. The formula for calculating the Regional value Content is provided in Article 403 of TAFTA.

National treatment

National Treatment has the aim of applying equal treatment to the parties of each country as they each treat their local producers. This principle is very important in international trade. Each Party shall accord national treatment to the goods of the other. Trade in goods was covered in TAFTA in Art. 202, and is in accordance with Art. III of GATT 1994.

Transitional period

The key of strategy of TAFTA is tax reduction. The process of tax reduction is discussed in Chapter 2: Trade in Goods of TAFTA. It is one of the main mechanisms to facilitate free trade. Details are provided in Annex 2: Tariff Schedule of TAFTA. TAFTA plans to adjust the duty structure and eliminate trade barrier over 20 years. It entered into force on 1 January 2005. TAFTA will reach the timeframe in 2025 by which time Thailand and Australia will have free movement in goods and services.

The Free Trade Agreement Joint Commission (FTA Joint Commission) was established under TAFTA as the organization established to "ensure the proper implementation of this Agreement and to review periodically the economic relationship and partnership between the Parties".

TAFTA scoping study

Prior to commencing substantive negotiations, the Australian Department of Foreign Affairs and Trade and the Thai Ministry of Commerce (2002) conducted a joint scoping study concluded that an FTA "would bring significant economic benefits to both countries". The economical modelling undertaken as part of the study indicated that, if implemented immediately, TAFTA would boost Australia's GDP by US$6.6 billion and Thailand's GDP by US$25.2 billion. The report expected an increase in Australian exports to Thailand in areas such as dairy and other agricultural products, pharmaceuticals, aluminium, and large passenger motor vehicles and components. Thailand's increased export potential was expected to be in the areas of small motor vehicles (passenger and commercial), plastic goods, iron and steel products, pulp and paper products and agricultural products.

It predicted significant gains from liberalizing the services sector; with Australia benefiting from being able to operate more freely in Thailand and Thailand benefiting from an appreciable impetus to investment. Depending on the terms of the FTA there could be an increase in foreign direct investment into both countries. It considered that an FTA would open up new opportunities in textiles and clothing. The existing links in sectors such as education and tourism were expected to intensify. The study found that, as Australia and Thailand had relatively complementary economies with different specializations, the value of the current international trade between each is only around 2% of their total trade, "the adjustment costs associated with an FTA are likely to be modest". Finally it considered that an FTA "would provide a framework for improved cooperation in many areas".

After reviewing the signed FTA and undertaking further economic modelling, the Centre for International Economics (CIE) (2004), in a report prepared for the Australian Department of Foreign Affairs and Trade, found that TAFTA would deliver economic benefits for both countries. The gains to Thailand would be larger as Thailand had higher barriers to trade and therefore, according to CIE, a less efficient economy. An Australian Parliamentary Library briefing note on the enabling customs legislation concluded that overall there was evidence that TAFTA would have a positive economic effect on both countries with Thailand appearing to gain more (Donald & John, 2005).

It might be noted that neither the scoping study nor the CIE reports prepared for the Australian Government consider factors other than economic considerations.

Benefits to Thailand of TAFTA

TAFTA had an immediate benefit to Thailand as Australia eliminated most of its tariffs and quotas on Thai products immediately, while Thailand agreed to the elimination of 94 per cent of Thailand's tariff and quota barriers on imports from Australia by 2010. Australia had an absolute period of ten years to eliminate the tariff on all Thai products by 2015. Thailand has an obligation to phase out all tariffs on Australian products by 2025. This occurs on an annual basis on 1st January each year in accordance with the schedule plan.

This gave Thailand early access to the Australian market whilst protecting the Thai domestic market from competition allowing Thai industries time to adjust. What was important was that the negotiators focused on products rather than industries. In particular, benefits were provided to the Thai agricultural sector. The sensitive area of the Thai economy was considered to be the agri-food sector so it was agreed that such products of Australian origin which included meat, diary, fruit and vegetables, sugar, other processed foods and hides and skins, would be subjected to a reducing tariff regime where Thailand would gradually reduce most of its tariffs to zero by 2020. The remaining tariffs and quotas which applied to dairy goods especially skim milk powder and liquid milk and cream, where all tariffs and quotas will be reduced gradually until they are eliminated in 2025. Thailand has successfully undertaken waves of agrarian reform (Kitiarsa, 2012) and there is no reason to suspect that this will not happen in the future.

TAFTA also provided benefits to Thai investors as it allows Thais to invest up to 100% in any Australia service sector except press, radio and aviation on the proviso that any capital investment of more than AUD 10 million has to be approved by the Foreign Investment Review Board (FIRB). In addition, Australia is more flexible to Thais than are other WTO members as it allows businesses from Thailand such as legal consultants, landscape designer, car maintenances, Thai language Institutes, spas and restaurants to operate in Australia. Australia has also eased entry requirements for Thai business people and people with trade qualifications. Finally Australia has initiated a Working Holiday Scheme for Thai students.

In the area of sanitary and phytosanitary measures, Australia is known as being very strict and its requirements are often seen as an obstacle to trade. Prior to the signing of TAFTA Thailand had been fairly unsuccessful in negotiating entry of many products into Australia (Smith & Smith, 2014). TAFTA established a process to resolve the problem and establish rules for the entry of Thai priority products such as mangosteen, lychee, longan, durian, chicken and prawn to the Australian market. At present pineapple, longan, lychee, durian, mangosteen and processed prawns and chicken can access the Australian market.

Australia is an expanding and stable economy, and the two countries are relatively close but the volume of trade was lower than one might expect, especially as their economies are complementary. This provided a real opportunity for Thailand. There has been a noticeable increase in bilateral trade since the commencement of TAFTA. Merchandise trade (exports + imports)

increased from US$ 5 billion to US$ 15.1 billion between 2004 and 2010 with the share of bilateral trade to total trade increasing from 2.6% to 4.0% and this is attributable to a large extent to the operation of TAFTA (Athukorala & Kohpaibon, 2011).

Conclusions

TAFTA has had a significant impact of the trade in goods and services between both countries. Whilst it is still at an early stage in its evolution it is clear that it has led to an increase in Thai exports to Australia. It has also opened the Australian market to the Thai services sector and Thai investment.

One of the key features of the TAFTA negotiations was the desire of the parties to ensure that the changes required to open up the Thai economy to Australian goods and services was staggered over a number of years. This was to allow Thai industry time to develop its own local industries so that they would be better able to adjust and so be able compete with Australian imports. The negotiations also gave Thailand the opportunity to negotiate a framework for the resolution of sanitary and phytosanitary issues that had previously been a major impediment to the export of Thai produce to Australia.

In many ways the benefits derived from TAFTA are due to the complementary nature of the two economies. Even so, the negotiations ensured that TAFTA would cause minimal impact on any one sector of the economy by focusing on a product by product (i.e. tariff code) basis rather than on the broader industry providing the more trade exposed sectors of the economy time to adjust, up to 25 years in the case of the dairy industry.

Because of the nature of its economy which is export rather than consumer driven Thailand, by necessity, needs to be part of the international trading community. What the TAFTA negotiations and subsequent agreement have shown is that a developing country can negotiate a free trade agreement with a developed country resulting in an agreement that seeks to preserve the sustainability of all sectors of the Thai economy whilst providing Thailand with the opportunity to benefit from the two way trade in services and investment.

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ADVANCING MODES OF EQUITY PARTICIPATION IN ISLAMIC FINANCE: PROBLEMS AND MEASURES

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ABSTRACT

Facilitating equity participation in trade and other undertakings that help the real fruits of ventures spread among a larger segment of the society while dividing the inherent risk is an important facet of an Islamic financial system. Several decades after their appearance in the scene of banking and finance, Islamic banks continue to use debt-financing tools widely, and have not so far been successful in implementing equity modes in a significant manner. The reality of equity financing becoming merged with debt-oriented practices due to erroneous or weak structures gaining currency may prove harmful to the cause of Islamic finance in the long-term. Many equity formats in vogue embody features that inhibit them from optimum performance. With growing awareness of the negative facets of debt financing, scope for equity modes could expand in the near future. It is essential that necessary guidelines are laid down and complexities dealt with in time for ready application. The paper explores problems related to implementing equity based structures, and highlights the measures to be adopted for advancement of equity financing.

Keywords: equity financing, debt financing, Islamic commercial law, Islamic finance

Introduction

Ideally, a large proportion of all business financing in an Islamic economy would be based on equity financing, where the financier shares in the profit and loss of the business financed. Given the short period and limited experience allowed for the evolution of financing modes in Islamic banking and finance as alternatives to interest-based modes, it could be readily understood that they are in need of continued review and improvement. This is especially true of equity financing modes currently adopted, which presented a novel concept in banking at the time of their introduction by Islamic banks. As such, these are seen to be based on formats originally developed mainly for survival and competition in a predominantly hostile setup. Practical involvement in the field of Islamic banking would reveal that current equity structures comprise various areas that call for a reassessment in the light of shari'ah principles.

With the experience gained through implementation over a period, a careful scrutiny of prevalent equity financing techniques could be appropriate in order to assess the level of their shari'ah standing. In addition, with Islamic banking gaining a firm foothold in the banking and commercial sectors, a more dynamic approach to promulgating the shari'ah ideals of equity participation appears timely. This is especially relevant in view of the fact that the transition from interest-based banking to an Islamic setup was primarily undertaken to ensure adherence to shari'ah norms. Unless the latter intent is realised satisfactorily, efforts taken in this regard are in danger of becoming an exercise in vain.

The current paper provides a summary of equity financing and its relationship to debt financing mainly from an economic perspective. Thereafter, the paper would proceed to explore the application of equity financing in the context of Islamic banks, and study the possible reasons for the current apathy towards employing equity based structures for financing and the problems involved. The paper would conclude with outlining issues that need to be addressed for advancement of equity financing.

Financing on equity vis-à-vis debt financing

In conventional debt financing, additional finance sought is injected in the form of a loan at a predetermined rate of interest. The funds injected come as a liability on the venture, which is to be repaid with the interest, according to the terms agreed. The funds do not play any role in increasing the equity base. They remain a foreign element as far as the assets of the venture are concerned, and do not take a constructive share in enhancing the networth. Therefore, even a large amount of funds injected as a debt serves only the purpose of inflating the cash position temporarily. Profit / loss of the venture is borne solely by the entrepreneur, the lender not being immediately concerned with this aspect. Irrespective of the ultimate profitability of the venture, the lender is entitled to receive the agreed amount of interest. Thus, risks are associated with the entrepreneur solely.

In financing on the basis of equity participation, the funds required by the venture are injected as equity or capital that is entitled to a share of any profits realised through the venture, while being exposed to erosion or total eradication in the event of loss. The funds increase the equity base of the venture, thus providing stability. The profit and loss both are distributed among all participants who contribute towards the equity, which is differentiates this mode of financing from debt financing. Thus, equity

financing entails mutual sharing of risks pertaining to the enterprise and an equitable distribution of the return. The actual rate of return of all sharing parties will be determined *ex post* in accordance with the actual performance of the venture.

In profit sharing arrangements, only shares of expected profit are determined at the outset, while the actual rate of return on investments is to be determined in the end, on the basis of realised profits. However, debt, on the other hand, requires predetermined interest payments, and business difficulties may create pressures on the firm's cash flow, forcing it to forgo lucrative business ventures, borrow further, or sell its existing assets. As equity finance does not create such mandatory payment, the cost of adjustment to any contingency is lower.[1] Therefore, proponents argue that in an advanced economy, equity financing should be the rule and not the last resort. Profit sharing provides more flexibility in meeting contingencies. This is because of the balanced distribution of gains as well as the risks among the participants in equity financing, while debt is restrictive and unforgiving, hence less stable.[2]

Researchers have highlighted the property right imbalance in debt finance arising through the fixed nature of the interest element. One party, i.e. the lender, has some permanent and contractually guaranteed rights, while the other, the borrower, only has some temporary and residual rights. Such imbalance and asymmetry of property rights may entice opportunistic behaviour on the part of the borrower in several forms such as misappropriation of funds or forgoing altogether of what could otherwise be a profitable venture. On the part of the lender, should difficulties develop, he could resort to foreclosure and liquidate what could be a better business in the long run.[3]

In depositing funds with a bank under an equity arrangement, instead of being guaranteed for the face value of deposits, the depositors here are essentially shareholders whose returns vary with the profits and losses of the bank. The situation could be even compared to accounts in mutual funds. This would render deposit insurance unnecessary, and there would be less likelihood of financial panics or runs. Research in the area of mutual-fund banking comes to the same conclusion.[4] Researchers also observe that under equity financing, assets and liabilities of the bank would move together due to the above reason. This, while relieving banking authorities from excessive regulatory oversight, would result in the net-worth values constantly giving an adequate read on the health of the financial institution.[5]

In debt financing, the possibility of refinancing brings about an uncertainty for both parties as to the nature of the future terms of the contract. It may even induce the debtor to liquidate to save as much as he can of the present value before foreclosure prevents him from saving his own equity. In a profit sharing arrangement, there is less incentive for this even if the expected average gross rate of return changes, due to the absence of a strict obligation of principal repayment on the entrepreneur. The return to the capital investor will be in accordance with the actual market conditions.[6]

In the equity based risk / reward sharing system, value judgements as well as strength of the proposal would both play an important role in the allocation of resources.[7] Financing of any economic or business activity turns into an ownership stake, and banks have an incentive to make the joint venture work. They become fully involved in overseeing the project and make sure that the money is spent wisely.[8] Similarly, the equity arrangement should encourage the borrower to exert more effort in his endeavour and should lessen the moral hazard problem of underreporting profits.[9] The fusion between investment experience and financial experience found in the Islamic banking system could provide the maximum guarantee for sounder investment through the best possible utilisation of limited resources.[10]

Equity financing in the practice of Islamic banks

Despite of certain advantages as could be perceived in the equity mode, the conventional system of banking and finance is seen to be founded on debt financing with the interest-based loan as its primary building block, equity financing usually being the last resort. The conventional system has refused to share in the risk of the ventures financed in any manner, sufficing with the risk-free gain through interest income. More surprisingly, adoption of equity financing modes by Islamic banks themselves is noted to be less common than the use of debt-financing modes. The latter usually involve various adaptations of mark-up schemes, and are employed for the most part in short-term financing. Although Islamic banks are allowed to invest in businesses directly in addition to financing third party enterprises, in actual fact, direct investment by Islamic banks is not seen to have flourished due to a variety of factors, not the least among them being the identity inherited from the conventional industry as mere financial intermediaries, and legal impediments resultant of this identity. Debt-based structures frequently adopted by Islamic banks are

[1] Usamah A Othman, 5.

[2] Ibid.

[3] Othman, 11.

[4] Tyler Cowen, Randall Kroszner, "Mutual fund banking: a market approach," (1990) vol. 10 No. 1 The Cato Journal 227, in Mohammed Akacem, Lynde Gilliam, 124(15).

[5] Akacem, Gilliam above.

[6] Othman, 7.

[7] M Umer Chapra, 332.

[8] Akacem, Gilliam above.

[9] Othman, 8.

[10] M A Mannan, 226.

murabahah, ijarah, istisna', and numerous variations based on these. Application of equity financing modes is seen to be less developed and adopted sometimes in unfavourable conditions where they may not function in a manner that could reveal their full potential.

Islamic banks in general employ *murabahah*-based structures to finance local and foreign trade transactions, albeit with a considerable level of inconvenience. The tendency among Islamic banks has been to invest in short-term deals, due to the apprehension that involvement in long-term equity projects could affect regular payments of profit to depositors, a necessary aspect in competing with conventional banks. Such aversion to long-term investment reduces the efficiency of Islamic banks in the long run.[11] In the Malaysian context, Islamic banking is concentrated in the individual customer sector and not in commerce and industry.[12] Despite of the fact that short-term financing, involving trade financing and other types, performs an important economic function, such financing does not cause the creation or increase of additional production capital, on which real economic growth rests. Thus, emphasis on short-term financing would not be congruent with social needs.[13]

It is necessary to analyse the causes for the lack of widespread application of equity financing modes in Islamic banking practice. In the discussion below, an attempt is made to study the background to this setback, which had led to the prevalence of debt-based modes in the Islamic banking culture, instead of a genuine implementation of equity based structures. The problems faced in employing equity modes, and possible measures for advancement would be explored thereafter.

Background to the marginalisation of equity modes

The economic measures advocated by shari'ah favours a system that leads to an equitable distribution of wealth, avoiding excessive concentration and deprivation.[14] Facilitating equity participation in trade and other undertakings that help the real fruits of ventures spread among a larger segment of the society while dividing the inherent risk is an important facet of an Islamic financial system. As such, a decisive and unambiguous introduction of genuine equity financing modes has been a vital goal in the establishment of Islamic financial institutions.

During their formative period, in order to compete with the well-established interest-based banking sector, Islamic financial institutions were hard-pressed to develop a viable scheme compatible with Islamic principles in a relatively short span of time. Due to the special constraints under which they had to operate at the time, shari'ah scholars had allowed them to resort to some trade oriented products that could serve the purpose of providing a permissible alternative to interest-based financing. Similarly, in employing methods of equity participation, in acquiring funds from investors as well as disbursement to entrepreneurs, aspects pertaining to capital, profit / loss sharing etc were subjected to some modification and amendment in order to facilitate ease of application in different areas of financing. These structures allowed elements of Islamic finance to be introduced in the field of modern banking and commerce in an experimental manner, in harmony with the prevalent norms and operational procedure. In order to win market approval and customer confidence, they were structured in a way that incorporated some aspects of conventional banking, and were planned to diverge from established banking practices only where it was essential. Thus, equity-financing modes that are employed by Islamic banks currently in many areas are seen to embody aspects that could be more readily related to debt financing.

Several decades after their appearance in the scene of banking and finance, Islamic banks continue to use debt-financing tools widely, and have not so far been successful in implementing equity modes in a significant manner.[15] Some of the reasons cited for the limited employment of equity structures were discussed above under equity financing in the practice of Islamic banks. Nonetheless, the reality of the current Islamic financial scene is that a number of modes currently adapted by Islamic banks for financing purposes have little in common with investment and financing. These modes are not the perfect Islamic substitutes for the interest-based counterparts they are supposed to replace, but happen to be extensions of debt-based products that have been adapted to conform to shari'ah requirements for financing mediums. As stated earlier, while these modes constitute valid means of trading and commerce when utilised in their original contexts, their adoption for financing, often with a number of alterations for their suitability in a banking environment, is not devoid of negative aspects. Regardless of their admissibility or otherwise, continued operation of these modes could not be expected to realise the fruits of an ideal Islamic economic system, which result from a full-fledged implementation of Islamic equity modes.

Due to the persistence of Islamic financial institutions in employing debt-financing structures as the main avenue of business, contemporary scholars have done a considerable amount of work in fine-tuning them and identifying solutions for difficulties faced in their implementation as a universal alternative for all types of interest-based loans. The efforts in this regard have been undertaken to ensure that such financing, although unsuccessful in realising Islamic economic objectives, remains within the broad limitations of the shari'ah. However, considering the fact that debt financing is never the ideal Islamic alternative, and as such, could hardly be expected to curb the economic evils of the current system, debt-based tools appear to be grossly unworthy

[11] Saad al-Harran, 8.

[12] Nik Mohamed Affandi bin Nik Yusoff, 55.

[13] Obiyathulla Ismath Bacha, 35.

[14] Qur'anic verses on the division of booty, inheritance, payment of *zakah*, charity and spending of excess wealth etc. allude to this fundamental value. See *Surah al-Hashr*, 59: 7, and *al-Baqarah* 2: 219.

[15] For a highly incisive yet succinct appraisal of the issue, see the chapter on "The Performance of the Islamic banks – a realistic evaluation" in Muhammad Taqi Usmani, 235.

of the extensive work carried out by contemporary scholars and the ongoing discussion on the topic. Therefore, a major push by academic circles to incline Islamic financial institutions towards a sincere attempt at implementing equity modes appears timely, through increased discussion on the topic and removing major hurdles on the way.

Problems in implementing equity structures

While some have gone so far as to question the sincerity of Islamic banks in devising workable interest-free alternatives,[16] i.e. based on equity participation, reasons cited by others for the lukewarm interest shown by current-day Islamic financial institutions in implementing equity structures carry some similar themes. A major factor could be that equity financing is commonly perceived as difficult in operation. This perception appears to arise from the conventional banking standpoint, where equity financing is considered specialized business carrying drawbacks such as risk, difficult nature, long gestation period and potential involvement in management.[17] *Mudarabah* financing is assessed to have more agency problems compared to conventional debt or equity financing.[18] Obligation to oversee projects in which they are partners is another potential deterrent. This requires managerial skills and expertise in overseeing different investment projects.[19] Clients and projects to be financed require more careful evaluation.

While some of the above factors had been partially addressed in the foregoing appraisal of equity financing and debt financing, some additional responses could be reviewed here. It has been pointed out that costs and other requirements pertaining to auditing and monitoring internal performance and related issues are part of set-up costs, which are needed irrespective of the form of finance.[20] Others argue that debt financing only bypasses the need for information by requiring collateral and creditworthiness to ensure repayment of principal plus fixed, predetermined interest. The issue of information cost in the profit loss sharing system, i.e. equity financing, has to be judged by comparing the benefits of collecting information with the costs associated with it. Moreover, in a bank-client relationship, it is hardly likely that the client would contemplate of only a single transaction with the bank and be tempted to withhold information. In the context of the need for a continued bank-client relationship and competitive demand for bank finances, the problem of information asymmetry poses less of a problem. In fact, the issue exists in all market transactions, which is taken care of through credit rating and other measures. Institutions and conventions could be developed, when those in existence are considered inadequate, to restrict gains from fraud.[21] It should be conceded in this regard that within profit loss sharing techniques, *musharakah* might have an edge over *mudarabah* in the sense that in *musharakah*, the capital owner has a right to enter into the management and hence have some control over the problems created by information asymmetry and moral hazards.[22]

Therefore, although some have suggested asymmetry of information as an explanation of why profit loss sharing has failed to prevail in a competitive market despite of being superior to the interest-based system or mark-up based techniques, others have highlighted the fallacy of this supposition as outlined above. Thus, it is necessary to investigate other causes for this phenomenon. A major hurdle could be the economic structure, which may have a bias in favour of the interest-based system rather than a profit and loss sharing arrangement. Tax structures are regarded unfavourable to equity formats. While interest payments are deductible expenses and result in reducing the tax burden, adopting equity financing thus claiming a share in profits could increase tax liabilities for the entrepreneur. Some researchers have shown that the only advantage of debt financing vis-à-vis equity financing is the tax savings generated by the former.[23]

Another important reason that prevents equity schemes coming into practice is the simultaneous presence of the interest option. Interest is a convenient, less effort-requiring option for both parties, and drives out profit loss sharing on analogy with Gresham's Law of bad money driving out good.[24] The existence of an inferior product and absence of a superior product is possible on various non-economic grounds. Convenience may outweigh economics, due to the fact that adopting an equity basis places additional burdens on the capital owner such as vigilance over the operation of the project and bearing of financial loss, while entrepreneurs could be willing to undertake fixed payments rather than share profits or responsibility. Since there are capital providers who can afford to forego possible advantages for the sake of convenience and entrepreneurs who can afford to bear all the risk of loss, if any, interest rates and mark-up schemes tend to drive out profit and loss sharing mediums. Similarly, the tendency to reserve capital away from risk even at the cost of a lower return, and the facility provided by debt financing of earning interest even on consumption loans too have been identified by researchers as factors that prevent capital-owners from seeking profit loss sharing ventures with investors.[25]

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[16] Tarek El Diwany

[17] Al-Harran, 7.

[18] Bacha, 45.

[19] Akacem, Gilliam above.

[20] Othman, 4.

[21] M Fahim Khan, 241.

[22] Fahim Khan, 99.

[23] F Modigliani, M H Miller, in Fahim Khan above, 241.

[24] Gresham's law: in economics, the tendency for money of lower intrinsic value to circulate more freely than money of higher intrinsic and equal nominal value (often expressed as 'Bad money drives out good'). Formulation of this principle is attributed to Sir Thomas Gresham [d. 1579, Eng. financier and founder of the Royal Exchange.]

[25] Fahim Khan, 242-44.

Based on the above, some modern Muslim economists conclude that as long as interest is allowed to prevail in the economy, an Islamic financing technique based on profit and loss sharing cannot prevail. Similarly, despite of the higher efficiency of profit and loss sharing techniques in most of the operations in the economy, they may remain in the background as long as the option of mark up based techniques is available to capital providers. However, as mark-up based techniques have a basis in shari'ah, they may not be eradicated as interest. Therefore, these economists suggest that in the long term, Islamic commercial banks must be gradually prohibited from involvement in mark-up based activities, as is the case with non-Islamic banks usually. Thus, commercial banks would have no option but to deal on an equity platform. There could be specialised banks carrying out trading and leasing based on mark-up.[26] These economists feel that without such efforts, profit / loss sharing scheme will never be enforced, and will remain in use only to the extent to which equity participation is in use in the activities of interest-based banking.

Although the above suggestion appears to be an extreme measure unlikely to be sought in the immediate future, there is no gainsaying the fact that if equity financing is to be promoted with any measure of success, some restriction should be introduced, either through legislation or through shari'ah directives based on *maqasid al-shari'ah* by shari'ah supervisory boards, on the proliferation of mark-up based debt-finance schemes in areas of financing. While such formats could be adopted with observance of shari'ah guidelines in their original contexts, i.e. in bona-fide trading and leasing, their extensive adoption for financing purposes may require revision.

When banks find themselves obliged to adopt equity financing, it could reasonably be assumed that speedy solutions may be found to many of the obstacles perceived currently. Customer education, and to a larger extent, a change of the identity of the bank too appear imperative. It should be noted that as long as Islamic banks maintain their inherited image of a mere lender and financial intermediary, they would hardly be considered entitled a share in the profits. Ensuring willingness of the clients to adopt equity modes could primarily depend on Islamic banks creating for themselves an image of a vibrant business partner who could contribute positively to the success of the venture. With the resources available at the disposal of a banking institution, this should not prove unachievable, especially in view of the higher returns such a change could generate. Management of Islamic banks, instead of being assigned solely to personnel trained in conventional banking, could be opened for more involvement of business expertise. This could solve aspects such as information asymmetry and agency problems while also moderating the temperament of extreme risk aversion typical of conventional banking, bringing a level of commercial approach to investment and finance.

Based on the above discussion, it could be assumed that, should Islamic banks make a decisive effort to employ equity-based modes on a wider platform, possibility thereof is not non-existent. Although modes based on debt financing could be adopted in instances such as facilitating acquirement of assets and usufructs, a general reliance on debt-based modes for financing purposes could result in the non-realisation of Islamic economic objectives. The moral responsibility of Islamic banks too should not be lost sight of. The developmental nature of an Islamic bank means that it has to exert persistent and continuous efforts to improve and diversify its investment in order to achieve satisfactory results for society, shareholders, depositors and partners,[27] which could be best done through broader involvement in equity financing.

Possible measures for advancement of equity financing

In the situation described above, there appears a strong possibility that equity financing structures currently adopted could be developed further to ensure a higher level of shari'ah conformity while curing some of the negative aspects, so that their full potential could be adequately revealed. A vital area in this regard is the nature of capital contributed towards equity relationships. A cursory perusal of Islamic legal texts reveals that considerable emphasis has been placed on the existence and availability of capital at the formation of equity partnerships. This is seen to result in important consequences pertaining to the involvement and liability of the partners. The practice of Islamic banks in this regard does not appear to reflect this aspect adequately. The nature of this shari'ah requirement and the possibility of its realisation in the modern fiscal environment needs to be examined, especially in the context of deeper connotations it may carry with regard to constancy and stability of money supply. Employment of non-liquid assets as the capital base of equity relationships too demands verification.

In some variations of equity investment adopted by Islamic banks, the profit loss sharing mechanism is found to be correlated to the period of the facility in some manner, through ensuring an association between the profit ratio and the duration of investment. This is especially true of investment and savings accounts offered by Islamic banks, where depositors enter in to a contract of investment with the bank for sharing profits realised through utilising deposited funds in business. For profit distribution among depositors, Islamic banks generally adopt a method where the profit is calculated based on both the amounts that had remained in the account and the respective periods. This basis, although widely in use, is in need of further scrutiny, to ensure that it is in keeping with the just distribution of gains and liability which forms the core principle of equity participation in shari'ah.

Structures employed for project financing through equity participation could be further enhanced to reflect the essential aspects that differentiate them from interest-based modes. Currently adopted equity formats may embody features that inhibit them from optimum performance. In addition to financing complete projects, funding of ventures in progress too could be carried out on an equity basis with advantage. Currently, Islamic banks employ murabahah-based structures in general to facilitate foreign trade

[26] Fahim Khan, 245.

[27] Al-Harran, 9.

transactions, albeit with a considerable level of inconvenience. Involvement of foreign exchange makes adopting murabahah here a complicated process, endangering shari'ah compatibility at times, and paving the way for hidden and doubtful gains to the financial institution. Adopting an equity format could solve a number of problems from an Islamic perspective, in addition to bringing the transaction closer to justice and fair play.

Profit and loss distribution in equity ventures is a fundamental issue that determines the outcome of Islamic equity financing modes and the extent of influence they could exert on directing the flow of wealth. Contrary to the interest-based system that has a tendency to aid in the concentration of wealth, equity modes are expected to dissipate the latter aspect. The mechanism employed by Islamic banks in deciding the ratio of profit sharing may require further refinement. Alternative methods that could be employed for the purpose need to be explored. Stipulations purporting to facilitate one of the partners achieve a near-certain amount of profit need to be weighed up with regard to their admissibility.

Conclusions

Practical involvement in the field of Islamic banking would reveal that current equity structures, where implemented, comprise various areas that call for a reassessment in the light of shari'ah principles. Many equity formats in vogue embody features that inhibit them from optimum performance. Profit and loss distribution in equity ventures is a fundamental issue that determines the outcome of Islamic equity financing modes and the extent of influence they could exert on directing the flow of wealth. In some variations of equity investment adopted by Islamic banks, the profit loss sharing mechanism is found to be correlated to the period of the facility in some manner, through ensuring an association between the profit ratio and the duration of investment. The mechanism employed by Islamic banks in deciding the ratio of profit sharing may require further refinement. Structures employed for project financing through equity participation could be further enhanced to reflect the essential aspects that differentiate them from interest-based modes.

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THE BEST INTERESTS OF THE CHILD: STATE PRACTICE

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ABSTRACT

The principle of best interests of the child is a basic rule in the protection of children. Its application in all matters concerning children is required under the United Nations Convention on the Rights of the Child. The rule is said to have crystallised into customary international law but to prove the claim is an arduous task. This is a qualitative study that aims to show that there are sufficient evidence to substantiate the element of state practice in the formation of international custom. The study argues that state practices are diverse and can be found in various forms. Data collected for this study demonstrate consistent and uniform practice but some challenges are inevitable.

Keywords: best interests of the child, proof of custom, state practice.

Introduction

This study examines the principle of the best interest of the child, a useful rule that can be used as an argument to enhance the protection of children in general and in specific situation such as forced migrant children. The application of the principle of the best interests of the child (BIC) is specific to children in any circumstances, anytime, anywhere, as long as they involve the elements of actions and decisions impacting on children. The application of the rule in any situation can benefit children and enhance the enjoyment of their rights. The focus of this study is to establish that the principle of the BIC is a realistic basis to improve the protection of children by holding that all states are bound to protect children under the principle, regardless of their background, immigration and social status or economic conditions.

For this purpose, this study begins with a discussion on the reason why the BIC principle is being seen as an appropriate framework to confer better protection for children. Next, it analyses whether or not the rule of the BIC has satisfied the requirements of state practice required to proof the custom. It specifically looks at state practice relating to immigration matters.

General meaning of the bic rule

The principle of the BIC means considering the child before a decision affecting a child's life is made (Dausab, 2009). The term is also known as the wellbeing of a child (UNHCR, 2008) and 'tender years' doctrine (Kohm, 2008; Fitzgibbon & Campbell, 1993). Today, the rule has become a principle that must be followed by all organs of state and stakeholders even when courts are not involved. The rule becomes more significant since its adoption by the in Article 3 that impose the duty to act in accordance with the principle on all organs of states.

Article 3 of the UNCRC reads as follows:
"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

In giving meaning to the BIC, firstly, the rule is regarded as a substantive right so that every child has right to have his/ her best interests assessed and given primary consideration in the decision-making (CRC Committee, 2013). This is a guarantee that the principle will be applied whenever a decision is to be taken concerning a child or a group of children' (Zermatten, 2010). A decision-maker has to decide what constitutes the best interests of a specific child and must then hold those best interests as a primary consideration along with other competing interests. In every situation, if a decision is likely to have a greater impact on a child, greater emphasis should be placed on the requirement to make the BIC a primary consideration for instance as decided in the case of Baker v Canada (Minister of Citizenship and Immigration) 1999 2 S.C.R. 817 in which the Supreme Court stated that, to ensure procedural fairness in cases involving a parent's deportation, decision-makers should have regard to the human rights of the appellant's children as the decision will have a huge impact on the life of the children. Therefore, any proposal to adopt a different approach that contradicts the principle or does not hold the BIC as a primary consideration will require solid and concrete reasoning (Tobin, 2009).

Secondly, the principle is to be used as a fundamental and interpretative legal principle to allow interpretation of legal provisions that serve the BIC effectively (CRC Committee, 2013). Thirdly, as a rule of procedure, a decision that affect children must make evaluation of its impact on children as part of the decision making process (CRC Committee, 2013). It is a requirement in which procedures involving determination or action affecting a child must make the BIC a primary consideration, and "...give them substantial weight, and be alert, alive and be sensitive to them." The 'best interests' rule is not about the outcome but about the process of reaching the conclusion or decision. The interests of the child are to be assessed and weighed as part of a process in applying a rule or procedure. This principle however, does not command a decision-maker to decide everything in complete agreement with a child's best interests (Tobin, 2009).

The expansion of the principle as it appears in Article 3 demands its application in every action and decision taken by public and private providers of welfare services and by all organs of states; the judiciary, executive and legislature (CRC Committee, 2013; CRC Committee, 2006). The rule places the duty to 'consider the child's best interests' on the adjudicator, administrator and legislator. This can be done by integrating the general principles of the BIC rule into legislative measures, budgets, judicial and administrative decisions (CRC Committee, 2003). The provision proposes to ensure that the BIC are not compromised by state actions and decisions that might contradict each other. A decision-maker has a duty to give a child's interests primary consideration together with other interests when deciding on any child-related issue or taking actions affecting children (Thronson, 2002). In undertakings by adjudicatory bodies external to the courts such as conciliation, mediation and arbitration the rule also applies (CRC Committee, 2013).

The scope of action and decision of administrative authorities is broad encompassing education, healthcare, immigration and asylum matters (CRC Committee, 2013). The consideration of the rule is also required when legislative bodies adopt laws, regulations, bilateral and multilateral agreement, treaties, and budget approval (CRC Committee, 2013). The primacy of the principle has to be explicitly mentioned, adequately defined and reflected in all relevant domestic legislations and policies (CRC Committee, 2005) including laws affecting juvenile justice, immigration, freedom of movement and peaceful assembly (CRC Committee, 2008). Laws that provide for capital punishment and life imprisonment is contrary to the BIC and shall not be imposed on children for crimes committed below the age of 18 (CRC Committee, 2006).
Generally, determining the best interests of a child is not easy as a child's best interests may differ from one situation to another, and a group of children's interests may vary from those of another group depending on their circumstances, and culture and religion have some influence on what constitutes the BIC (An-Na'im, 1994). As a standard of international law, the concept is a form of protection beyond the traditional precept and it can further develop as the result of states' practices in implementing and applying the principle in their jurisdictions (Freeman & Veerman, 1992).

The duty to apply the BIC rule also requires that the child's views and opinions be sought and given due weight according to his/her age and maturity (CRC Committee, 2012). This requirement shows that the right to be heard and to participate is an important component in making sure that the BIC are effectively and sufficiently considered. Children of all ages including babies have the right to have their best interests assessed and given primary consideration (CRC Committee, 2013). Other important elements that must be taken into account in the assessment of BIC are the child's identity such as gender, country of origin, religion and culture; preservation of family life and relations by preventing separation unless it is necessary (CRC Committee, 2013). Child's protection and care including basic material, physical, educational, emotional, affection and safety needs must be taken into account (CRC Committee, 2013). Vulnerabilities of the child such as victims of abuse, disability, belonging to minority group, or being a refugee and asylum seekers are important too and each vulnerability give rise to different best interests (CRC Committee, 2013). Health condition and the right to health are assessed by considering available treatment and risks, and the right to education involves evaluation of access to quality education (CRC Committee, 2013).

State practice as a proof of custom of the bic rule

The benefit of the BIC principle has made it an intrinsic norm in many aspects of child-related matters, especially in custody and family relations, the most relevant subject of a child's life. It has been suggested that the rule has become a customary international law. State practice relating to the principle of BIC can be found in both verbal and physical form. Each of the state practice is discussed below.

i. Best Interests Provisions in State/National Legislation Indicate Widespread and Representative Practice

States from all over the world have incorporated the principle in their national legislation, and 182 state parties to the UNCRC have incorporated the provisions of BIC in their local legislation with 35 countries explicitly give a constitutional guarantee to the rule (Supaat, 2013). These provisions require the court to give the BIC either primary or paramount consideration when making custody decisions. The practice is common in the arrangement of alternative care, adoption, rehabilitation, juvenile justice and in the treatment of alien children, especially children seeking refuge (Supaat, 2013). These practices can be deduced from a variety of resources including, but not limited to, the following: enactment of state legislation; state ratification of international treaties; state conduct in dealing with children; publication of state policies regarding the use of the principle; statement made by governments of states or their representatives and the application of the principle in national and international courts.

From the periodic reports submitted by state parties to the Committee on the Rights of the Child, it is clear that states are not only embodying the principle in legislation but are also striving to implement the provisions of the UNCRC, including the need

to ensure that the BIC are not affected by its actions and decisions. The reports also demonstrate that the principle as provided under the UNCRC has been judicially applied by domestic courts (Supaat, 2013).

ii. The Requirement to Give the BIC Primary Consideration in International Treaties Has Not Been Objected to.

Thus far, no objection or opposition has been published, aired, recorded or written on the rule where it requires the principle of the BIC a primary consideration. Indeed, the rule has emerged from a lower obligation, that is, a 'welfare' standard, a narrower term than the principle in question, to become a broader legal obligation. The current standard has been developed due to states' recognition and acknowledgement that it is a duty and responsibility of states to do so to protect children. The lack of objections is also reflected in the fact that none of the ratifying states have made reservations to Article 3 of the UNCRC.

iii. Judicial Decisions Relating to BIC

Several cases decided by state court are referred to in this part to show state actual practice in this matter. A close look at a UK case can clarify on how to appreciate the application of the BIC rule in judicial determination of asylum cases that benefit children who will otherwise be adversely affected. Section 55 of the Borders, Citizenship and Immigration Act 2009 imposed the duty to safeguard and promote the welfare of the child on the Secretary of State in discharging the immigration function.

The case referred to is the case of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. The appellant, ZH is a Tanzanian citizen who has made three unsuccessful asylum applications since 1995. She had a relationship with a UK citizen and they had two children born in 1998 and 2001 both having UK citizenship. The children live with ZH and maintain regular contact with the father after their separation. When the father was diagnosed with HIV in 2007 ZH made a fresh asylum application to the tribunal but was rejected on the basis that she . The case went for reconsideration but was dismissed on the basis that it would not be unreasonable for the children to live in the UK with their father or in Tanzania with mother if she is to be returned. The case went to the Court of Appeal where the finding of the tribunal that it is reasonable to expect that the children would follow the mother back to Tanzania was upheld. ZH then appealed to the Supreme Court and argued that in the light of the obligations of the UK under the UNCR, the removal order is incompatible with their right to respect for their family and private lives when it is the obligations of the Secretary of State to safeguard the welfare of the child under section 55 of the Borders, Citizenship and Immigration Act 2009. The interference with this right is only permissible in accordance with law and in the interests of national security, public safety, economic wellbeing of the country, for the protection of health or morals; or rights and freedom of others. It was also argued that insufficient weight is given to the welfare of all children who are British citizens who will be affected by the removal of the mother.

The court needs to consider whether it is proportionate to remove ZH and in doing so referred to the case of *Uner v The Netherlands* (App. No. 46410/99 (2007) 45 Eur. H. R. Rep. 14. In *Uner*, the father was convicted for serious criminal offence resulting in his exclusion from Netherlands for 10 years and his permanent resident status being revoked. He argued that this interfere with his right in Article 8 of the ECHR. While recognising the need to give particular consideration to the BIC, in assessing the proportionality in interfering with the right in Article 8, the court however was of the view that in the light of the applicant's current serious convictions, and multiple previous convictions, it is fair and justified to remove the applicant to maintain public order and safety thus, the interests of the state to maintain immigration control outright the BIC. No reference is made to Article 3 of the UNCRC but the substantive right of the BIC however was applied in a manner consistent with the requirement of the BIC rule in the UNCRC.

The court also refers to *Rodrigues da Silva, Hoogkamer v. The Netherlands* (App. No. 50435/99, (2007) 44 Eur. H. R. Rep. 729). Here, the removal of a mother who failed to get a resident permit was held to be in violation of Article 8 because it is in the best interests of the daughter that the mother remains in the Netherlands. In *Rodrigues* the best interests of the child prevails over the interests in maintaining Dutch Immigration rules and the mother's bad immigration background did not affect the child's right to enjoy family life. It is acknowledged that the European Court of Human Rights requires the consideration of the best interests of the child as a primary consideration. In the present case, the court found that UK has an obligation under Article 3 of the UNCRC to give the principle of BIC a primary consideration. In *Rodrigues*, two Australian cases, *Wan v. Minister for Immigration & Multi-cultural Affairs* [2001] 107 FCR 133 and *Minister for Immigration & Ethnic Affairs v. Teoh* [1995] 183 CLR 273, that applied the BIC as primary consideration were referred to in defining the obligation. The court acknowledges that Article 3 of the UNCRC must be observed and further noted that the rule of BIC does not demand decision to be made in conformity with the interests of the child. By virtue of Article 12 of the UNCRC, the child views are an important element in the determination of the BIC and should not be neglected. The court went on to state on how the competing interests should be treated:

'...in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. ***It is a factor, however, that must rank higher than any other.*** *It is not merely one consideration that weighs in the balance alongside other competing factors.* ***Where the*** *best interests of the child* ***clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them.*** *It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result.* [Emphasis added] (*ZH (Tanzania) v Secretary of State for the Home Department)*

In the assessment of the BIC, the court has analysed the level of the child's integration in the UK and the length of their absence in Tanzania; arrangement for the care of the child in Tanzania and the level of the child relationship with the parents and other family members that will be severely affected if they were to move to Tanzania. It also takes into account the status of the children as British citizen, whose rights exercisable in the UK may not be able to be enjoyed in other country. Apart from the BIC, the court also considers the public interests in maintaining immigration control, the appellant's appalling immigration history, the establishment of family life between ZH and her partner despite ZH's precarious immigration status. The court found that it could not devalue the BIC for the fault of the parent, and the mother should not be removed because in doing so would coerce the children to go with her to Tanzania, a decision that is not justified and disproportionate to the preservation of her right in article 8. Thus, the BIC has dwarf the public interest to maintain a fair and firm border control. This case provides a clear guide on how the immigration and asylum cases should be considered in the light of the BIC rule (Wallace & Janecko, 2011) .

Prior to ZH (Tanzania), the court was of the view that the BIC cannot be given primacy (Christie, 2013) and before the enforcement of Section 55 of the Borders, Citizenship and Immigration Act 2009, the rights of the child were often demoted (Christie, 2013). Due to the general reservation of Article 22 of the UNCRC, the UK authority can exempt the application any of the UNCRC provisions including the BIC rule in immigration matters (Christie, 2013). The reservation was removed in 2008 and thereafter Section 55 was introduced and come into force in November 2009 (Christie, 2013).

In the case of *R (On the Application of SG and Others (Previous JS and Others)) v Secretary of State for Work and Pension* [2015] UKSC 16 the Supreme Court of England was posed with a question of whether it was lawful for the Secretary of State to make a regulation that impose a cap on the amount of welfare benefits on non- working households. It was argued that the Secretary of State has an obligation under section 6 of the Human Rights Act to treat the BIC as a primary consideration in making the regulation, as required under Article 3 of the UNCRC. The court is of the view that the cap has the effect of causing children of non- working household to lose the benefit and affect his/ her family life including the right to and thus is incompatible with the obligation to treat the BIC as primary consideration.

In an Australian case, *Minister of State for Immigration and Ethnic Affairs v. Teoh* the respondent had entered Australia from Malaysia, on a temporary permit, and subsequently married his deceased brother's *de facto* wife. She had four children - including three fathered by his deceased brother - and a child was born of the marriage. Respondent's applied for a grant of resident status but pending the decision he was charged and convicted of a number of offences in connection to heroin, and was sentenced to six years imprisonment. As a result, the application for the grant of resident status was refused on the basis that the applicant was not of good character. On application for review the Immigration Review Panel recommended against allowing the respondent's application because the "compassionate grounds" based on his relation with the wife and the children and the family life as there were insufficient reason to oust his conviction for a serious crime of illegal possession of heroin. Thereafter, a deportation order was made against the respondent. The respondent applied to the Federal Court for an order of review of the deportation order. It was initially dismissed. Nevertheless, the Full Court of the Federal Court allowed the respondent's appeal on grounds of the delegate's failure to give proper consideration of the effect of the respondent's deportation on his family. It is in the best interests of the child that he should not be deported. The court also acknowledged that Australia's accession to the UNCRC had given rise to a legitimate expectation in the respondent's children that the application for resident status of their father would be treated in accordance with the principles of the UNCRC. The Minister's decision to refuse resident status was set aside so the minister appealed to the High Court of Australia. The High Court refers to Article 3(1) of the UNCRC declaring that, in all actions concerning children by all the organs of the states including the administrative bodies, "the best interests of the child shall be the primary consideration and thus the appeal was dismissed for the failure of the delegates to take the interests of the child as a primary consideration.

In *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, the Supreme Court of Canada held that the principle of the BIC must be taken into consideration in the immigration application based on humanitarian and compassionate leave to remain. In another case, *Duka v Canada* (2010) FC 1071, the court reiterated that the BIC must be actively and seriously considered by decision makers. Explanation of the principle is also carried out in *Jiminez v Canada (Citizenship and Immigration)* (2012) FC 1407, in which the court recognised that immigration officer must pay a great deal of attention in considering application affecting refugee children but it is up to the immigration officer to decide the weight to be given to the consideration. The weight given to BIC in immigration application in Canada does not amount to primary consideration and this is a lower standard than imposed by the customary rule of best interests of the child. However these cases have helped to illustrate how the principle could be applied and its influence on the outcome of the trial. Meanwhile in *Mangru v. Canada (Minister of Citizenship and Immigration)* [2011] FC 779, the court found that the officer in charge of the applicant's application for a pre-removal risk assessment has failed to adequately assess the best interests of the applicant's children. It was wrong for the officer to incorporate her finding that "even though the children would experience hardship in starting a new life in Guyana, the hardship did not rise to the level of unusual and undeserved hardship" in the analysis of the best interests of the children. Furthermore no full assessment of the effect on the children of being removed from Canada to Guyana was made. This error has led to the wrong conclusion that the best interests of the child is in favour of the applicant's removal from Canada.

An example of the application of the BIC can also be seen when the court considers the question of sterilisation over mentally retarded child. In *Secretary, Department Of Health And Community Services v JWB and Another* - (1992) 106 ALR 385, the Australian Court emphasised on the principle of best interests of child and decided that sterilisation is only permitted with Court's order.

The same has been considered in a New Zealand case, *Re X* [1991] 2 NZLR 365. The BIC is a primary consideration in New Zealand's cases relating to adoption as in *Re Georgina Kennedy; an application to adopt a child* [2014] NZFLR 367, in medical

treatment, as shown in the case of *Re C; Hutt District Health Board v B [Guardianship: life support]* [2011] NZFLR 873, and in immigration related matters, such as in *Ye v Minister of Immigration* [2009] 2 NZLR 596.

The same assessment is made in Singapore's case, where the BIC become the crux of the reasoning for custody in *AZB v AYZ* [2012] SGHC 108, and *BG v BF* [2007] SGCA 32. Meanwhile in Canada, the Canadian Supreme Court in *Re Eve* [1986] 2 SCR 388, held that non-therapeutic sterilisation can never safely be said to be in the best interests of a person and so can never be authorised by a court. In West India's case of *Naidike (Robert), Naidike (Timi) and Naidike (Faith) v Attorney-General* [2004] UKPC 49 relating to deportation of parents, the court viewed the need to balance reason for deportation against the BIC.

In addition, Sri Lanka' Court of Appeal in *Jeyarajan v. Jeyarajan* (1999) 1 SLR 113 has also recognised the principle of best interests of child (CRC Committee, 2003). In a Uruguay's case of *La Justicia Uruguaya Judgement No. 152 of the Second Rota Court of Appeals of 3 October 2001*, the BIC were protected by the judge's refusal to authorize the child's departure with the mother, and thus separation from the father, because of the potential psychological damage.

The case of European Court of Human Rights is referred to illustrate the position of BIC in its jurisdiction: *Hokkanen v. Finland*, 23 September 1994, Series A no. 299-A. This is a long battle for custody and access rights between a father and the maternal grandparents who have been looking after the child when she was 2 after the mother's death. After two years the grandparents inform the father that they do not intend to return the child. What follows after that is a series of arrangement to reconcile the father and the grandparents, application of custody, and right to have access with the child. During the period of about 6-7 years of the conflict, the grandparents persistently refused to follow court orders to allow the father to meet the child out of the their home, or order to return the child to the father denying the father the access while the authority has failed to enforce court order to compel the grandparents to comply or risk a fine. After a long period of absence and denied access, in the best interests of the child, the custody was transferred to the grandparents. The views of the child were sought and she is capable of forming her own views and chose not to see her father. Thus taking into consideration the length of the duration of the child's care with the grandparents and the views of the child, the custody was transferred to the grandparents and the access cannot be imposed on her. The case went to the European Courts of Human Rights when the father claim damages against the authority for their delay in making administrative decision relating to the case and failure to enforce the court order against the grandparents thus violated his right to respect for family life under Article 8 of the European Convention of Human Rights. Despite the illegal conduct of the grandparents who kept the child away from the father, the custody was granted to them because it is in the BIC to remain with the grandparents. The father's interest was outweighed by the interests of the child.

The ECHR in *Neulinger and Shuruk v. Switzerland* [GC], No. 41615/07, ECHR 2010 pronounced a detailed consideration given to the principle of BIC. A child was abducted by the mother from Tel Aviv and secretly went to Switzerland fearing that the son will be brought to Lubavitch movement that she opposed to. The Lausanne District Justice of the Peace was of the view that there was a grave risk that the child's return to Israel would expose him to physical or psychological harm or otherwise place him in an intolerable situation. On appeal, the Vaud Cantonal Court it dismissed and finding of the earlier was affirmed.. The case went to the Swiss Federal Court which decided that the protection under Article 13 (b) of the Hague Convention was wrongly applied in the earlier court and thus ordered the child to be returned to Israel. An application to the ECHR was denied as the court found no violation of Article 8 if the child is returned to Israel. Hence the mother appealed to the Grand Chamber. To strike a balance between interests of the child, of the parents, and of public order, the court has made the BIC as the primary consideration. These interests are to maintain the relation with family and his development in a sound environment. The Hague Convention provides for the prompt return of the abducted child on the basis of BIC except where there is grave risk of exposing the physical or psychological harm. The Grand Chamber refers to the experts' reports that acknowledge the risk of the child's there would be a risk for return to Israel, and to avoid trauma, his return must be accompanied by his mother to avoid significant trauma. The Court also noted that the under the Hague Convention, a child cannot be returned if he has already settled in the new environment, in the present case the child has been living in Switzerland when he was 2 years old, he has Swiss nationality, attended municipal secular day nursery and a Jewish day nursery. During the hearing when he was 7, he attended a Swiss and spoke French. The court is aware of the possibilities of serious consequences if he is forced to move back to Israel. It was also made known to the court that the father's right of access was being restricted by the Israeli court and was unable to maintain his new family that lead to another divorce. If the mother is to return to Israel with the child, there is a possibility of being charged and imprisonment for violating the Israeli court order and this is not in the best interests of the child. Taking into account that the mother is also a Swiss national and the father's doubtful capacity to care for the child in the event that the mother is detained, his past behaviour and constrained financial capacity, it is justified to refuse the return of the child to Israel as it is not in the best interests of the child.

The case of *Uner* and *Rodrigues Da Silva, Hoogkamer v Netherlands* discussed earlier are relevant example of the consideration of the BIC. Cases brought to the Inter-American Commission on Human Rights also show the application of the BIC rule. In *Fei v. Colombia* (514/1992), ICCPR, A/50/40 vol. II (4 April 1995), the Committee accepts that the interests and the welfare of the children are given priority in the proceedings which are initiated by the children of a divorced parent. In *Buckle v. New Zealand* (858/1999), ICCPR, A/56/40 vol. II (25 October 2000), the Committee identified that, the State may decide on children removal from their parents' care entirely if that removal is in the BIC. The case of *Wayne Smith, Hugo Armendariz al. v. United States*, Case 12.562, Report No. 81/10 (July 12, 2010) recorded that the Committee decides that, in case of deportation, it must consider the BIC involved.

v. State Legislation as Recognition of the Rule

When a state makes laws and regulations pertaining to certain matters, those actions may have resulted from its international obligation or its independent perception that it ought to practise certain things as such because it has a natural obligation to do so as, according to natural law, it is only fair to do it. The implementation and application of the principle of the BIC to be given primary consideration in state practice and national law has been taking place for many years, and this should be sufficient to support the conclusion that states take such actions because they feel obliged to do so. The fact that none of the ratifying states have made reservations to Article 3, and its status as a guiding principle of the Convention as admitted by many commentators, conveys a clear message that states acknowledge its legal status and feel obliged not to reserve the provision even though it will place a duty on the organs of the state as a whole. It is also argued that state practice in enacting statutes containing the rule or principle of the BIC is actually an *opinio juris*. States consider themselves bound by the principle of the BIC (whether or not it follows the ratification of the CRC); thus, its inclusion in state law displays the state's sense of obligation because the state makes laws for everyone to follow, including its agencies.

Furthermore, to fortify the argument, a number of international committees and organisations lend support to the cause. For example, the Committee on the Rights of the Child supports the view that the principle has acquired the customary status. Its concluding observation and General Comment clearly reflect its stand on this matter. To the Committee, because of its almost universal ratification by 192 states the UNCRC has acquired the status of customary international law. Amnesty International also asserted that the Convention and its provisions have reached customary status.

Conclusion

The example of state practice above have provided clear and strong support for the assertion that the principle of BIC has reached customary status. There is enough evidence to conclude that the principle of the BIC should be treated as a customary international law and should thus be binding on all states. States' practices in terms of legislation and administrative action constitute universal acceptance of the principle. It is also clear that the principle has been applied in a multitude of children-related issues including custody, family relations, alternative care, healthcare, criminal justice, disabled children, education, and survival. This study takes the view that it is safe to conclude that the principle has satisfied the requirement outlined in the North Sea Continental Shelf case. As a customary rule established from the provision of Article 3 of the UNCRC, the principle of the BIC should be observed by all state agencies as well as by private sectors. Its application as a custom extends to all matters concerning children. This study believes that, if states were to apply the standards in dealing with all groups of children, more children would be protected and would thus be able to get on with their lives and survive in an environment that was safe and suitable for their development.

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GUARANTEE ACCESS TO INFORMATION OF CLIMATE CHANGE ON WATER RESOURCES BASED ON NATIONAL PLAN FOR CLIMATE CHANGE ADAPTATION IN INDONESIA

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ABSTRACT

Climate change is likely a heavy impact on water supply services both on supply and demand. In terms of supply, the existing tendency of changing rainfall patterns with implications for food production, water transportation, and various sources of livelihoods that rely on water. In the matter of demand, global warming will increase water needs of society and accelerating evaporation from the surface of the plant and from water sources such as ponds and lakes. Long term goal of this research to develop a model of construction regulations Integrated watershed management plans in order to meet guaranteed access to climate change information based national plan for climate change adaptation is a new strategy for strengthening the role of local governments in working out regulations Integrated Watershed Management in order to realize fulfillment of guaranteed access good information about climate change in the region.

Keywords: Guarantee, Access to Information, Climate Change, Water Resources, National Plan

Introduction

Even sustainable development, as an overarching societal objective with obvious environmental connotations, reflects this goal oriented conception of environmental law and policy[1] Indonesia is the third largest contributor to emissions after the United States and China. Where about 72 percent of the tropical rain forests of Indonesia in 2007 has been damaged due to deforestation. Long term goal of this research to develop a model of construction regulations Integrated watershed management plans in order to meet guaranteed access to climate change information based national plan for climate change adaptation is a new strategy for strengthening the role of local governments in working out regulations Integrated Watershed Management in order to realize fulfillment of guaranteed access good information about climate change in the region. As we know that regulation is an area of strategic policy that has the highest legal force in the area. This means that if the model construction RPDAST regulations in order to guarantee the fulfillment of access to information-based climate change National Adaptation for Climate Change is really able to apply it is expected that every regulation as a legal umbrella in the region are no longer produced as its environmental damage is happening now. Targeted specifically, models generated in this study in particular has a purpose as an offer or alternative solutions legislative function well in the real of the executive and Parliament to produce regulations Integrated Watershed Management. Modeling construction in order to meet regulatory RPDAST guaranteed access to information based climate change National Adaptation for Climate Change is done by mapping existing condition phases of construction are used today. Regardless of mitigation measures, climate change is happening now[2] is expected to continue in the future[3]. This prompted the need for adaptation measures to climate change in order to reduce the potential negative and maximize the positive potential impact of climate change. The method that will be used through the stages include: mapping existing condition that during this construction is used, mapping of potential executives (leading sector) and the Council, evaluating regulations that have been produced so far (Year I), identifies and evaluates the constraints faced construction stage

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[3] IPCC, 2007

policy, identify opportunities and formulate strategies and models that can be developed (Year II), draft guidelines and standard operating procedures, provide training, mentoring and monitoring for executives (leading sector) and legislators (Year III) Emphasis in order construction regulations do executive and Parliament to produce NPCCA based regulation. In Indonesia, the impact of climate change is indicated by an increase in frequency of climatic phenomena that can lead to droughts and floods. Climate phenomenon known as ENSO (EL-Nino-Southern Oscillation), which consists of occurrences of El Nino and La Nina greatly affect the distribution of rainfall in Indonesia. El Nino events identified with flood events. Indications are associated with reports of an increase in the frequency of droughts in Indonesia in the last 4 decades[4] and the incidence of flooding in many areas in Indonesia in the period 2001-2004[5]. In the document the National Action Plan for Adaptation to Climate Change (RAN-PI)[6] and Indonesia Country Report[7] summarized and reported various potential impacts of climate change on various economic sectors such as agriculture, forestry, fisheries, health, coastal, resource water power. Understand the potential impacts of climate change, efforts were made including preparing a legal device, among others issued Law No. 17 of 2004 on the Ratification of the Kyoto Protocol to the United Nations Framework Convention Over on Climate Change shows Indonesian government's commitment to reduce the rate of global warming. Regardless of mitigation measures, climate change is happening now[8] is expected to continue in the future[9]. This prompted the need for adaptation measures to climate change in order to reduce the potential negative and maximize the positive potential impact of climate change.

One important element that is required in conducting impact assessments and vulnerability to climate change is climate information. Research on the construction of a model regulation Integrated watershed management plans in order to meet guaranteed access to climate change information based national plan for climate change adaptation is a new strategy for strengthening the role of local governments in working out regulations Integrated Watershed Management in order to realize the fulfillment of guaranteed access to good information about climate change become important area.

What is meant by climate change is the change in climate variables, particularly temperature and rainfall that occur gradually in a long period of time between 50 to 100 years. Besides, it should be understood that the change is caused by human activity (anthropogenic), especially those related to fossil fuel use and control of land use. So the changes are caused by natural factors, such as additional aerosols from volcanic eruptions, are not taken into account in terms of climate change. Thus the natural phenomena that give rise to extreme climatic conditions such as cyclones that can happen in a year (inter annual) and El-Nino and La Nina that can happen in ten years (inter-decadal) can not be classified into global climate change. Human activity is an activity that has led to an increase in greenhouse gas concentrations in the atmosphere, especially in the form of carbon dioxide (CO2), methane (CH4), and nitrous oxide (N2O). Gas-gas was then determine the air temperature increase, because it is like glass, which can forward the short-wave radiation that is not hot, but hold long-wave radiation that are hot. The pattern and distribution of rainfall occurred with a tendency that dry areas will become increasingly dry and wet areas becoming increasingly wet. Its consequences is that the sustainability of water resources will also be disrupted. In Indonesia, three kinds of distribution patterns of rainfall, the monsoon pattern (monsoonal), equatorial and local. First, the area which is heavily influenced by the monsoon rain patterns with the peaks. The hallmark of this pattern is the rainy season and the dry crisp and each lasts for approximately 6 months, i.e from October to March as the rainy season and from April to September as the dry season. Secondly, an area close to the equator is affected by the system equatorial rain pattern has two peaks (bimodal), ie in March and October when the sun is near the equator. Third, the area with the local rainfall patterns, characterized by the shape of unimodal rainfall pattern with peaks reversed compared to the pattern of the monsoon rains mentioned above. Climate change (especially temperature and precipitation) not only cause changes in the volume of deficit or surplus of water, but also the period of the region have a surplus or a deficit. In a study of the hydrological watershed (DAS) in the equatorial regions such as Sulawesi, climate change (with the concentration of atmospheric CO2 concentration 2-fold compared to pre-industrial era are only 280 ppm) will cause the watershed is not in deficit while the surpluses rose twice fold. Being a watershed in the monsoon areas such as Java, surplus water is only about 30% of the deficit period that is shorter than if the climate does not change[10].

The agricultural sector will be affected by a decrease in food productivity caused by increased sterility of cereals, which can be irrigated acreage decline and decrease the effectiveness of nutrient absorption and spread of pests and diseases. In some places in the developed world (high latitudes) increase in CO2 concentration will increase productivity because of increasing assimilation, but in the tropics that most developing countries, the increase was not significant compared assimilation respiration were also increased. Overall if adaptation is not done, the world will experience a drop in food production by 7 percent. However, with further adaptation level, meaning that the cost is high, food production can be stabilized. In other words, stabilization of food production on climate change will take a very high cost, for example by improving irrigation facilities, provision of inputs

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(seeds, fertilizers, insecticides / pesticides) extra. In Indonesia, the scenario of CO2 concentrations double the current rice production will increase to 2.3 percent if irrigation can be maintained. But if the irrigation system is not improved rice production will have declined by 4.4 percent[11] . Warmer temperatures will cause a shift in vegetation species and ecosystems. Mountain regions will lose many species of native vegetation and replaced by low-lying vegetation species. At the same time the condition of water resources comes from the mountains will also be impaired. Furthermore, the stability of the soil in mountainous areas also disturbed and difficult to maintain the existence of the original vegetation. This impact is not so noticeable in low latitude areas or areas of low elevation. If more and more forest fires are common in Indonesia, a bit difficult to connect between these events to climate change, because most (if not all) the incidence of forest fires are caused by human activities related to land clearing. That happened simultaneously with the El-Nino events since this phenomenon provides dry weather conditions that facilitate the occurrence of fires. However, as described above El Nino is a natural phenomenon associated with extreme climate events in climate variability, not climatic change in the sense described above.

The increasing number of people put pressure on the water supply, especially in urban areas. We have had many urban residents who have difficulty getting clean water, especially those who are income or low skilled and educated. The impact of climate change is causing changes in temperature and rainfall will impact the availability of water from surface runoff, groundwater and other reservoir shapes. In the year 2080 there will be 2 to 3.5 billion people will experience water shortages. In some watersheds (DAS) is important in Indonesia surface water availability is expected to increase due to increased surplus and decrease the deficit. The Citarum, West Java, the increase reached 32%, in the Brantas River Basin in East Java 34%, and in the watershed Saadang, South Sulawesi 132%[12].
As a consequence the incidence of flooding will increase due to the declining capacity of the river due to an increase in surface runoff and decreasing the capacity of rivers and reservoirs due to increased erosion and sedimentation. Some infectious diseases is strongly influenced by climatic factors. Parasites and vectors of disease are extremely sensitive to climatic factors, particularly temperature and humidity. Diseases spread by vectors (vector-borne diseases, VBDs) such as malaria, dengue fever (dengeue) and elephantiasis (schistosomiosis) need to watch out because the transmission of diseases such as this will increase with climate change.

Some 33,500 people in Asia have been interviewed to determine their perceptions and insights on climate change. Climate Institutions Asia, the largest study in the world on the experiences of everyday people in Asia related to climate change and expose in Jakarta. BBC Media Action together with the British Embassy in Jakarta initiated Asia Climate study by surveying citizens of Bangladesh, China, India, Nepal, Pakistan, Indonesia and Vietnam. It was found that citizens of Indonesia is the lowest level of his insights on how to respond to environmental changes due to climate change and also in terms of willingness to change lives. The survey data taken in June to November 2012 showed that 17 percent of the total respondents and 6 percent of Indonesian respondents categorized Surviving, they feel the impact of climate change, but it is difficult to adapt and do not know how. They do not feel integrated with the community and it is one reason why they do not take action. By 21 percent of the total respondents and 23 percent of Indonesian respondents categorized Struggling, they feel the impact of climate change and realize that the impact will increase in the future, but they do not worry. They do not take action because of a lack of money and information. Amounting to 20% of the total respondents and 11% of respondents in the category Adapting Indonesia, they feel the impact of climate change with greater insight and have greater income. They take action in both the long and short term. 19% of total respondents and 32% of respondents in the category Indonesia Willing, their well educated, broad-minded, access to good information, and open to make life adjustments related to the impact of climate change. they are willing to make changes, but has yet to take action at this time. Amounting to 23% of the total respondents and 27% of respondents in the category Unaffected Indonesia, they do not feel affected by climate change and feel they have other priorities more important. They do not make any changes in his life. "Climate Asia designed to put people's personal experience in the heart of the climate change efforts in the future. This survey shows that while the information dissemination efforts have reached a population in urban areas, there are still many rural communities or rural areas and small towns are facing a real challenge in responding to changes in the environment and want to do more, "said Damian Wilson, Director of the Asia Program at the conference Climate Asia at Wisma Antara, Jakarta. Data from the study also openly accessible on the portal BBC Media Action.

Problems

Based on the above arguments, the important question is how the evaluation of the guarantee access to information climate change on water resources based National Plan For Climate Change Adaptation?

Methods

11 Matthews RB, Kropff MJ, Bachelet D, Van Laar HH. *Modelling the impact of climate change on rice production in Asia. 1995. Executive summary. CABI in association with IRRI, 13.*

[12] Murdiyarso, D., Ridayati R. 1994. *Model Simulasi Proses-Proses Hidrologi Berdasarkan Perubahan Iklim dan Tata Guna Lahan*. Bul. Agromet. I:34-45.

This research used empirical research on law (ELR). ELR seeks to understand and explain how law works in the real world. ELR has become a recognized part of the social science research environment. The results of empirical research on law are central to the concerns of the academic analysis of Law[13] as well as more generally to understanding the role of law in modern society[14].
The approach used in the research problem is to use an empirical approach and normative Juridical. Juridical empirical studies with the aim to see problems in the field that can be resolved or legal reference. The study documents the analysis consists of legislation and various policies Relating to the subject matter and report results from a variety of meetings, seminars, public hearings. The Data used in this study can be classified into two types, the data primary and secondary data. The primary sources of data such as interviews and observations from the field. Secondary sources of data include the primary legal materials, secondary and tertiary. Methods of Data Collection To Obtain the Data of primary legal materials and secondary legal materials as well as materials tertiary law, business studies conducted with documents or literature that includes a data collection Efforts by visiting libraries, reading, literature review and study materials that have a strong link with the subject matter.

Analysis and discussion

1. Legal Perspective

The legal aspect of guarantee access to information climate change on water resources contained in the Constitution of the Republic of Indonesia Year 1945 Article 33 (3) and Article 28 (H) states that the earth and water and natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people. In this regard, the management of the watershed as an ecosystem is essentially intended to benefit from natural resources, especially forests, land and water for the welfare of the community while preserving the watershed itself. Clearly in the Forestry Act, wrote that the purpose of the implementation of forestry is to increase the carrying capacity of watersheds and covering 30% of the total area of the watershed in the form of forest area. Meanwhile, the use of protected forest area, forest conservation and forest production should be done with caution. Similarly, use of forest products and environmental services to all functions of protected forest areas must be done in a sustainable manner without interfering with the preservation of the forest ecosystem so that the forest as part of the DAS helps to improve the carrying capacity of the watershed. DAS is defined in detail and then the watershed became part of the River Basin (WS) namely the territorial integrity of water resource management in one or more watersheds and / or small islands covering an area of less than or equal to 2,000 km2. Act Water Resources and its implementing regulations are more concerned about conservation, development, utilization / utilization, distribution and control of water damage and water resources institutions. In Act No. 26 of 2007 on Spatial Planning, noted that the planning use of space / area based protection functions and cultivation, carrying capacity and carrying capacity of the region, alignment, alignment, balance, and harmony between sectors. Spatial planning (RTRW) performed within the administrative boundaries of national, provincial, district / city to district, but consideration of the watershed as a whole ecosystem across administrative areas is still very less attention even though the definition of DAS. Provincial government authorities organized watershed management across districts / cities and Regency / City shall manage the watershed scale district / city. Several other laws and regulations related to watershed management, among others, Law No. 5 of 1990 on Conservation of Natural Resources and Ecosystems, Act No. 25 of 2004 on National Development Planning System, Regional Government Act, Law Number 27 Year 2007 on the Management of Coastal Areas and Small Islands, Regulation No. 44 Year 2004 on Forestry Planning, PP No. 6 Year 2007 jo Government Regulation No. 3 of 2008 on Forest Arrangement and Preparation of Forest Management Plan and Forest Utilization, and Government Regulation No. 76 Year 2008 on Forest Rehabilitation and Reclamation. Implementation of watershed management is also strongly associated with global issues that have become the world's attention as the Convention on Climate Change (UNFCCC), biodiversity (UNCBD) and land degradation (UNCCD), which have all been ratified by the Indonesian Government. Besides the legislation mentioned above is the basis in the implementation of watershed management, the implementation is very necessary commitment and political support of the parties, especially the head of government decision makers both at the central, provincial and district / city (executive element), parliament, legislature local (legislative elements) and law enforcement (judicial elements). Political support can be realized in watershed management mainstreaming into policies, programs and budgets at all levels of government.

The principles on which the reference for integrated watershed management, among others:

a. Watershed management is done by treating the watershed as a whole ecosystem from upstream to downstream, one plan, one management system.

In the watershed as a whole ecosystem there are upstream-downstream linkages, the watershed resource management activities and their impact ("on-site" or "off-site impact"). This is because the presence of water as a natural resource watershed that flows from upstream to downstream. Upstream-downstream linkages is also underlies the use of watershed ecosystem as the best unit in the ecosystem-based resource management. For that there must be an integrated watershed management plan from upstream to downstream so that there is a watershed resource management system agreed by the parties involved to ensure the preservation of the watershed in the long term.

b. Integrated watershed management involves multi-stakeholder, coordinated, holistic and sustainable.
DAS natural resources are very diverse (biological and non-biological) is a complex system that integrated watershed management requires the participation of various sectors and multi-stakeholder approach to inter-disciplinary, cross disciplines and across administrative areas of government. The authority of resource management in the watershed are on more than one

[13] McCrudden, 2006. Legal Research and the Social Sciences. Law Quarterly Review 122: 632-50.
[14] Martin Partington, 2010. Empirical Legal Research and Policy Making.

sector. Therefore, integrated watershed management requires coordination, integration, synchronization and synergy between stakeholders both in setting policy, program planning and activities as well as in the implementation and control of the implementation of watershed management. Management also includes not only the utilization / utilization of natural resources but also must contain the activities of the protection and conservation of natural resources so that benefits can be sustained and control efforts against the destructive force that may arise / caused by the extreme conditions of a natural resource, because it must watershed management done in a holistic, comprehensive and sustainable.

c. Watershed management is adaptive to changes in dynamic conditions and in accordance with the characteristics of the watershed. DAS is a dynamic ecosystem where the elements of biophysical (eg: flora, fauna, climate, land, water, building infrastructure), social, economic, and cultural communities are always changing over time. Therefore, if there is a change elements of the ecosystem in the watershed will require a response from the organizers of the watershed management both in terms of policy and implementation of programs and activities that watershed management goals can be achieved.

d. Watershed management implemented by the division of tasks and functions, costs and benefits equitably among multi-stakeholders. In watershed management there are many parties involved and the many beneficiaries of watershed goods and services at the same time there are also those who create pollution or damage to the watershed ecosystem. Financing the implementation of watershed management is not fair if only borne by the government, but also to be financed by the beneficiaries of goods and services watershed and ecosystem pollutants DAS mainly for the rehabilitation, restoration and / or reclamation of forest resources, land and water for the benefit of the watershed ecosystem sustainability themselves in order to improve the welfare of society at large. The principle of fairness should also consider linkages upstream and downstream watersheds where there is often the upstream watershed must undertake forest conservation, soil and water conservation for the benefit of water resources in the area downstream of the watershed.

e. Watershed management is based on stakeholder accountability interests. Watershed management is basically the integration across sectors and administrative area in the management of resources within the framework of sustainable development. To benefit the optimum benefits from natural resources to human and other life on an ongoing basis is needed accountability of each sector or stakeholder.

2. National Plan for Adaptation to Climate Change.

To the threat of climate change and global warming, Indonesia included in highly susceptible. As an island nation with a very long coastline, has millions of poor people with high dependence on natural resources for their food security days, Indonesia undoubtedly suffered enormous impact both in scale and complexity of the pads turn is potentially catastrophic and conflicts that endanger the continuity and integrity of the nation. Climate change and global warming that is now occurring around the world, including Indonesia, is a phenomenon in the sense that globally, anywhere. How a society or a nation to manage the levels of carbon emissions will affect the quality of nature and the environment around the world. The impact of climate change and global warming threatens the lives of human beings and other living organisms. Facing this problems, the Indonesian government has prepared a plan of mitigation of climate change impacts in a National Action Plan (NAP). RAN is a reference base for all components of the nation Indonesia in facing and addressing the threat of climate change and global warming. Despite the RAN has had a comprehensive scope, including on the scheme Mechanisms Clean Development (CDM), there are some aspects that could be improved in the RAN concept, among others:

a. Approach cluster develop adaptation strategies and where there are clusters are groupings based on the special characteristics (both sector, geographical, type of disaster due to changes in climate, and socio-economic) and their specific strategies according to the characteristics of each cluster.
b. Positioning carbon-emission-reduction (CER) not as liability community and the business world, but as an investment.
c. stronger focus urban planning and development, and not solely focused pads Management of waste. This is because the cities and urban areas contribute to increasing carbon emissions.
d. sharper strategy to develop a program in which the CDM small scale, medium, and large managed to optimize the benefits for the deduction of poverty and increased prosperity for the people of Indonesia.
e. Focus on communication down-to-earth that clearly describes how critical actual nature of the impact of climate change and the warming of the earth, who will be the victims, where, and so on.

3. Factor influence the legal guarantee access to information

There are some factors that also influence the legal guarantee access to information climate change on water resources based National Plan For Climate Change Adaptation: first, substance factors. A number of substance or act were born during 2007 as Act (Act) No. 24 of 2007 on Disaster Management, Law No.26 of 2007 on Spatial Planning, Law No.30 of 2007 on Energy, Law 27/2007 on the Coastal Area Management Small Islands, it does not have the ability to be utilized as an instrument in the prevention, protection of the environment and the carrying capacity of natural resources tend even more to facilitate the process of exploitation of natural resources. Act No. 32 of 2009 on Environmental Protection and Management Act. The fact in Indonesia frequent environmental disaster, reached more than 60 environmental disaster 2010-2014, the more shows that the existing laws have not been able to accommodate these issues. The second role of the judiciary. Judicial decision which frees offender shows that the judiciary as the spearhead of law enforcement, it was not sensitive to the environmental crisis and sense of justice and is still too formal and procedural correctness forward compared with extracting substantial justice. Third International agreements in the framework of environmental protection and trade in which Indonesia was involved has not been optimized in order to save the environment and ensure that people are not harmed. According to the Indonesian context, realizing good governance consistently require an overhaul and revamping of social, political and legal. Improvements to be carried out

include the provision of legal guarantees and access to information, participation in decision making and access to justice to achieve the balance of power between the elements of the state, private sector and civil society. Sustainable development calls for equitable resource management, both economically, socially and environmentally for the current generation and generations to come. To realize the intra and inter generation justice, the sustainable development based on good environmental governance (Good Governance Sustainable Development) became very absolute. The right to access information at the core of each person is entitled to obtain full information, accurate and up to date for a variety of purposes. Access to information guarantee access to information climate change on water resources based National Plan For Climate Change Adaptation is divided into two types, called the right people get the information and public officials are obliged to provide information without having preceded the request of the public (access to information for certain), the public's right to receive information and the public authorities shall make and give information if there is a request from the public (access to information actively). The right of access to justice is to strengthen the access permissions and access rights of participation information. Justice is the right of people to ask for compensation or cost recovery should their rights to information, to participate and to get a good environment. The right to a healthy environment actually been guaranteed in the 1945 Constitution Article 28 H. While the right to information and participation forms of expression as expressly provided for in Article 28F and 28C paragraph (3). Right to justice has also been guaranteed in Article 28C paragraph (2). The forth is culture. Some people in Indonesia still have bad culture in environmental protection. Some kinds of factor that influences are economics and knowledge. Some programs that also influence the legal guarantee access to information climate change on water resources based National Plan For Climate Change Adaptation are:

1) The need for policies expressly mandated in the form of legislation
Policy efforts to integrate climate change adaptation into development policies will be more effective if the policy expressly mandated in the form of legislation. At the national level, more appropriate if the policy is formed in the Presidential Decree level or higher on it, because climate change policy is cross sectoral and can not be only focused by one department. At the local level, even though the rules at the level of heads of regions considered sufficient, but it would be better if the regulation established in the form of local regulation in order to force a stronger.

2) The need for the establishment of working groups or commissions climate change at the local level. The establishment of working groups or commissions related to climate change more precisely formed at the local level. This is because the region better understand the situation and conditions as well as the vulnerability of the area to the adverse effects of climate change, as well as local governments to better understand where the priorities of development in their respective areas. In addition, the process of community engagement will be more easily applied at the local level because people in the area that will be felt the direct impact of a policy. Centralized policy will not be effective in dealing with pluralistic state in Indonesia, especially in the context of overcoming the negative impacts of climate change in order to achieve sustainable development in Indonesia.

Conclusion

Based on the description, it can be concluded that:
1) Local governments better understand the situation and real conditions in the field and it is they who can make an assessment of the need for adaptation and vulnerability to climate change in their respective areas.
2) Urgent to make a commission in local government. The establishment of the commission is more appropriate climate change formulated in the form of local regulation, because it is a form of legislation which is more concrete and legally binding.
3) The central government should encourage efforts to integrate climate change adaptation into national development policies through policy development so that each area of climate change policy is more fundamental and appropriate.

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ENFORCED DISAPPEARANCE: AN UNDEFINED CRIME IN BANGLADESH

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ABSTRACT

Enforced disappearance is regarded as State sponsored heinous crime which emerged recently in Bangladesh. Political opposition is the main target of forced disappearance; however, civilians are also victim of this offence. Most of the incidents are unsolved and law enforcing agencies repeatedly denied their involvement with this. UN has adopted an International Convention for the Protection of All Persons from Enforced Disappearance in 2006 to abolish the offence from the planet. According to this convention state parties are obliged to take necessary actions to stop this offence. Some other international conventions also treated it as crime against humanity. However, no criminal laws of Bangladesh have yet recognized forced disappearance as offence albeit now it is a reality in Bangladesh. Nevertheless, right to life is one of the key fundamental rights guaranteed under Bangladesh constitution which is violated by continuous occurring of this crime. It has huge impact on victim's family as well as on the society of Bangladesh. Bangladesh needs to be a state party of the International Convention for the Protection of All Persons from Enforced Disappearance immediately and needs to legislate a new law to prevent any sort of state sponsored crime to stop further consequences. Otherwise, present illegal practice of forced disappearance will bring massive consequences for the whole nation.

Key Words**:** Enforced Disappearance, Human Rights, Constitution, Bangladesh, Fair Trial, Fundamental Rights, Violation, Crime.

Introduction

In last couple of years, the occurrences of abduction, kidnap, enforced disappearance, killing etc. have increased immensely in Bangladesh. Among them the seven murders case at Narayanganj in 2014 had created most reaction among the citizens which exposed the cruelty and inhumanity of the incident as well as aware the country massively about the gravity of these offences. Apart from this, in recent years there are huge numbers of allegations regarding kidnap, abduction, forced disappearance, extortion and finally killing by unidentified perpetrators.

Most of the incidents are still unsolved and a very few people are rescued successfully by the law enforcers. However, in most of the abduction cases family members, relatives and friends of the victim triggered their assertion towards law enforcement agencies and specifically they have suspected and alleged that people wearing civil dress introduce them as member of Rapid Action Battalion (RAB) or Detective Branch (DB) or from other law enforcing agencies are arresting and forcefully bringing the victim with them.

But when victim's family or media are asking the law enforcers, they repeatedly denied the matter and told that they even do not know anything about it or they did not conducted any such operation. Till now, none of the offenders have brought to trial. Moreover, the incidents are neither properly investigated nor any actions has been taken with proper liabilities to prevent such events. Hence it is not impractical at all that the criminals took the opportunity and gained their desire by the name of law enforcement agency. Hence this article research paper will examine the extent of the definition of enforced disappearance. Then it will analyze the scope of the International Convention for the Protection of All Persons Against Enforced Disappearance. After that this study will discuss the position of forced disappearance under the criminal laws of Bangladesh. In the latter portion this article will discuss about the impact of committee on enforced disappearance to control it and scenario of violation of national and international norms in this regard. At the end this study will recommend some effective measures to stop the crime.

Definition of Enforced Disappearance in International Law

Enforced disappearance is a relatively new addition to state crime. Enforced disappearances persist in many countries all over the world, having been a continuing feature of the second half of the twentieth century since they were committed on a gross scale in Nazi-occupied Europe. After the expansion of this offence in December 2006, the UN has adopted the International Convention for the Protection of All Persons from Enforced Disappearance. The Convention entered into force on 23 December, 2010. To date, 90 states have become signatories, and 30 have ratified the Convention. Among those states that are a party, 12 have recognized the competence of the Committee of Enforced Disappearances (CED) to receive and consider communications both by individuals alleging that their rights under the Convention have been violated as well as communications by states claiming

that another state party is not fulfilling its obligations under the Convention. Very few states have implemented the Convention into national law. The convention aims to prevent enforced disappearances taking place, uncover the truth when they do occur, punish the perpetrators and provide reparations to the victims and their families.

The Convention delivers a definition of the crime of enforced disappearance and necessary state action in order to both prevent the occurrence of the crime and to allow for the investigation and prosecution of the culprits. As per the language of Article 2 of the mentioned Convention an enforced disappearance takes place when a person is arrested, detained or abducted by the state or agents acting for the state, who then deny that the person is being held or conceal their whereabouts, placing them outside the protection of the law. Hence the International Convention for the Protection of All Persons from Enforced Disappearance identifies the following elements in the definition of enforced disappearances: there is an arrest, detention, abduction or any other form of deprivation of liberty; that conduct is carried out by agents of the state or by persons or groups of persons with the authorization, support or acquiescence of the state; the conduct is followed either by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person; the objective result of the conduct is that the disappeared person is placed outside of the protection of the law.

Article 1(2) also furnishes, in no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance. In addition to this, under Article 4 each State party has an obligation to take necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

Moreover, the aforementioned Convention added in Article 6(1) (a) & (b) that any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance; and a superior who: knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance and he/she shall be liable for the commission of that offence.

Enforced disappearance is a cumulative violation of human rights. This is because it may inflict a wide range of human rights violations, including violation of: the right to life: as the person may be killed or his or her fate may be unknown; the right to security and dignity of a person; the right to be free from arbitrary detention; the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment; the right to humane conditions of detention; the right to legal personality; the right to fair trial; the right to free movement; the right to family life;

All of the above rights are guaranteed as fundamental rights whether directly or indirectly and enforceable by the court under the scheme of the Constitution of the People's Republic of Bangladesh.
Apart from this, the Rome Statute of the International Criminal Court, the Committee of the Red Cross Rules of Customary International Humanitarian Law, the Inter-American Convention on the Forced Disappearance of Persons prohibits the act and obliges the State parties to define forced disappearance of persons as a crime in their national law and to impose a appropriate punishment commensurate with its gravity.

Rome Statute of the International Criminal Court particularly treats forced disappearance as crime against humanity in Article 7 as "*For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*
(i) Enforced disappearance of persons."

Additionally, Inter-American Convention on the Forced Disappearance of Persons affirmed the obligation of State parties in this regard in Article 1 as "*The States Parties to this Convention undertake: a) Not to practice, permit or tolerate the forced disappearance of persons, even in the states of emergency or suspension of individuals guarantees.*"

Hence to prevent this kind of offence Bangladesh should become a state party to the International Convention for the Protection of All Persons from Enforced Disappearance and must needs to legislate a new law urgently to stop the crime effectively.

Importance of the International Convention for the Protection of All Persons from Enforced Disappearance

Unlike other human rights violations, enforced disappearances were not prohibited by a universal legally binding instrument before the Convention come into force in 2010. Before that only the Rome Statute of the International Criminal Court provided for prosecution and award of reparation to victims in cases where enforced disappearance amounted to crimes against humanity.

The crime of enforced disappearances was also prohibited prior to 2010 by the 1992 UN Declaration on the Protection of all Persons from Enforced Disappearance, the 1996 Inter-American Convention on Forced Disappearance of Persons Rights and customary international humanitarian law. However, this previously existing framework exhibited both serious gaps and ambiguities, and has proven to be insufficient as a protection mechanism. The Convention, despite its own flaws, corrects some of the existing gaps in the legal framework.

Firstly, the Convention makes enforced disappearance crime under international law and recalls the right of every person not to be subject to it, even under exceptional circumstances, such as the state of war or a threat of war, internal political instability or any other public emergency. Secondly, it is an important treaty because it obliges states to implement it into national law. Therefore, ensuring that impunity shall not prevail for enforced disappearance. Thirdly, it guarantees the rights of victims or their

relatives to have access to justice and full and effective reparation and finally, the Convention sets up the Committee on Enforced Disappearances – which begins its work in November 2011.

Prior to this, the only mechanism specialized to deal specifically with enforced disappearances was the UN Working Group on Enforced on Involuntary Disappearances. This body has received and examined reports of disappearances submitted by relatives of disappeared persons or human rights organizations acting on their behalf since its establishment in 1980. This important global rapid response mechanism for requesting states to carry out investigations into cases in which the Working Group believes an enforced disappearance has taken place and monitoring state compliance with the Declaration on the Protection of all Persons from Enforced Disappearance continues to exist.

The Committee on Enforced Disappearance (CED) will similarly receive requests for urgent action from relatives of the disappeared, their legal representatives or others, which it can transmit to the state party concerned with a request to clarify the fate and whereabouts of the disappeared person. Also it will be able to consider individual complaints by persons who claim to be a victim of a violation of the provisions of the Convention, although only after states parties have recognized the Committee's competence to do so. The Committee is also empowered to perform other functions to monitor implementation and state parties' compliance with their obligations under the 2010 Convention

Forced Disappearance under the Criminal Laws of Bangladesh

In any law of Bangladesh there is no recognition of enforced disappearance. It is not only undefined in any penal law but also not treated as an offence in any way. It is a new form of crime in this country and launched last couple of years past. But there are provisions regarding kidnap & abduction in the Penal Code, 1860. According to section 362 of the Penal Code, 1860 a person is said to commit the offence of abduction when he by force compels or by any deceitful means induces any other person to go from one place to another.

On the opposite side, section 359 enumerates kidnapping is of two kinds i.e kidnapping from Bangladesh and kidnapping from lawful guardianship. Whoever conveys any person beyond the limits of Bangladesh without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from Bangladesh. On the contrary, whoever takes or entices any minor or any person of unsound mind, out of the keeping of the lawful guardian without such guardian's consent is said to kidnap such person.

As per the provision of the Penal Code a person whoever kidnaps any person from Bangladesh or from any legal guardian shall be punished with detention of either description for a term which may extend to seven years and shall also be liable to fine. Further, section 364 prescribed the punishment for kidnapping or abduction where the intention is to murder up to imprisonment for life or rigorous imprisonment for a term, which may extend to ten years and fine also. After analyzing these two we can say that kidnapping and abduction have the following features: kidnapping is committed in respect of minors under sixteen years in case of a male and under eighteen years in case of a female, or a person of unsound mind. Abduction can be committed in respect of a person of any age. In the event of kidnapping, a minor is usually taken away, forcefully or not, without the consent of legal guardian but force, compulsion or deceit are basic elements of abduction. Consent of the victim in case of kidnapping is immaterial where in case of abduction absence of voluntary consent is of vital importance. Kidnapping moves the victim away from the custody of legal guardian and being so it is a substantive offence but abduction is an auxiliary offence.

Apart from this, if a person kidnaps or abducts any child under the age of ten, in order that such child may be murdered or subjected to grievous hurt, or slavery, or to the lust of any person, shall be punished with death or with imprisonment for life or with rigorous imprisonment for a term which may extend to fourteen years, and shall not be less than seven years. Additionally, if a person kidnaps or abducts any woman with intent that she may be compelled to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse shall be punished with death or transportation for life or with rigorous imprisonment of either description for a term which may extend to twenty years but not less than ten years, and shall also be liable to fine.

The punishment for murder after abduction is death penalty or imprisonment for life as stipulated in section 302 of the Penal Code, 1860. In addition to this, if kidnapping or abduction is committed with an intention to wrongful confinement, the offender shall be punished with custody of either description for a term, which may extend to seven years and shall also be liable to fine.
Enforced disappearance is a crime under international law for which states are obliged to hold perpetrators responsible through criminal investigation and prosecution. Moreover, it amounts to a crime against humanity when it is committed as part of a widespread or systematic attack on a civilian population. Forced disappearance is a particularly cruel human rights violation; a violation of the person who has disappeared and a violation of those who love him/her. The disappeared person is often tortured and in constant fear for their life, removed from the protection of the law, deprived of all their rights and at the mercy of their captors while every person has the right to life, liberty and security of person.

Role of Committee on Enforced Disappearance (CED) to Prevent Forced Disappearance

The Committee on Enforced Disappearance (CED) is similar in its form and function to other UN human rights treaty bodies, such as the Committee against Torture (CAT). CED is composed of ten experts in the field of human rights, who serve on the Committee in their individual capacity and are expected to exercise their functions independently and impartially. Within two

years of accepting the Convention, state parties are required to submit a report to the Committee about the measures they have been undertaking to implement the Convention. Upon examining the report, the Committee will make general suggestions and recommendations as it considers appropriate to the state party. Furthermore, the Committee can transmit requests for urgent action sent by or on behalf of the relatives of a disappeared person to state parties requesting that they clarify the fate and whereabouts of the disappeared person. It can also undertake visits if it receives reliable information indicating that a state party is seriously violating the provisions of the Convention, or may bring situations of widespread or systematic practices of enforced disappearances to the attention of the UN General Assembly.

Moreover, the Committee also has an optional individual complaints system. This means that it can consider communications submitted by or on behalf of individuals alleging to be victims of a violation of the provisions of the Convention by a state party, which has declared that it accepts the competence of the Committee to receive such individual communications. The Committee may also receive and consider communications in which a state party claims that another state party is not fulfilling its obligations under the Convention if the state party concerned has agreed to the optional inter-state communications procedure.

Effect of forced disappearance on the societies and individuals

An enforced disappearance of an individual has a tremendous effect on the lives of his or her loved ones and their communities. Families are often emotionally unable to find closure and come in terms with the disappearance of their loved ones. Many suffer from severe psychological distress, sometimes resulting in physical illness as well. Children are not immune from such anguish; disappearance of a parent, sibling, or other members of the family often adversely affects their educational performance and social behaviour.

Furthermore, families frequently face enormous economic consequences, especially when the victim was the principal bread-winner of the family. Even if this was not the case, many families find themselves in dire economic straits during the course of their search for the victim. The societal and cultural isolation faced by the families frequently go undocumented. For example, while widows in certain cultures have a well-established support system within communities, wives of disappeared victims are at times left in limbo.

Often, people who have disappeared are never released and their fate remains unknown. Their families and friends may never find out what has happened to them. But the person has not just vanished. Someone, somewhere, knows what has happened to them. Someone is responsible but all too often the offenders are never brought to justice. However, the sufferer and his/her family have right to get fair justice and to reparation. They also have the right to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end.

Violation of National and International Laws

This incident indicates the serious scenario of falling rule of law in Bangladesh. The Republic is bound to ensure security and safety of life and property of every citizen. Furthermore, it has responsibility to ensure citizens fundamental rights guaranteed by the Constitution. But, by detaining any person without any due process of law, Govt. has grossly violated his fundamental rights. The Constitution of People‘s Republic of Bangladesh says that: *to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law*.

On the other hand, another Article of the Constitution incorporates: *no person shall be deprived of life or personal liberty saves in accordance with law*. In reality, this has not been implemented and this most fundamental right is being repetitively violated with complete impunity. The Govt. violated these two Articles of the Constitution of Bangladesh by depriving it’s citizen from enjoying the protection of law and to be treated in accordance with law that are announced in our sacred Constitution as inalienable right of every detenu. The law enforcing agencies detained at the time of illegal arrest without any warrant of arrest from any court of law. Even they didn’t inform the ground(s) for arrest, didn’t produce him before the nearest Magistrate Court till now and didn’t get chance to consult with any lawyer which is the clear violation of the Constitution.

The Universal Declaration of Human Rights, 1948 prohibits Govt. from arbitrary arresting with its clear cut text as it includes: *“no one shall be subjected to arbitrary arrest, detention or exile”* Each and every forced disappearance violated universal human right to be safe from illegal arrest. Bangladesh acceded to the International Covenant on Civil and Political Rights (ICCPR), that prohibits the grave violations of rights highlighted above. According to Article 6 and 2 of the ICCPR, Bangladesh respectively has the obligations to ensure the right to life of its people and to ensure prompt and effective reparation where violations occur.

It is also obliged to bring legislation into conformity with the ICCPR. Under the obligation of ICCPR, the Bangladesh government must ensure a fair and public trial for anyone charged with a criminal offense, and such a trial must take place "without undue delay." ICCPR also requires Bangladesh to protect freedom of expression. Bangladesh is a state party to the Convention Against Torture (CAT) and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Under CAT, the Bangladesh government must ensure that any person who alleges he has been subject to torture has the right "to complain to and to have his case promptly and impartially examined by competent authorities."

Recommendations to Stop Forced Disappearance

The government of Bangladesh should ensure a fair and independent investigation into all the cases of disappeared citizens. The government also needs to make clear to its security forces that the era of torture with impunity is over. Any criminal offence should be tried through the criminal justice system; it must not be punished by security forces outside of the due process of law. In the serious human rights violation case, Govt. should take positive step very soon. Every victim should be produce before the Court immediately by the concerned law enforcing agency within whose custody he is detained.

International community must consider the issues of human rights violation and the disappearances in political arena while making any decision about their relation with Bangladesh. Donor agencies should ensure that no person is kidnapped or tortured due only to his political identity, and that all people get equal protection of law from the state. Bangladesh must be urged to halt the growing phenomenon of enforced disappearances and show its commitment to do so by ratifying the International Convention for the Protection of All Persons from Enforced Disappearance without delay and producing and implementing in full domestic legislation in line with the provisions of this instrument.

States must commit themselves to ending the practice of enforced disappearance by taking steps to respect, protect and fulfill the rights of individuals not to be subjected to enforced disappearance. Furthermore, states must tackle the issue of impunity and ensure that the perpetrators are brought to justice.

Bangladesh should ratify the International Convention for the Protection of All Persons from Enforced Disappearance. Moreover, Bangladesh should accept the competence of the Committee on Enforced Disappearances to receive complaints from individuals and state parties under Articles 31 and 32 of the Convention. In addition, it should implement the Convention into national law into line with international law and standards.

Conclusion

Adoption of a long-term and comprehensive plan can prevent and eliminate enforced disappearance, which involves establishment of effective training programs of law enforcement and other personnel. Civil society actors can take specific actions to support their calls urging governments to ratify the Convention. Civil society may participate in the drafting and commenting of national implementing legislation. Civil society members can provide information in relation to the Committee's (CED) review of state reports and its other functions under the Convention, submit urgent requests for action to clarify the fate and whereabouts of a disappeared person, or submit individual communications on behalf of an individual who claims to be a victim of a violation of the Convention's provisions by a state party. Women and women's organizations should be particularly encouraged to do so to ensure that gender issues are taken into account and that the process of preparing implementing law is inclusive. Also, in many countries, it is men who are most often subject to disappearance, and it is their women family members who spearhead efforts to obtain justice for their loved ones.

State must commit to conclude the practice of forced disappearance by taking steps to respect, protect and fulfill the rights of individuals not to be subjected to enforced disappearance. Bangladesh should ratify the convention and incorporate the offence in domestic law immediately. Also the State should take effective legislation, administrative, judicial or other measures for the taxpayers to prevent and provide protection against unacknowledged or involuntary and forced disappearances. Further, states must undertake the issue of impunity and ensure that the criminals are brought to justice.

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THE INFLUENCE OF GLOBALIZATION AND INTERNATIONAL ECONOMIC LAW ON THE DEVELOPMENT OF NATIONAL ECONOMIC LAW

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ABSTRACT

The current globalisation has influenced many of the various aspects of life of the world community both on aspects of political, social, cultural, economic and law was no exception. Indonesia community as one part of the world community must not be separated from the influence of the globalization. Influence of the globalization of law in Indonesia did not repeat when Indonesia decided to become a member of regional and international trade organizations, such as the GATT, WTO, APEC and AFTA.. Since then, Indonesia entered into the circle of influence and global trading only in the field of trade and at the same time, too often the norm (any method) or regulations (laws) that are like foreign transnational joint venture agreements, franchise, license, agence became a model agreement which is known in the legal system of Indonesia today. In addition, some of the products produced have been assumed as influence the current of this globalization as act No. 41/2004, law No. 22/2001, law No. 25/2007. In the face of the impact of this globalization influence then there is no other way except that Indonesia should re-arrange its economic legal system in order to make generated economic law with the philosophy of the nation based on Pancasila and the 1945 Constitution article 33.

Key words: globalization, international economic law and the construction of economic law of Indonesia.

Introduction

The word globalization is taken from the Word global which means universal. Globalization itself does not yet have an established definition, but merely a working definition, bbecause globalization means universal depending on which people interpret it. Anyone sees it as a process of social or natural history or a process that will bring the whole nation and the world more and more tied to each other, realizing a new life order or unity of co-existence with the boundaries of the geographic, economic and cultural community. While on the other side, globalization is seen as a project compiled by the superpower governments so that people could have looked at it negatively.[1]

Nevertheless, in libraries (literature) found some sense of globalization. Globalization is a process of expansion of the scale of human life that his form of multidimensional local and then national to new scales cover the entire landmass of the Earth without exception.[2] Soetandyo Wignyosoebroto gives an overview of globalization as a phenomenon in the developmental process from nation states to a borderless global word. Life has been increasingly evident in the global format, seems to offer an alternative that could change aspects of life before the national law, but also offers a life of global with its international law as if it were about to cast the many localized enclaves everywhere.[3] Similarly, Roland Robertson explained that Globalization is a characteristic of the relationship between the population that goes beyond conventional boundaries such as the nation and the State. In the process of the interaction, the world has been compressed, as well as a community of shared consciousness occurs as one unified whole.[4] Whereas, according to I Gede AB Wiranata interprets globalization as more Union of economic units in various parts of the world into a single economic unit of the world's large and growing over time without limit and position of togetherness in the concept of equality and balance.[5]
On the views of the above generally speaking, that globalization that is actually an interaction between the communities whose nature is multidimensional which crosses extent of country which refers to the union of economic units globally.

[1] Gunawan Jatmiko, *Peranan Lembaga Pengadilan Dalam Mengintegrasikan Nilai-nilai HAM, Nilai-nilai Global dan Domestic Wisdom Dalam Rangka Pembaharuan Hukum*, dalam Hukum Bangun Teori dan Telaah Dalam Implementasinya, Penerbit Universitas Lampung, 2009, hlm. 232-233.

[2] FX Adji Samekto, *Ekspansi Kapitalisme Dengan Tekanan Demokratisasi*, Diskusi Panel Nasional Arogansi Amerika Serikat Dalam Hubungan Internasional, FH-UNDIP Semarang, Oktober 2000, hlm. 1.

[3] Soetandyo Wignjosoebroto, *Hukum Dalam Masyarakat: Perkembangan dan Masalah*, Banyumedia Malang, 2008, hlm. 237-252.

[4] Dalam Satjipto Rahardjo, *Pendidikan Hukum Sebagai Pendidikan Manusia, Kaitannya Dengan Profesi Hukum dan Pembangunan Hukum Nasional*, Genta Publishing, April 2009, hlm. 100.

[5] I Gede AB Wiranata, *Revitalisasi Dan Reorientasi Nilai-nilai Atas Tanah Sebagai Objek Investasi Dalam Pembangunan Hukum Ekonomi Di Era Global*, Pidato Pengukuhan Guru Besar Tetap Pada FH. Universitas Bandar Lampung, 10 November 2009, hlm. 2.

The Interaction between people across the country has been going on for a long time that occurs in the era of enlightenment. The spirit of enlightenment of Europe in the Middle Ages which prompted a search of the new world can be said to be a current of globalization. Therefore, globalization is not new. Although globalization has long lasting and it is not something new, but globalization seems to still gain the attention of the society, especially legal experts in Indonesia. the attention of experts is visible from the spotlight and discussion of the influence of globalization on the life of the nation, especially the impact of globalization on the development of economic law in Indonesia. At first, the interaction between people and between Nations ruled by military and political, which the emphasis on issues /economic interests, while culture, religion is on the position of the epiphenomenal.[6] Therefore, Wallenstein said that globalization is the process of the formation of the world capitalist system.[7]

The theory of capitalism is to understand which aims at making the buildup of capital (capital accumulation) through the processes of planting (capital investment). In practice understanding capitalism has encouraged and requires expansion to the outside in the form of control of the market, the source of supply of raw materials and labor as cheap as possible. The capture and control of markets, sources of supply and labor can aim for sustainability of the fertilization of capital home.[8] Thus globalization is none other than the expansion of global capitalism. Globalization as a process of interaction between the people of the world and between countries unwittingly in time travel has influenced various aspects of community life, the world order (global) be it in politics, culture, science and technology, as well as the law. The next Indonesia as part of one country in this hemisphere would certainly not escape the influence of the development of current globalization.

For example, in the process of globalization at this time was marked by a series of policies that are directed to open up the economy in order to expand and deepen integration with global markets. Therefore, any policy which is directed at the development and economic growth are influenced by global thinking and development must be accompanied by instruments that organize them called as law. The law is prepared to organize and regulate the life of the community that is affected by the development of industrialization and capitalism, and followed familiar-understand social, cultural, political and economic society has given rise to the modern State. Of the modern State of modern legal systems then appears with the doctrine of the rule of law.[9]

The emergence of modern law, according to Satjipto Rahardjo, is a response to the new economic system of production (capitalist) because the old system can already no longer serve the developments of the capitalist economic system.[10] Changing new world order nowadays many steps are undertaken by the Government to respond to this legal internationalization. The Government measures include the setting up of this particular field of economic law in the field of capital investment law (law of investment). The policy of the Government to organize the investment law aimed at attracting investors to infuse capital in Indonesia.

The motivation of this paper is to give an idea that globalization has an effect on all aspects of society, nation and state, including the Indonesian economic law and primarily affect the investment law and international trade law. This is because when Indonesia decides to become a member of the WTO at the same time Indonesia is obliged to perform harmonization of the laws of economics based on the norms of the WTO in accordance with the WTO Agreement attachments as contained in General Agremeent on Rates and Trade (GATT), Agreement on Trade Related Investment Measures (TRIMs) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) as an agreement that must be obeyed by all WTO member countries. In doing harmonization of economic laws in accordance with the norms of the WTO when it is not anticipated to be feared liberal ideologies spawned the individual in the economic law of Indonesia, which is certainly liberal ideologies is not in accordance with the spirit of the Indonesian people based on the values contained in Pancasila.

The Influence Of The Globalization Of International Economic Law On National Economic Law

Globalization as a process of intensification of the consciousness of the world as a whole has experienced accelerated intact since the last few decades. The process of accelerated globalization started the era of industrialization and capitalization in Europe and spread to variety corners of the world. Because of this the great influence of globalization may result in changes in social, cultural, political and economic world community. Furthermore, due to the effects of globalization is the world imperialism. The dominance of West European countries of the world (third world), especially in the political and economic scene continues. The idea of capitalism and free market starts rolling and introduced. The dominance of free-market capitalism and thinking which later became the embryo of the formation of GATT (the general agreement on tariffs and trade), in 1948 until the establishment of the WTO (word trade organization) in 1995.

At the moment with uruguay round negotiations has been agreed (uruguay round) and free multilateral trading system more to dominate the world. It can not be denied that multilateral trading system that is prefixed to the emergence of GATT, later joined by the WTO has contributed not least in the field of economic and social is able to increase productivity growth and economic development of the world. Indonesia as one of the countries in the hemisphere certainly can not be separated from the influence of globalization. The influence of globalization towards Indonesia cannot be avoided, when Indonesia decided to become a member of the regional and international trade organization. Indonesia's participation in regional and international trade organizations such as: GATT (General Agreement on Tariffs and Trade), AFTA (Asian Free Trade Area); APEC (Asia Pacific

[6] Satjipto Rahardjo, *Op.Cit*, hlm. 100.
[7] Dalam Satjipto Rahardjo, *Ibid*, hlm. 100
[8] FX Adji Samekto, *Loc.Cit*, hlm. 3.
[9] FX Adji Samekto, *Ibid*, hlm. 3.
[10] Faisal, *Menerobos Positivisme Hukum*, Rangkong Education, 2010, hlm. 51.

Economic Cooperation) and by the WTO (World Trade Organization) as well as in international institutions such as the IMF (International Monetary Fund), ADB (Asian Development Bank), FAO (Food and Agriculture Organization), ILO (International Labour Organization) WIPO (World Intellectual Property Organization) and so has a great influence to the entry of the current globalization in the life of the people of Indonesia.

As a country with an open economy, Indonesia has showed active participation since then Indonesia entered into an era of global trade and global competition in the influential circles merchandizing, and at once became a swirl of influences of liberalization. Liberalization is primarily a trade a world without limits, without protection, without inhibitions and heightens the level of competition for trade between the economic actors. Therefore the schools that are known in the trade as global capitalism, individualism and liberalism are familiar and understood that familiar and even unconscious has been part of the economic system of Indonesia.

When Indonesia became an open economy (market) then simultaneously also went in multinational corporations (multinational corporation) or trans-national companies (transnational corporation) operating in Indonesia. Multi national companies or transnational corporations certainly plays a major role to enhance the growth of economic development in Indonesia alone as well as in collaboration with domestic companies, but so that has been influential unconsciously on a wide range of community life Indonesia. Therefore, the people of Indonesia must be prepared to receive the attack range of foreign products, foreign cultures, new values arising out of international influences, not least in the field of economics and law.

The influence of economic globalization is that globalization and liberalism has offered an alternative for achieving a better standard of living, globalization also gives a lot of choice of the desired product that suits your needs and desired price. But on the other hand the influence of globalization increasingly widening inequality of income distribution between rich and poor countries, between rich and poor, as well as open up opportunities for wealth accumulation and monopoly business and political power in a few people.

In areas of law such as the existence of this free trade then certainly Indonesia's legal system certainly did not escape the influence of globalization. Due to the influence of globalization and the increasing influence of global trade and is pretty much the norm, the methods or rules (laws) of the trans-national nature of foreign have impact on the legal system of Indonesia.[11] For example in the field of the law of contract business in which developed countries take new transactions in developing countries and its trading partners receive the business contracts as part of its legal system concurrently with it's no surprise some agreements such as: joint venture agreements (joint venture), the franchise (franchise), a license agreement (license), Agency (agency)[12] agreements as a model agreement which are familiar in our legal system today and not even rarely be the same model in several countries. And its common law countries because a country is following the model of developed countries with regard to legal institutions for capital gain.[13]

In addition, the necessary attention is when Indonesia decides to become a member of WTO since after the WTO legal consequences of economic fields such as investment law, international trade law hormonisasi must be done in accordance with the norms of the WTO. This is consistent with the WTO Agreement attachments as contained in GATT, TRIMs and TRIPS as an agreement that must be obeyed by all WTO member countries. Efforts to harmonize economic laws of Indonesia in accordance with the norms of the WTO is feared mengadung ideologies of liberalism and individualism in the legal nature of the Indonesian economy which is not in accordance with the spirit of the Indonesian people. This concern is understandable given on the one hand Indonesia is a country born on the principles of communal while norms in the WTO norms born of liberal life style developed countries.

Various laws that were born after the ratification of the WTO were accused of very liberal and not assessed in accordance with the conditions and soul of Indonesia including the Forestry Law No. 41/2004, Oil and Gas Law No. 22/2001, and the Investment Law No. 25/2007. It can be said that the various laws in the field of economic law is liberal and even some circles call it a legal product that is patterned capitalist. The influence of globalization on the making of the law seen from the many highlights and reaction, as well as the public rejection of the above Act.

This situation will require attention to all components of the Indonesian people, especially the government to avoid such legal developments that may lead to colonization of new models that harm the people of Indonesia. In other words, globalization has a major impact on the legal system in Indonesia should be maintained so as not to cause harm to the Indonesian nation itself.

In the face of the current globalization in recent years, one area of the law that its presence is increasingly needed and have significance is a legal economy. The presence of economic law for Indonesia became very important because Indonesia has become part of the global economy (trade). To anticipate the impact of the globalization influence then there is no other way except the Indonesia should organize its legal system, especially the economic legal system to address economic development

[11] Erman Rajaguguk, Peranan Hukum Dalam Pembangunan Pada Era Globalisasi: Implikasinya Bagi Pendidikan Hukum di Indonesia, Pidato Pengukuhan diucapkan pada Upacara Penerimaan Jabatan Guru Besar dalam Bidang Hukum pada FH Universitas Indonesia, Jakarta, 4 Januari 1997, hlm. 7.

[12] Erman Rajaguguk, *Ibid*, hlm. 7.

[13] Erman Rajaguguk, *Ibid*, hlm. 7.

today.[14] The development of the legal economy is due in accordance with the law in Indonesia that is politic has directed the development of the law in sustained economic growth. But for the sets (build) the legal system.

Development Of Economic Law In Indonesia

Development is a series of continuous efforts made to achieve prosperous societies in various strata of life.[15] Similarly, according to Adi Sulistiyono that development is an effort to transform society from a condition to a better condition. Therefore, the process of transformation must be directed at: 1. dates of old values that are no longer relevant to the needs, challenges and contexts of the age, 2. modification and revitalizing old values that are still relevant to the needs, challenges in the context of the times. 3. The discovery and new values of corrections needed to interact with the environment that continually changes and to answer new problems brought by the change.[16] Thus the construction of it is an effort that is done continuously modify or change so as to leave or find new values to achieve a certain goal namely welfare.

One aspect of the support changes for society to achieve order and regularity is through the development of the law. The construction of the law that needs to be done to address the effects of globalization on the incredible amount of people currently in the fields of Economics, culture, politics, science and technology and the law. Construction law is a process that has long been in progress and the same amount of development work to the nation and the State. The prevalence of law (law) as the law is written through legislation and litigation (judge made law) has been taking place in the world of law and it can be also described as the process of development of the law.

So it is with the legal system of Indonesia. The legal system of Indonesia certainly did not escape the influence of globalization. As a result of globalization and the increasing influence of global trade that quite a lot of foreign legal rules which the transnational nature has effect on the legal system of Indonesia. Call it for example in law of contract business in which developed countries take its trading partners business transactions in developing countries and its trading partners receive new business contracts as part of its legal system[17] as well as Indonesia.

To anticipate the impact of the globalization influence then there is no other way except the Indonesia should organize its legal system, especially the economic legal system to address economic development today. The construction of economic law is exercised because in accordance with the law in Indonesia that is politic has directed the development of the law in sustained economic growth.[18] But to organize the legal system, the economic system is to first understand what is shared in this nation, because by understanding the economic system embraced of course can easily be styled legal system its economy forward.

The economic system that embraced people of Indonesia is based on a national consensus about the paradigm of economic system drawn up in accordance with article 33 of the Constitution of 1945. This provision has the meaning that togetherness (collective) i.e. fraternity, humanism and humanity. Therefore, the economic system of Indonesia is not viewed as a manifestation of the liberal economic system competition but Indonesia contains moral nuance and togetherness as a reflection of the social responsibility of Indonesia. In addition, this provision also regulates the role of Government in the economy, as regulators and actors. The role of the Government appears to be on the Government's authority to regulate natural resources for the most of the prosperity of society. Furthermore, in principle this principle into the substance of the nation's economy is the economy of Pancasila Indonesia.[19]

The nation's economy as Indonesia's economy meanwhile should meet certain characteristics. According to Mubyarto features of the economic system of Pancasila are: 1. the wheel of economic activity moved by the stimulus for economic, social and moral, 2. There is a strong determined the entire nation to realize social equity, 3. There are economic nationalism, 4. A Cooperation is a pillar of the national economy, 5. There is a balance that is aligned, balanced and harmonious from economic planning and implementation in these areas.[20] Whereas, Edi Swasono said building an economy people do need partisanship, an ideological stance favoring to popular sovereignty.[21]

The people's economic development is an appropriate strategy to develop the national economy which is a strategy of improving productivity (people to be a national asset) and the effective utilization of available resources as grassroots-based strategies and resources. More than that, building a people's economy is one of the fundamental forms of participatory and emancipator implementation approach embraced by savvy economic democracy.[22]

Thus the economic system that embraced the economic system of Indonesia is not served on a capitalist system that extols the free market economic system but embraced the economic system that tends to favor the people's economy, as mandated in article 33 of the Constitution of 1945. In connection with it, there is a need to be prepared to support legal economic system, by

[14] Adi Sulistyono, *Pembangunan Hukum Ekonomi Untuk Mendukung Pencapaian Visi Indonesia 2030*, Pidato Pengukuhan sebagai Guru Besar Tetap pada FH. Universitas Sebelas Maret, Solo, 17 September 2007, hlm. 18.
[15] I Gede AB Wiranata, *Loc.Cit*., hlm. 1.
[16] Adi Sulistyono, Loc.Cit., hlm. 3-4
[17] Eman Rajaguguk, Loc.Cit., hlm. 7.
[18] Adi Sulistyono, *Loc.Cit.*, hlm. 18.
[19] Adi Sulistyono, *Ibid*., hlm. 16.
[20] Mubyarto, dalam Adi Sulistyono, *Ibid*., hlm. 16.
[21] Edi Swasono, dalam dalam Adi Sulistyono, *Ibid.*, hlm. 16.
[22] Edi Swasono, dalam dalam Adi Sulistyono, Ibid., hlm. 16-17.

establishing the legal system of the national economy which is based on the principles in the Constitution. To prepare a law which is based on the Constitution and the Pancasila, political direction of development should be understood in the frame of the embraced law.

With regard to it then, Moh. Mahfud MD, states that law is the legal political policy or the official policy on the law which will apply both the new legal acts or by the turn of the old law in order to achieve the objectives of the country. [23] This means that the development of national law is concerned with the politics of the law embraced the ruling Government.

As for the political direction of the development of the legal economy of Indonesia should be based on the nation identity that contains the philosophy of the nation, the constitutional foundation of ideology and grounding on the Pancasila and the 1945 Constitution in article 33. Therefore, the fundamental values embodied in the principles of Pancasila and the life of the nation in the torso, the Constitution is signs for its construction management law.[24] Therefore, all products of the law (statutory) including economic laws must be based on a foundation. By fulfilling the foundation values and basic principles of basic family and citizenship contained in product of legislation, not just rely on the rule of law but also more paid attention to the rule of morals or the rule of justice. Thus the purpose of the law was reached that creating prosperity for the nation and country in accordance with the mandate of the Constitution protects the opening all the spilled blood all over Indonesia and Indonesia and to promote the general welfare, the intellectual life of the people and carry out orderly world based on freedom, eternal peace and social justice.[25]

To achieve the goals and objectives of the countries with the runway and the guidelines for national legal systems to be built is the legal system of Pancasila which legal systems take and incorporate different interests, the value of social values and the concept of Justice and lay it in the balance of the[26] 1. The balance between individualism and collectivism, 2. The balance between the rechtstaat and the rule of law, 3. The balance between the function of law as a tool to advance and the law as mirror the values that live in the community, 4. A balance between religious and secular State (Theo-democratic) and religious nation state.

The next Adi Sulitiyono stated that the construction of the law is a human activity with regard to the existence and the enactment of the law within the community. That activity includes activity form, carry out, implement, finding, researching and systematically studied and applicable law. Further development of law stated can be distinguished from the construction law practical and legal theoretical development. Development of the practical law is mainly run by the institution of the field of legislation, judiciary, legal aid institutions and its administrative HR governance in General, while the development of a theoretical law is done by the College of law.[27]

Based on the legal opinion on the construction of the economic law development options in this paper is the development of practical law for new legal acts as well as the turn of the old law. As for the paradigm that is used to look at legal issues is paradigm constructivism.

This approach was taken because of the existence of legislation in the field of law is aimed to support the growth of the economy that had turned out to be not able to optimally serve to create an atmosphere conducive to investors, increasing the presence of foreign investors and prop up economic growth in order to prosper the society and the State. Mochtar Kusumaatmadja said that the presence of legislation in the field of economy turns out to have not contributed optimally because of the lack of legal certainty, both regarding the provisions of the legislation that many things are unclear and contradictory, as well as on the implementation of the Court ruling. There are 3 factors which are not the cause of the existence of legal certainty in Indonesia, namely, first, the hierarchy of legislation does not work and is still a pile of material arranged, secondly, the apparatus is weak in running, and the third, rules, dispute settlement in the field of Economics can't be predicted.[28]
Therefore, there is a necessary political commitment of the Government and the State to play a role in advancing the well-being of the people. George Jellinek in his book Die Allgemene Staatslehre posited theories about the status of the relationship between the State and the people is as follows:[29] 1. the Status of positive, active State organized or intervened the issue of well-being/prosperity, 2. negative Status, the State does not intervene the Affairs of the people's economy, 3. Active Status, i.e. the people actively participating in the Government/development, 4. passive Status, people don't participate, but only subject to the Government/state.

Of the four statuses later gave birth to three types of countries, namely: first, the type of police state (polizzei staat), with discrete State determines everything, whereas a passive people, so the people's relations are positive-passive. Second, the type of formal legal state/liberal (rechtstaat) with discrete: the State should not interfere in the economic sphere, the people of the free

[23] Moh. Mahfud MD, *Politik Hukum Di Indonesia*, Rajawali Press, Jakarta, 2009, hlm. 1.
[24] M. Solly Lubis, Pembangunan Hukum Nasional, Makalah disampaikan pada Seminar Pembangunan Hukum Nasional VIII, Tema Penegakan Hukum Dalam Era Pembangunan Berkelanjutan, diselenggarakan oleh Badan Pembinaan Hukum Nasional Departemen Kehakiman dan Hak Asasi Manusia RI, Denpasar, 14-18 Juli 2003.
[25] M. Solly Lubis, Ilmu Pengetahuan Perundang-undangan, Penerbit Cv. Mandar Maju, Bandung, 2009, hlm. 27.
[26] Suteki, *Rekonstruksi Politik Hukum Hak Atas Air Pro Rakyat*, Surya Pena Gemilang Publishing, Surabaya, 2009, hlm. 70.
[27] Adi Sulistyono, *Op.Cit*., hlm. 13.
[28] Adi Sulistyono, *Ibid*, hlm. 30.
[29] A. Mukti Fadjar, *Beberapa Permasalahan Pembangunan Hukum dan Hukum Pembangunan*, FH. Universitas Brawijaya, Malang, 1996, hlm. 60-62.

individual who actively attend to the Affairs of his own well-being, so that the nature of the relationship is negative-folk-active. Third, State law for any material or type of Stte welfare (welfare state: social service state), where there is a consideration in the role of the State and the people in the business of organizing the well-being/prosperity, so that the nature of the relationship of State-people are positive-active.

Meanwhile from an economic theory, known as the three economic systems of the world, namely, First, of the liberal economic system or known as free enterprise economic system, in which fulfillment in economics was treated by the individuals in the private sector, while the Government only acted as a policeman who supervise the activities and lives of the country's economy, the Second, an economic system guided or guided economic system, where all economic activity, both production and distribution is in principle controlled and regulated by the State, while individual/private does not have a place, third, a mixed economic system, where the existence of the private sector and the Government in the economy, in the sense recognized in addition there is also the private agencies the State planners determine the direction of economic development according to the goals or objectives that have been set. So the system is a blend between liberal economics and guided economic systems.

In Indonesia and the country's economic system type selected is the welfare State (welfare state) with a mixed economic system. In the system of State welfare law that the State has an obligation and ensure the creation of shared prosperity in the life of the community, whether that concern the interests of the economic, social, cultural, educational, political and legal interests. It is certainly in line with the Preamble of 1945 in particular paragraph IV States: "... from it to form a Government of Indonesia which protects all the people of Indonesia and all the spilled blood of Indonesia and to advance the general welfare...." From the platform affirms the obligation of the State and the task of the Government to protect and serve the public interest in order to materialize the happiness all the people of Indonesia.[30]

As a consequence of this choices then we borrowed an opinion Wolfgang Fiedmann,[31] i.e. the State as guarantor (provider) people's welfare, the State as a regulator Friedmann, (regulator), the State as entrepreneur (entrepreneur) or run contactors through State-owned enterprises (SOEs), and as a referee (the umpires) to formulate fair standards of economic sectors including State enterprises (state corporation), be required to be implemented.

The intervention of the State in terms of the functioning of the State as guarantor of the welfare of the people visible in, first, the basic constitutional law in Indonesia is the political Constitution which in its opening depicts of the mind ruling the nation Indonesia which is a choice of values and objectives of the Union and civic life with four its conception, i.e. the concept of the State Union, the concept of social justice countries, the concept of the independent country of the people (democracy), and the concept of morality in society and State with based upon the divinity of the one true God.

Functions of the State as expressed by Wolfgang Friedmann at the top, indicating that the country is actually in the country could understand welfare state intervention in the economy. Jimly Asshiddiqie materials according to state that the concept of the welfare State countries demanded expanded responsibilities to the socio-economic problems faced by many people. The development of this is what gives legitimacy to interventionist State constituency in the 20th century. The country is thus necessary and even had to intervene in a variety of social and economic problems to ensure the creation of shared prosperity in the life of the community.[32] In line with the opinion of the Frans-Magnis Suseno says that essentially serve to dress the general welfare. Countries must provide all prerequisites, conditions, and infrastructure so that the public can live with justice and peace.[33]
With respect to the development of the legal economy and to overcome various problems and facing an increasingly rapid economic development, complex and difficult to predict or foretold that to do the most thorough and to respond to development and ensuring legal certainty.

Economic law is built based on the philosophy of the law will influence to the development of economic life: legal elements which affect its construction economics is *first*, predictability. The law should have the ability to give you an idea for sure in the future about situation or the relationships in modern times. *Second*: procedural skills. Coaching in the field of law allows legal material it can realize himself well, into the legal sense this event not only legal provisions of legislation but also all the settlement procedure agreed to by the parties in dispute, for example, forms: arbitration, conciliation and so on. All of these institutions should be able to work efficiently when it is expected that economic life was like to reach the maximum level. *Third*: the codification of the goal, objectives. Legislation can be seen as a codification as well as intent as required by the State. In economics, for example, we will be able to meet the goals as formulated in some legislation which directly or indirectly have an impact on the economy. *Fourth:* offsetting factors. The legal system should be able to be a force that provides a balance between the conflicting values within society. The legal system provides a sense of balance in the efforts the State undertook economic

[30] Luthfi J. Kurniawan dan Mustafa Lutfi, Perihal Negara, Hukum & Kebijakan Publik, Perspektif Politik Kesejahteraan yang Berbasis Kearifan Lokal, Pro Civil Society dan Gender, Setara Press Malang, 2012, hlm. 49.

[31] Sering disebut dengan istilan negara ekonomi, lihat Wolfgang Friedmann, The State and The Rule of Law in A Mixed Economy, 1971, p. 3, lihat juga Aminuddin Ilmar, Hak Menguasai Negara dalam Privatisasi BUMN, Kencana Prenada Media Group, Jakarta, 2012, hlm. 13.

[32] Jimly Asshiddiqie, Gagasan Kedaulatan Rakyat Dalam Konstitusi dan Pelaksanaannya di Indonesia, Penerbit PT Ichtiar Van Hoeve, Jakarta, hlm. 223.

[33] Franz Magnis-Suseno, Etika Politik Prinsip-prinsip moral Dasar Kenegaraan Modern, Penerbit Gramedia Pustaka Utama, Jakarta, 1994, hlm. 316.

development. *Fifth*: the accommodation. Rapid changes once in fact will cause a loss of balance that long either in relations between individuals and groups in society. This circumstance in itself wants to demonstrate balance through one and the other way. Here the legal system governing the relationship between individuals both materially and formally gave the opportunity to balance that interrupted it to adjust to the new environment as a result of these changes. This is made possible by the recovery back for in tossing this legal system gives grip of certainty through formulation-formulation of a clear and definitive, opening an opportunity for the return of justice through orderly procedures and so on. *Sixth*: the definition and legal clarity about status.[34]

In addition to the elements above, the law contained elements supporting other law against economic development not less important is the element of legitimacy and stability. The validity of the meaning of the law after having validity, in order to have the ability then the law must be made of his education (education) and socialized, while elements of stability (stability) means that the law has the potential to maintain balance and accommodate competing interests.[35]

In order to be able to play its role of law to provide legal certainty on the economy then the Government should take to make the law as Commander in Chief, so the law is capable of increasing its role as a guiding factor, protector;, mentors and able to guarantee certainty so as to create an atmosphere conducive to the field of economics.

Conclusion

Globalization has created a whole world which is without boundaries between state / non-borderless, and can affect almost all human life. The influence of globalization on human kehidupaan of whom are in the field of economics and law. Globalisai influence in the field of ekonami that globalization has offered an alternative for achieving a better standard of living, it also gives many choices of products offered according to the needs and cool prices. But on the other hand the impact of globalization is also causing more and widening inequality of income distribution between rich and poor countries, as well as open up opportunities for wealth accumulation and monopoly business and political power in a few people.

The influence of globalization in the field of economic law, namely the Indonesian government began the ratification of the Agremeent Establishing The World Trade Organization (WTO) and as a member of WTO. With diratifikasikannya WTO by the Indonesian government, the various laws in the economic field should be adapted to the norm-norm WTO Agreement then the consequences that Indonesia should be to harmonize the entire legal economy associated with norms in the WTO. Efforts to harmonize the laws of economics has given birth to various laws that can be said to be lacking in the spirit of the people of Indonesia based on Pancasila. This view is understandable given on the one hand, Indonesia is a country born on the principles of communal, while the norms of the WTO is a norm that comes from liberal life style.

Recommendations presented in this paper brought in doing development on the economic law of Indonesia in the era of globalization, should refer to the values of Pancasila and the Indonesian people living purposes contained in the Preamble to the 1945 Constitution, namely the welfare of the entire people of Indonesia and Article 33 of the Constitution 1945. in the legal development of the Indonesian economy by referring to the values of Pancasila and the 1945 Constitution, and Article 33 of the 1945 Constitution, the laws produced can realize prosperity for all Indonesian people, and sociologically generated economic law of course unacceptable Indonesian society, as well as legally produced products of economic laws can also provide protection for the economy and trade Indonesia.

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[34] Adi Sulistyono, *Op.Cit*., hlm. 7-8. Bandingkan juga dengan : Eman Rajagukguk, *Peranan Hukum Indonesia Menjaga Persatuan Bangsa, Memulihkan Ekonomi dan Memperluas Kesejahteraan Sosial*, disampaikan dalam rangka Dies Natalis dan Peringatan Tahun Emas UI (1950-2000), Kampus UI-Depok, 5 Februari 2000, hlm. 6-7 dan Bismar Nasution, *Mengkaji Ulang Hukum Sebagai Landasan Pembangunan Ekonomi*, Pidato Pengukuhan Guru Besar Tetap pada FH USU Medan, tanpa tanggal dan tahun, hlm. 4-5.

[35] I Gede AB Wiranata, *Pembangunan Hukum Nasional*, Materi Kuliah I, Program Doktor Ilmu Hukum Angkatan IV KPK UNDIP-UNILA, tahun ajaran 2011/2012.

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ARRANGEMENT OF *MUKIM* BOUNDARIES IN ACEH INDONESIA

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ABSTRACT

Legal Recognition for indigenous people in Indonesia has been through a rocky and long journey. In the national context, the existence itself has been recognized by the core principles of the state and the 1945's Constitution. As decentralization came up in late 1990s, the provincial government has been giving recognition for drafting their own law and regulations. In the local context of Aceh, there are local laws (Qanun) and regulations which committed and recognized the existences of indigenous people or also be called as customary law community or mukim. One of derivation of this recognition includes the arrangement of territorial boundaries among the customary law communities (mukim's) lives in. Within this context, the arrangement of mukim boundaries has got more opportunities since the amendment of the 1945's Constitution which recognizes the existence of indigenous people. Furthermore, the enactment of Law 11/2006 reaffirmed the recognition of the mukim in Aceh Province. One of the districts that passed the Qanun of mukim is District of West Aceh, which promulgated in Qanun of West Aceh District no. 3/2010 concerning the Government of Mukim. The important thing that has affirmed in this qanun is regarding the boundaries of mukim. This regulation also associated with the other things, including the management of natural resources within the boundary of mukim. To accommodate this problem, it takes model and regulation to arrange the boundaries of mukim. Therefore, the Qanun of mukim, to be expected, becomes operationalize and implementable in the field.

Keywords: arrangement of boundaries, indigenous people (customary law community), *mukim*

Introduction

The existence of indigenous people or customary law community in Indonesia is still being debatable, whether as a concept in general or a concept based on law. Based on legal term, the confirmation and requirements as indigenous people or customary law community is still being in questions. However, according to the 1945's constitution, the existence of indigenous people in Indonesia cannot be separated from two (2) things: Firstly, the existence of indigenous people being recognized, as long as it still alive and in accordance of development of society; secondly, based on the State principles of Unitary Republic of Indonesia.
The very concept itself had been drafted in the Law no. 5/1960 on Agrarian (land ownership) Principles, which confirmed that the rights of indigenous people were recognized and respected, if it was not in contrary to the national interest and the higher regulations. Thus, it might lead to the indecision in practice.[1]

Fauzi (2003) described thus condition as a form of suspicion.[2] Perhaps, it is related to the national development goals, which essentially put the indigenous people as an integral part in it. The national development goals, intrinsically, to fully realize all of Indonesian and its society to achieve condition of fairness and prosperous society, whether materially and spiritually, in accordance of Pancasila and 1945's Constitution.

After the amendment 1945's constitution in the early Reformation period, there are major changes in legal, political and governmental system in Indonesia. The introduction of decentralization since the amendment of 1945's constitution has been shifted the patterns of relationship between the central and regional provinces. It was a dramatic change, since centralized patterns of legal, political, and governance was held in three decades during Soeharto presidency.

Through the amendments, the recognition of indigenous people is expressly stated in Article 18 B (2) of the 1945's Constitution, namely: *"The State recognizes and respects the units of indigenous people with their traditional rights as long as it still alive, and in accordance to the development of society and the State principles of Unitary Republic of Indonesia, which is regulated by the law."*

[1] Rikardo Simarmata, *Pengakuan Hukum terhadap Masyarakat Adat di Indonesia*, UNDP Regional Centre, Bangkok, 2006, hlm. 4-8.

[2] Noer Fauzi, *Bersaksi untuk Pembaharuan Agraria, dari Tuntutan Lokal hingga Kecenderungan Global*, Penerbit Insist Press, Yogyakarta, 2003, hlm. 86-87.

The recognition of indigenous people in the constitution, as being argued by Sweet (2009), is a circumstance in legal pluralism which not contradicted with the constitutionalism.[3] Despite, the law of the State still dominates in the form of modern law.[4]
Regarding the above provisions, the rules must be derived within the legislation and regulations. Therefore, the constitution could be implemented as expected.[5]

The results show several legislations have been issued in relations with the above provision, among others: the Law no. 39/1999 on Human Rights; the Law no. 41/1999 on Forestry; the Law no. 44/1999 on the Special Status of Aceh; the Law no. 21/2001 on Special Autonomy; the Law no. 7/2004 on Water Resources; the Law no. 32/2004 on Regional Government; the Law no. 11/2006 on the Governing of Aceh; the Law no. 32/2009 on the Protection and Environmental Management; etc.[6]

In the context of Aceh, the birth of the Law on Governing Aceh (Law no. 11/2006) further strengthened the position of indigenous people. One of manifestation regarding indigenous people in Aceh is the existence of *mukim*.

There are numbers of articles regarding the *mukim* in the Law no. 11/2006, namely article 98, article 99, and article 114 (1) and (2). One of important clause is *Qanun* no. 4/2003 on the Government of *Mukim* as derivative from Law no. 18/2001 would no longer valid, if there are Districts/Municipalities which enacted their own law (*Qanun*) regarding *mukim* within theirs territory. In contrary, if a District/Municipal has not have a *Qanun* regarding the *mukim*, then the *Qanun* no. 4/2003 would be in use.

One of the districts that enacted the *Qanun* regarding the government of *mukim* is the District of West Aceh. It is promulgated in the *Qanun* of West Aceh no. 3/2010 regarding the government of *mukim*. This *Qanun* was enacted in June 7, 2010.

The important thing that has affirmed in this *qanun* is regarding the arrangement of *mukim* boundaries. This setting and regulation associated with variety of other things, aside for the government implementation mechanisms, also it includes the natural resources management in *mukim* territory.

Research Methods

This study focusses on the document study. The main data used are the primary legal material that are legislations related to the Aceh authority. Moreover, some related research results are also used to help explaning problems encountered. This study applies quantitative analysis by descriptive explanation.

Result and Discussion

1. Towards Legal Pluralism

Generally, the purpose of the establishment of the state is to create happiness for its citizens.[7] As stated in the preamble of 1945's Constitution, the goals of the state are to protecting Indonesia as a whole, promoting the general welfare, advancing the intellectual life of the nation, and participating in the establishment of world order.

According to Article 1 the 1945's Constitution, Indonesia is a Unitary State. Mahfud MD (2010) argued that, the concept of unitary state is a constitutional concept which regulated the relationship between central and regional power.[8]
According to Article 18B the 1945's Constitution: (1) The State recognizes and respects the local government units which are special and regulated by law; (2) The State recognizes the units of traditional community with all the traditional rights as long as it still alive, and in accordance with the development of society, along with the State principles of Republic of Indonesia which are regulated by the law.

Thus, Indonesia as a State set the law that requires the legal recognition for indigenous people, which in fact is still exist and thriving within society.[9]
In the national context, the terms of "indigenous people as customary law community," at first – formally – appears in article 1 (3) of Supreme Court Regulation no. 5/1999. It is defined as "a group of people who bound by the order of customary law as citizens within a community of law, due to the similarity of dwelling or descents."

[3] Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, Indiana Journal of Global Legal Studies Vol. 16, 2, 2009 (pp. 621-645).

[4] FX. Adji Samekto, Slamet Haryadi, Oki Hajiansyah Wahab, *Revealing The Myth Of Rule Of Law*, Journal of Law, Policy and Globalization, Vol.21, 2014, (pp. 1-7).

[5] Taqwaddin, "Revitalisasi Pemerintahan *Mukim* di Aceh", *Proceeding* Aceh Development International Conference, International Islamic University, Kuala Lumpur 26 – 28 Maret 2012.

[6] Taqwaddin, *Aspek Hukum Kehutanan dan Masyarakat Hukum Adat di Indonesia*, Intan Cendekia, Yogyakarta, 2011,hlm. 69 – 113.

[7] Miriam Budiardjo, *Dasar-dasar Ilmu Politik Hukum*, Gramedia, Jakarta, 2004, hlm. 45.

[8] See Moh. Mahfud MD, *Konstitusi dan Hukum dalam Kontroversi Isu*, Rajawali Press, Jakarta, 2010, hlm. 212.

[9] For a new state, it is common such conflict exists between local and state norms. See Laura Grenfell, *Legal Pluralism and the Rule of Law in Timor Leste*, Leiden Journal of International Law, 19 (2006), (pp. 305–337).

However, in the global context, the term of indigenous people has been introduced in the Convention of International Labor Organization (ILO) no. 169/1989 concerning the indigenous and tribal peoples, which defined as "tribes who resided in independent countries whom socially, culturally, economically is different from other groups."

According to Kingsbury (1995), there are four characteristics of the indigenous people, namely: (1) identified themselves as a distinct group; (2) has historical experience in relation to their vulnerability to disruption, dislocation, and exploitation; (3) has a long relationship with the area they live in; (4) willing to maintain a different ideology.[10]

While the forms of indigenous peoples, including: (1) The legal community based on genealogy [patrilineal, matrilineal, parental]; (2) The legal community based on territorial [village communion, fellowship area, village associations]; (3) The legal community based on genealogy and territorial [assimilation, migration/ transmigration].[11]

By relying on those concepts, the recognition of indigenous people cannot be separated from the essence of national development. In the explanation of the Law no. 17/2007 regarding the National Long-term Development Plan for 2005-2025, it is states: "National development is a series of sustainable developments which covering all aspects of society, nation and state, to carry out the task of realizing the national goals as being defined in the preamble of 1945's Constitution."

One of manifestation of national goals is the development of law. It was one of the Indonesia's legal political directions proclaimed after the change of constitutional agenda, which includes: (1) political and legal; (2) economic and business; (3) social welfare and culture; (4) mapping system and apparatus.[12]

The term of law development itself has various definitions, namely: 'law reform,' 'changes in law,' 'legal guidance,' and 'modernization of law.' Raharjo (2009) using the term of 'legal reform.'[13] Wignjosoebroto (2007) distinguish the concept of legal reform in the sense of law reform (law as subsystem and serves as a tool of social engineering alone) with legal reform (the law is not only the concern of law enforcement, but also public affairs).[14]

Simply put, the development of the law is part of series of national development, which the goal is referring to the national goals, as defined in the preamble of 1945's Constitution.

In fact, the development itself is likely controlled by other interests, such as the interest that does not pay attention to the sustainable development.[15] However, with the support of green Constitution, the goals of sustainability would be easier to achieve.[16]

2. *Mukim*: History and Management

The government of *mukim* is very crucial feature in the history of Aceh, which it cannot be separated from the atmosphere of religious life. Particularly, Shafi'i school has been dominant in Aceh. The school requires at least 40 grown up men at noon Friday prayer.[17] Therefore, a mosque has to be established at least in one *mukim*. *Mukim* is a combination of the villages and it is formed of religious character in customary law community. *Mukim* leader is called as *imeum mukim*.[18]
Historically, the development of *mukim* could be divided into seven phases:[19] (1) the government of *Mukim* in 13 Century, was promulgated in *Qanun Syara'* of Sultanate of Aceh, and in 17 Century in the era of Iskandar Muda, it was stated in *Qanun Al*

[10] B. Kingsbury, "Indigenous People as an International Legal Concept", in RH. Barnes et al (eds.), *Indigenous Peoples of Asia*, Michigan University Press, 1995, p. 33.

[11] I. Gede AB. Wiranata, *Hukum Adat Indonesia, Perkembangan dari Masa ke Masa*, Penerbit PT. Citra Aditya Bakti, Bandung, 2005, hlm. 112-115.

[12] Imam Syaukani, "Karakteristik Politik Hukum Nasional", Jurnal Harmoni, Vol. 7 No. 8 Tahun 2008, hlm. 57.

[13] Satjipto Rahardjo, *Membangun dan Merombak Hukum Indonesia*, Genta Publishing, Yogyakarta, 2009c, hlm. 15.

[14] Soetandyo Wignjosoebroto, "Pembaruan Hukum Masyarakat Indonesia Baru", dalam Donny Donardono dkk, *Wacana Pembaharuan Hukum di Indonesia*, HuMa, Jakarta, 2007, hlm. 94.

[15] Heriamariaty, *Legal Politics of Mineral and Coal Mining Permission Regulation in Protection Forest Area that Lies on the Conservation and Sustainable Principles in Indonesia*, Academic Research International, Vol. 5 (2), 2-14 (pp. 429-436).

[16] Muhammad Akib & Fathoni, *Learning Environmental Rights, Finding Green Future: The Road To Ecojustice*, Journal of Law, Policy and Globalization, Vol.21, 2014 (pp. 28).

[17] Taqwaddin, *Eksistensi Masyarakat Hukum Adat terhadap Penguasaan dan Pengelolaan Hutan Adat dikaitkan dengan Penyelenggaraan Otonomi Khusus di Aceh*, Disertasi, USU, Medan.

[18] Mahdi Syahbandir, *Sejarah Mukim di Aceh*, Jurnal Kanun No. 64 Tahun XIV April 2014, hlm. 2.

[19] Taqwaddin, *Kapita Selekta Hukum Adat Aceh*, LKHA, Banda Aceh, 2013, hlm. 18.

Asyi or *Adat Meukuta Alam*;[20] (2) in the Dutch and Japan colonization periods. The position of *mukim* slightly changed, in accordance with the interests of those countries. For such could be seen in 1935, the Dutch colonial power issued the 1935's Ordinance – No. 102 (Article 3 (a) RO), which for the first time acknowledged the existence of customary court;[21] (3) The early independence of Indonesia in 1945. The existence of *mukim* has been recognized and enforced under the provisions of article 11 of the Transitional Provisions of 1945's Constitution. In addition, to maintain the position of *mukim* above the structures of village governments, the Residence of Aceh issued the Residency Regulation no. 2 and no. 5/1946,[22] which according to these regulations, the government of *mukim* was implemented for the entire of Aceh;[23] (4) The New Order (1966-1998). The existence of *mukim* was removed by the Law no. 5/1974 on the principles of provincial administration, and the Law no. 5/1979 on the government of village; (5) In the reformation period (1998-2012). The removal of the Law no. 5/1974 and the Law no. 5/1979. The birth of Law no. 44/1999 on the Special Status of Aceh, which asserted the status of Aceh as special autonomous region by Law no. 18/2001 on Special Autonomy for Special Province of Aceh as Nanggroe Aceh Darussalam. The implementation of the Law contributed to the enactment of *Qanun Aceh* no. 4/2003 on Government of *Mukim*, which recognizes *mukim* as government, administrators and customary law community; (6) in the post-reformation period. There were four times amendment of 1945's Constitution started from 1998 to 2001; (7) Post-Tsunami and after the signed of MoU Helsinki in 2005 gave birth to the Law no. 11/2006 on Governing Aceh, which accommodated the birth of *Qanun Aceh* no. 9/2008, *Qanun Aceh* no. 10/2008 on customary institution, and *Qanun Aceh* no. 3/2009 on Election Procedures of *Imeum Mukim*.

From above explanation, as *de jure*, the position and status of *mukim* and *imeum mukim* was recognized by the law. It can be seen in the position of *mukim* as government institution as stipulated in article 112 (3)(b) of the Law no. 11/2006 concerning the governing of Aceh. It is also affirmed in the article 3 on the *Qanun* no. 3/2009, which has stated, "*Mukim has the task to organize the administration, implementation of development, social development and improvement of the implementation of Shari'a*."

In addition, there is an explanation which a *mukim* as a unit of legal community, has its own territory, as defined in article 1 (19) of the Law no. 11/2006. However, this regulation seems not confirmedly express in the contents.

If we go back to the concept of indigenous people, the explanation is still vague and could be interpreted in wide range. According to Dahlan & Bathlimus (April 2001), the term of "law community unit" is a definition that has juridical-technical in nature, it is refer to a group of people who live in a residence area (*ulayat*/communal) and in certain circumstances, has a resources and leader in charge of maintaining the interest of group (internally and externally), and has regulations (system) of law and governance.[24]

Based on the concept brought by Van Vollenhaven, T. Djuned (2001) was mentioned that, each customary law communities have the authority of *origins right*, in the form of authority and rights: (1) run the system of self-government; (2) control and maintain the natural resources within its territory, especially for the benefit of its citizens; (3) acting to the inside, to regulate and manage the society and the environment, while to the outside, acting on behalf of customary law community as legal entity; (4) has the right to participate in any transaction related to the environment; (5) has the right to establish the customary rights; and (6) has the right to organize a kind of legal court.[25]

Thus concept has similarities with the explanation of article 67 of the Law no. 41/1999 on Forestry, which confirms that indigenous people or customary law community would be recognized, if, in fact consists the elements of: (1) the society of indigenous people still in the form of community (*rechtsgemeenschap*); (2) there is a institution in the form of customary authorities; (3) there is a clear area/territory of customary law; (4) the existences of legal institutions and legal instruments, particularly related to the customary court, which still be adhered; and (5) Still apply the harvesting activities in the surrounding woods areas to meet the needs of everyday life.

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[20] In this function, as if as a mirror, custom and customary law could not be separated from the purpose of regulating life. Faridah Jalil, *Peranan 'Hukum' dalam Menjaga 'Hukum Ada' untuk Kesatuan Masyarakat*, Jurnal Kanun, No. 61 Tahun XIV Desember 2013, hlm. 406.

[21] Sanusi M. Syarif, *Gampong dan Mukim di Aceh, Menuju Rekonstruksi Pasca Tsunami*, Pustaka Latin, Bogor, 2005, hlm. 67.

[22] In this time, Aceh was a residency in Sumatra under the governor of Mr. Teuku Muhammad Hasan based in Medan. In the early independence of the Republic of Indonesia, the territories were divided into eight (8) provinces: West Java, Central Java, East Java, Sumatra, Borneo, Celebes, Moluccas, and Lesser Sunda). S.M. Amin, *Kenang-Kenangan dari Masa Lampau*, Pradya Paramita, Jakarta, 1978, hlm. 40.

[23] Mahdi Syahbandir, *Op. Cit*.

[24] Dahlan dan Bathlimus, "*Hak Masyarakat Hukum Adat Atas Tanah di Propinsi Daerah Istimewa Aceh "* , Jurnal Kanun, No. 28 Tahun X April 2001. In certain fields, the history of custom is different depends on its development process. Emily Kadens, *The Myth of the Customary Law Merchant*, Texas Law Review, 90, 5, 2012 (pp. 1153-1206). Even in certain areas, custom and sharia cannot be separated. Jan Michiel Otto, *Rule of Law, Adat Law and Sharia: 1901, 2001, and Monitoring the Next Phase*, Hague Journal on the Rule of Law, 1: 15–20, 2009.

[25] T. Mohd Djuned, *Kesiapan Sumberdaya Mukim dalam Mengemban Amanat UU No. 18 Tahun 2001*, *Makalah* Diskusi Lembaga *Mukim* Dulu, Sekarang, dan Masa Akan Datang, LSM PUGAR, Banda Aceh , 3 Mei 2003 .

Therefore, referring to the authority of *origins right* as argued by T. Djuned (2001), as well as the explanation of article 67 on the Law no. 41/1999 above, it can be understood that the *mukim* of Aceh is a form of customary law community, because the six requirements above can be found within the *mukim* institution in Aceh.

As the implications of this position, the number of natural resources lies within the *mukim* territory automatically considered as the wealth of *mukim*, as well as the resources that further be controlled and ruled by the *mukim* in the future, such as forests, soil, water rod, estuary, lake, sea, mountains, marshes, swamps, and others which also be called as *ulayat mukim*.

However in fact, in the other areas, the collaboration between government and indigenous people is difficult to be formed in managing such wealth and property.[26]

3. The Arrangement of *Mukim* Boundaries

The Article 2 of the Law no. 11/2006 on Governing of Aceh, has affirmed the *mukim* – juridically – as one level of institution in the Government of Aceh. In juridical concept, *mukim* is a unit of customary law community under sub-district (*Kecamatan*) that consists of several *gampong* (village) which have certain boundaries led by *imeum mukim* or the other name, and legally put under the sub-district administration (in the article 1 (19) of Law no. 11/2006).

As explained before, *Mukim* has been put in two forms: *First*, in the article 98 (3)(b) on the Law no. 11/2006, mentions that *imeum mukim* as one of the traditional institution (the institution, functioning and acting as media of public participation in governing Aceh along with district/municipal in the areas of security, peace, harmony, and public order (article 98 (1)), as well as the settlement of social issues through customary/traditional institutions (article 98 (2)). The executorial *Qanun* as derivation from this Law in accordance with the article 98 (4) was enacted in the form of *Qanun* Aceh no. 10/2008.

Second, the regulation in the article 114 (1) and (2) on the Law no. 11/2006, which has stated the rules concerning the formation of *mukim* consisting of several villages which led by *imeum mukim* as organizer and being helped by *tuha peut mukim* or by the other names. These provisions gave birth to two mandates to formed *Qanun* of district/municipal on institution, duties, functions, and apparatus of *mukim* (article 114 (4)), and *Qanun* regarding the election procedures for imeum *mukim* (article 114 (5)).

As the implications of these provisions, one of the district in Aceh namely West Aceh (Kabupaten Aceh Barat), had enacted the *Qanun* of District regarding the Government of *Mukim*. This *qanun* was promulgated on June 7, 2010.

Related to this study, there are two important features that necessary to be explained, which are: the issues of wealth of *mukim* (*ulayat mukim*) and the boundaries. Article 1 (8) on the *Qanun* of West Aceh no. 3/2010 mentioned that "*the wealth of mukim is the wealth controlled by Mukim or by other names, and have not be submitted to gampong (village), as well as other legal sources of income*." Whereas, article 1 (10) states that, "*tanah ulayat (communal land) is the land within the territory of mukim and regulated by customary law.*"

Moreover, in the article 7 (1)(j) describes one of the duties and obligations of *Imuem mukim* is to foster and promote the economy and welfare of the community, also maintain and preserve the ecological functions of environment and natural resources.

The mechanisms to achieved this success being asserted in article 21 (1) which has stated, wherein the *mukim* wealth (*ulayat mukim*), or which then ruled by *mukim*, such as forests, soil, water rod, estuary, lake, sea, mountains, marshes, swamps, and others would become the *ulayat mukim*, as long as have not contradicted with other higher law and regulations.
Article 21 (2) has stated that, the types of *mukim's wealth* have to be inventoried and registered, and the utilization have to be governed by *Bupati* (Regent) based on consensus or agreement in the *Mukim*'s council. The wealth itself would be one of revenue for *mukim* (article 22 (1)).

This *Qanun* also confirmed the *mukim*'s sources of incomes, either taxes or retribution that had been collected by the District government, and there should not be additional charges from the *mukim*. The District government can distribute the part of income proportionally, decent and fair, which later on regulated by Regent Decree (*Peraturan Bupati*) (article 25).

The *mukim* wealth (*ulayat mukim*) itself associated with the boundary of the *mukim*. Article 18 defined: "*the alteration of mukim's boundaries can be arranges through the agreement of mukim council and the other mukims which in directly adjacent*." And this alteration of *mukim* boundaries regulated by separated *Qanun* District. Therefore, this *Qanun* has not provided the regulations regarding the arrangement of *mukim* boundary.

Indeed, *Qanun* on *Mukim* (*Qanun* No. 4/2003), *Qanun* on District/Municipalities (*Qanun* no. 2/2003), and the *Qanun* on *Gampong* (village) (*Qanun* no. 5/2003), have mentioned that the coverage of *mukim* is the combination of several *gampong*s. In the explanation of *Qanun* on *mukim*, every *mukim* respectively has own borders, which is marked by natural boundaries (*krueng* (river), *alue* (water rod), *teureubeng* (cliff), *glee* (mountain), etc. These borders should be certificated (must be formulated in writing), so the boundaries of *mukim* would be obvious in fact and legally, and can be used as a guide for the future generations.

[26] Ahmad Maryudi & Max Krott, Local Struggle for Accessing State Forest Property in a Montane Forest Village in Java, Indonesia, Journal of Sustainable Development; Vol. 5, No. 7; 2012 (62-68).

The border of *mukim* is the outer lines of *gampong*s which belong to a *mukim* which directly adjacent with the other *mukim*s.[27] This term of border referring to the article 2 on the Law no. 11/2006 on Governing Aceh, which Province of Aceh divided into Districts/ Municipalities, each District/ Municipalities divided into Sub-Districts, Sub-Districts divided into *Mukim*s, *Mukim* divided into *gampong*s.

The boundaries of *mukim* set into a map, and promulgated within *Qanun* of District/ Munipality as an integral attachment, along with the formation of *mukim*s. The territorial map has to be created by *cartometric* mechanism, using scale and coordinates point, along with consideration towards natural characteristic and local wisdom. It is necessary to avoid the territorial dispute, including the clarity of assets and potencies in the area around the borderline.

In accordance of *Qanun mukim* (*Qanun* no. 4/2003), the alteration of *mukim* boundaries can be made through the consensus of *mukim*s, and the changes itself promulgated with *keputusan Bupati/Walikota* (Regent/ Mayor Decree).

From the aspect of demography, in the Law no. 6/2014 regarding the Government of Village, it is requires in minimum 4,000 peoples (800 head of family) for one village in Sumatera. It is fantastic, since previously through Minister of Interior Decree no. 28/2006 was stated that, the village in Sumatera could be candidate for the expansion only if to have a minimum 1,000 people (200 head of family). Thus, if within one *mukim* consists two *gampong*s, so there would be 8,000 peoples in minimum, it is fantastic figure which difficult to achieve in Aceh.

Regarding the *mukim* that have territorial disputes, there are two mechanisms of settlement within the concept of *mukim*: *Firstly*, the concept of settlement by following the regulation from higher hierarchy, as stated by Minister of Interior Decree no. 76/2012 on Confirmation of Territorial Borders. *Secondly*, by settlement from below hierarchy as being defined in Minister of Interior Decree no. 27/2006 regarding the Boundaries of Village. The second option should be easier, if the numbers of village that included in one *mukim* has already confirmed. Therefore, the boundaries of *mukim* have to be determined by village borders within the *mukim* itself.

Meanwhile, related to demarcation of *mukim*, the process is conducted by a team led by *Bupati/Walikota* (Regent/Mayor) or their Vices, Secretary of District (or vice), which consists each members of: (1) Assistant in charge of governmental affairs; (2) The Head of Section in charge of administration; (3) The Head of Legal Department and the Head of Departments in charge with local development planning; (4) The Head of National Land Agency; and (5) Officials that related to the issue (article 19).

The process is carried out through a series of steps, starting from forming the Confirmation of Territorial Borders (CTB) team. And the team leader can assign his vice and/or member of the team or appointed or assigned official to attend the activity to confirm the territorial border. Vice-leader and/or members or appointed or assigned official has authority and responsibility to sign each stages of activities related to the confirmation of territorial borders (article 21).

While in Minister of Interior Decree no. 27/2006, has mentioned that the village is a unit of legal community that has boundaries with the authority to regulate and manage the interests of society, based on the origin and customs that are recognized by the State.

4. Problems of Boundaries Arrangement

In the life of nation, the legal recognition of customary law community could create dilemma for the state. In one hand, customary law community is seen as threatening the unity of the state, because the spirit of pluralism to be put in front to do a legal thing. On the other hand, by the strict requirements of the concept of recognition and have to be consistent with the fact in the field, the existence of customary law community is not contradicted with the national interest, in line with the States principles of Republic of Indonesia, and regulated by the Law.

Thus impression could also be captured in the life of heterogeneous countries. With the most of system of law descended from the former colonial law. Three basic legal concepts have to be considered as part of it, namely, *indigenous law, imported law, and development law*. The principles have to be based on *community, market and command.*[28]

By leaning to the living law, the reality of the law itself cannot be ignored. Law which lives within society could be binds the people, because it comes from religious values, traditions, and beliefs.

Therefore, the diversity of values and customs should reinforce the spirit to strengthen the legal concept of nation in accordance with Indonesia legal paradigm.[29] This paradigm describes and explains legal life could not be separated from *Pancasila* and 1945's Constitution.[30]

[27] In the concept based on local wisdom, forest that belong to *mukim* measured by indicator of "*siuroe jak*" or "*Sehari pergi*". This concept have to elaborated based on the present context, given the various development that could increasingly debatable, such as the "limit" that can be reached in one day travels.

[28] Nobuyuki Yasuda, "Law and Development from the Southeast Asian Perspective: Methodology, History, and Paradigm Change", in Christoph Antons (Ed.), *Law and Development in East and Southeast Asia*, Routledge Curzon, London, 2005, p. 25-67.

By such paradigm, the recognition of customary law community can be a force for developmental concept in a broad sense. Customary law community that being recognized by such requirements, based on Indonesian legal paradigm, may increase the awareness of the spirit on nationhood.

By referring to the *Qanun* of West Aceh regarding the government of *mukim*, there would be one thing to assert regarding the boundaries of *mukim* that has to be implemented by *Peraturan Bupati* (Regent Decree). In *Qanun* of West Aceh it is determine that the arrangement of *mukim*'s boundaries can be done in conjunction along with the inventoried and registration of *mukim* assets.
By that assumption, two questions would be comes up: *Firstly*, if *Mukim* has to be interpreted only in the context of customary institution, is it *mukim* could manage the natural resources? *Secondly*, how the extent of *Imuem mukim* actually realized his position not only merely limited as customary institution? So when he doing his activities, he thoroughly knew his authority, thereby understand what should be fought of?

From these two important questions, to be expected, there would be appeared the understanding of *mukim* on the importance of regulation on co-ownership and collaboration in natural resources management. This regulation should be an answer for the expectations of welfare in one hand, and sustainability assurance in the other hand.

Thus concept of regulation and arrangement, have to concretize the *mukim* rights and responsibilities in the management, utilization, and preservation of natural resources in the *mukim* level.

However, such concept would not without challenges. Empowering governance in the *mukim* level should be done. In the derivation of regulation, several features have to be accommodated, such as *mukim* boundaries and inventory assets of *mukim*.

Conclusion

On the basis of the explanation, it can be conclude that the legal recognition of customary law community in Indonesia has not so much developed within four (4) periods of national development. The development of recognition on customary law community requires the condition of community to be alive and thrive. In their existence, it should in line with the State principles of Indonesia and regulated by the Law.

With the development of legal recognition for customary law community in Indonesia, it should not be doubted, as the Constitution itself has recognized its existence. Even with the concept in reinforcing the spirit of Indonesian law paradigm based on Pancasila and the 1945's Constitution, it should further have empowered the spirit and awareness of customary law community to be in the life of nationhood.

Since the reformation era, several laws and regulations have been issued by the government to regulate the Government of *mukim* in Aceh, ranging from the Law no. 44/1999, the Law no. 18/2001, and the Law no. 11/2006. Especially, the Law no. 18/2001 became the basis for the formulation of *Qanun* Aceh no. 4/2003 on Government of *Mukim*.

After the enactment of the Law no. 11/2006, the position of *mukim* has to be regulated/ derived to *Qanun* of District/Municipal. The District of West Aceh is the only one that already enacted the *Qanun* of *mukim*. Thus, several things that should be regulated in relations with the government of *mukim* in district have been promulgated.

Based on the *Qanun*, it is necessary to followed up with *peraturan bupati* (Regent Decree) to answers various enforcements belong to the Government of *mukim*. By this offered arrangement and model, it is expected, that *Qanun* of *mukim* could become operationalize and implementable in the field.

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[29] Paradigm is "*... universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners*. Thomas Kuhn, *The Structure of Scientific Revolution*, Chicago University Press, Chicago, 1970, hlm. viii.

[30] Soetandyo Wignjosoebroto, "Permasalahan Paradigma dalam Ilmu Hukum", Makalah Simposium Nasional Paradigma dalam Ilmu Hukum Indonesia, PDIH Undip, 10 Februari 1998.

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ARRANGEMENT OF *MUKIM* BOUNDARIES IN ACEH INDONESIA

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ABSTRACT

Legal Recognition for indigenous people in Indonesia has been through a rocky and long journey. In the national context, the existence itself has been recognized by the core principles of the state and the 1945's Constitution. As decentralization came up in late 1990s, the provincial government has been giving recognition for drafting their own law and regulations. In the local context of Aceh, there are local laws (Qanun) and regulations which committed and recognized the existences of indigenous people or also be called as customary law community or mukim. One of derivation of this recognition includes the arrangement of territorial boundaries among the customary law communities (mukim's) lives in. Within this context, the arrangement of mukim boundaries has got more opportunities since the amendment of the 1945's Constitution which recognizes the existence of indigenous people. Furthermore, the enactment of Law 11/2006 reaffirmed the recognition of the mukim in Aceh Province. One of the districts that passed the Qanun of mukim is District of West Aceh, which promulgated in Qanun of West Aceh District no. 3/2010 concerning the Government of Mukim. The important thing that has affirmed in this qanun is regarding the boundaries of mukim. This regulation also associated with the other things, including the management of natural resources within the boundary of mukim. To accommodate this problem, it takes model and regulation to arrange the boundaries of mukim. Therefore, the Qanun of mukim, to be expected, becomes operationalize and implementable in the field.

Keywords: arrangement of boundaries, indigenous people (customary law community), *mukim*

Introduction

The existence of indigenous people or customary law community in Indonesia is still being debatable, whether as a concept in general or a concept based on law. Based on legal term, the confirmation and requirements as indigenous people or customary law community is still being in questions. However, according to the 1945's constitution, the existence of indigenous people in Indonesia cannot be separated from two (2) things: Firstly, the existence of indigenous people being recognized, as long as it still alive and in accordance of development of society; secondly, based on the State principles of Unitary Republic of Indonesia.
The very concept itself had been drafted in the Law no. 5/1960 on Agrarian (land ownership) Principles, which confirmed that the rights of indigenous people were recognized and respected, if it was not in contrary to the national interest and the higher regulations. Thus, it might lead to the indecision in practice.[1]

Fauzi (2003) described thus condition as a form of suspicion.[2] Perhaps, it is related to the national development goals, which essentially put the indigenous people as an integral part in it. The national development goals, intrinsically, to fully realize all of Indonesian and its society to achieve condition of fairness and prosperous society, whether materially and spiritually, in accordance of Pancasila and 1945's Constitution.

After the amendment 1945's constitution in the early Reformation period, there are major changes in legal, political and governmental system in Indonesia. The introduction of decentralization since the amendment of 1945's constitution has been shifted the patterns of relationship between the central and regional provinces. It was a dramatic change, since centralized patterns of legal, political, and governance was held in three decades during Soeharto presidency.

Through the amendments, the recognition of indigenous people is expressly stated in Article 18 B (2) of the 1945's Constitution, namely: *"The State recognizes and respects the units of indigenous people with their traditional rights as long as it still alive, and in accordance to the development of society and the State principles of Unitary Republic of Indonesia, which is regulated by the law."*

[1] Rikardo Simarmata, *Pengakuan Hukum terhadap Masyarakat Adat di Indonesia*, UNDP Regional Centre, Bangkok, 2006, hlm. 4-8.

[2] Noer Fauzi, *Bersaksi untuk Pembaharuan Agraria, dari Tuntutan Lokal hingga Kecenderungan Global*, Penerbit Insist Press, Yogyakarta, 2003, hlm. 86-87.

The recognition of indigenous people in the constitution, as being argued by Sweet (2009), is a circumstance in legal pluralism which not contradicted with the constitutionalism.[3] Despite, the law of the State still dominates in the form of modern law.[4]
Regarding the above provisions, the rules must be derived within the legislation and regulations. Therefore, the constitution could be implemented as expected.[5]

The results show several legislations have been issued in relations with the above provision, among others: the Law no. 39/1999 on Human Rights; the Law no. 41/1999 on Forestry; the Law no. 44/1999 on the Special Status of Aceh; the Law no. 21/2001 on Special Autonomy; the Law no. 7/2004 on Water Resources; the Law no. 32/2004 on Regional Government; the Law no. 11/2006 on the Governing of Aceh; the Law no. 32/2009 on the Protection and Environmental Management; etc.[6]

In the context of Aceh, the birth of the Law on Governing Aceh (Law no. 11/2006) further strengthened the position of indigenous people. One of manifestation regarding indigenous people in Aceh is the existence of *mukim*.

There are numbers of articles regarding the *mukim* in the Law no. 11/2006, namely article 98, article 99, and article 114 (1) and (2). One of important clause is *Qanun* no. 4/2003 on the Government of *Mukim* as derivative from Law no. 18/2001 would no longer valid, if there are Districts/Municipalities which enacted their own law (*Qanun*) regarding *mukim* within theirs territory. In contrary, if a District/Municipal has not have a *Qanun* regarding the *mukim*, then the *Qanun* no. 4/2003 would be in use.

One of the districts that enacted the *Qanun* regarding the government of *mukim* is the District of West Aceh. It is promulgated in the *Qanun* of West Aceh no. 3/2010 regarding the government of *mukim*. This *Qanun* was enacted in June 7, 2010.

The important thing that has affirmed in this *qanun* is regarding the arrangement of *mukim* boundaries. This setting and regulation associated with variety of other things, aside for the government implementation mechanisms, also it includes the natural resources management in *mukim* territory.

Research Methods

This study focusses on the document study. The main data used are the primary legal material that are legislations related to the Aceh authority. Moreover, some related research results are also used to help explaning problems encountered. This study applies quantitative analysis by descriptive explanation.

Result and Discussion

1. Towards Legal Pluralism

Generally, the purpose of the establishment of the state is to create happiness for its citizens.[7] As stated in the preamble of 1945's Constitution, the goals of the state are to protecting Indonesia as a whole, promoting the general welfare, advancing the intellectual life of the nation, and participating in the establishment of world order.

According to Article 1 the 1945's Constitution, Indonesia is a Unitary State. Mahfud MD (2010) argued that, the concept of unitary state is a constitutional concept which regulated the relationship between central and regional power.[8]
According to Article 18B the 1945's Constitution: (1) The State recognizes and respects the local government units which are special and regulated by law; (2) The State recognizes the units of traditional community with all the traditional rights as long as it still alive, and in accordance with the development of society, along with the State principles of Republic of Indonesia which are regulated by the law.

Thus, Indonesia as a State set the law that requires the legal recognition for indigenous people, which in fact is still exist and thriving within society.[9]
In the national context, the terms of "indigenous people as customary law community," at first – formally – appears in article 1 (3) of Supreme Court Regulation no. 5/1999. It is defined as "a group of people who bound by the order of customary law as citizens within a community of law, due to the similarity of dwelling or descents."

[3] Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, Indiana Journal of Global Legal Studies Vol. 16, 2, 2009 (pp. 621-645).

[4] FX. Adji Samekto, Slamet Haryadi, Oki Hajiansyah Wahab, *Revealing The Myth Of Rule Of Law*, Journal of Law, Policy and Globalization, Vol.21, 2014, (pp. 1-7).

[5] Taqwaddin, "Revitalisasi Pemerintahan *Mukim* di Aceh", *Proceeding* Aceh Development International Conference, International Islamic University, Kuala Lumpur 26 – 28 Maret 2012.

[6] Taqwaddin, *Aspek Hukum Kehutanan dan Masyarakat Hukum Adat di Indonesia*, Intan Cendekia, Yogyakarta, 2011,hlm. 69 – 113.

[7] Miriam Budiardjo, *Dasar-dasar Ilmu Politik Hukum*, Gramedia, Jakarta, 2004, hlm. 45.

[8] See Moh. Mahfud MD, *Konstitusi dan Hukum dalam Kontroversi Isu*, Rajawali Press, Jakarta, 2010, hlm. 212.

[9] For a new state, it is common such conflict exists between local and state norms. See Laura Grenfell, *Legal Pluralism and the Rule of Law in Timor Leste*, Leiden Journal of International Law, 19 (2006), (pp. 305–337).

However, in the global context, the term of indigenous people has been introduced in the Convention of International Labor Organization (ILO) no. 169/1989 concerning the indigenous and tribal peoples, which defined as "tribes who resided in independent countries whom socially, culturally, economically is different from other groups."

According to Kingsbury (1995), there are four characteristics of the indigenous people, namely: (1) identified themselves as a distinct group; (2) has historical experience in relation to their vulnerability to disruption, dislocation, and exploitation; (3) has a long relationship with the area they live in; (4) willing to maintain a different ideology.[10]

While the forms of indigenous peoples, including: (1) The legal community based on genealogy [patrilineal, matrilineal, parental]; (2) The legal community based on territorial [village communion, fellowship area, village associations]; (3) The legal community based on genealogy and territorial [assimilation, migration/ transmigration].[11]

By relying on those concepts, the recognition of indigenous people cannot be separated from the essence of national development. In the explanation of the Law no. 17/2007 regarding the National Long-term Development Plan for 2005-2025, it is states: "National development is a series of sustainable developments which covering all aspects of society, nation and state, to carry out the task of realizing the national goals as being defined in the preamble of 1945's Constitution."

One of manifestation of national goals is the development of law. It was one of the Indonesia's legal political directions proclaimed after the change of constitutional agenda, which includes: (1) political and legal; (2) economic and business; (3) social welfare and culture; (4) mapping system and apparatus.[12]

The term of law development itself has various definitions, namely: 'law reform,' 'changes in law,' 'legal guidance,' and 'modernization of law.' Raharjo (2009) using the term of 'legal reform.'[13] Wignjosoebroto (2007) distinguish the concept of legal reform in the sense of law reform (law as subsystem and serves as a tool of social engineering alone) with legal reform (the law is not only the concern of law enforcement, but also public affairs).[14]

Simply put, the development of the law is part of series of national development, which the goal is referring to the national goals, as defined in the preamble of 1945's Constitution.

In fact, the development itself is likely controlled by other interests, such as the interest that does not pay attention to the sustainable development.[15] However, with the support of green Constitution, the goals of sustainability would be easier to achieve.[16]

2. *Mukim*: History and Management

The government of *mukim* is very crucial feature in the history of Aceh, which it cannot be separated from the atmosphere of religious life. Particularly, Shafi'i school has been dominant in Aceh. The school requires at least 40 grown up men at noon Friday prayer.[17] Therefore, a mosque has to be established at least in one *mukim*. *Mukim* is a combination of the villages and it is formed of religious character in customary law community. *Mukim* leader is called as *imeum mukim*.[18]
Historically, the development of *mukim* could be divided into seven phases:[19] (1) the government of *Mukim* in 13 Century, was promulgated in *Qanun Syara'* of Sultanate of Aceh, and in 17 Century in the era of Iskandar Muda, it was stated in *Qanun Al*

[10] B. Kingsbury, "Indigenous People as an International Legal Concept", in RH. Barnes et al (eds.), *Indigenous Peoples of Asia*, Michigan University Press, 1995, p. 33.

[11] I. Gede AB. Wiranata, *Hukum Adat Indonesia, Perkembangan dari Masa ke Masa*, Penerbit PT. Citra Aditya Bakti, Bandung, 2005, hlm. 112-115.

[12] Imam Syaukani, "Karakteristik Politik Hukum Nasional", Jurnal Harmoni, Vol. 7 No. 8 Tahun 2008, hlm. 57.

[13] Satjipto Rahardjo, *Membangun dan Merombak Hukum Indonesia*, Genta Publishing, Yogyakarta, 2009c, hlm. 15.

[14] Soetandyo Wignjosoebroto, "Pembaruan Hukum Masyarakat Indonesia Baru", dalam Donny Donardono dkk, *Wacana Pembaharuan Hukum di Indonesia*, HuMa, Jakarta, 2007, hlm. 94.

[15] Heriamariaty, *Legal Politics of Mineral and Coal Mining Permission Regulation in Protection Forest Area that Lies on the Conservation and Sustainable Principles in Indonesia*, Academic Research International, Vol. 5 (2), 2-14 (pp. 429-436).

[16] Muhammad Akib & Fathoni, *Learning Environmental Rights, Finding Green Future: The Road To Ecojustice*, Journal of Law, Policy and Globalization, Vol.21, 2014 (pp. 28).

[17] Taqwaddin, *Eksistensi Masyarakat Hukum Adat terhadap Penguasaan dan Pengelolaan Hutan Adat dikaitkan dengan Penyelenggaraan Otonomi Khusus di Aceh*, Disertasi, USU, Medan.

[18] Mahdi Syahbandir, *Sejarah Mukim di Aceh*, Jurnal Kanun No. 64 Tahun XIV April 2014, hlm. 2.

[19] Taqwaddin, *Kapita Selekta Hukum Adat Aceh*, LKHA, Banda Aceh, 2013, hlm. 18.

Asyi or *Adat Meukuta Alam*;[20] (2) in the Dutch and Japan colonization periods. The position of *mukim* slightly changed, in accordance with the interests of those countries. For such could be seen in 1935, the Dutch colonial power issued the 1935's Ordinance – No. 102 (Article 3 (a) RO), which for the first time acknowledged the existence of customary court;[21] (3) The early independence of Indonesia in 1945. The existence of *mukim* has been recognized and enforced under the provisions of article 11 of the Transitional Provisions of 1945's Constitution. In addition, to maintain the position of *mukim* above the structures of village governments, the Residence of Aceh issued the Residency Regulation no. 2 and no. 5/1946,[22] which according to these regulations, the government of *mukim* was implemented for the entire of Aceh;[23] (4) The New Order (1966-1998). The existence of *mukim* was removed by the Law no. 5/1974 on the principles of provincial administration, and the Law no. 5/1979 on the government of village; (5) In the reformation period (1998-2012). The removal of the Law no. 5/1974 and the Law no. 5/1979. The birth of Law no. 44/1999 on the Special Status of Aceh, which asserted the status of Aceh as special autonomous region by Law no. 18/2001 on Special Autonomy for Special Province of Aceh as Nanggroe Aceh Darussalam. The implementation of the Law contributed to the enactment of *Qanun Aceh* no. 4/2003 on Government of *Mukim*, which recognizes *mukim* as government, administrators and customary law community; (6) in the post-reformation period. There were four times amendment of 1945's Constitution started from 1998 to 2001; (7) Post-Tsunami and after the signed of MoU Helsinki in 2005 gave birth to the Law no. 11/2006 on Governing Aceh, which accommodated the birth of *Qanun Aceh* no. 9/2008, *Qanun Aceh* no. 10/2008 on customary institution, and *Qanun Aceh* no. 3/2009 on Election Procedures of *Imeum Mukim*.

From above explanation, as *de jure*, the position and status of *mukim* and *imeum mukim* was recognized by the law. It can be seen in the position of *mukim* as government institution as stipulated in article 112 (3)(b) of the Law no. 11/2006 concerning the governing of Aceh. It is also affirmed in the article 3 on the *Qanun* no. 3/2009, which has stated, "*Mukim has the task to organize the administration, implementation of development, social development and improvement of the implementation of Shari'a*."

In addition, there is an explanation which a *mukim* as a unit of legal community, has its own territory, as defined in article 1 (19) of the Law no. 11/2006. However, this regulation seems not confirmedly express in the contents.

If we go back to the concept of indigenous people, the explanation is still vague and could be interpreted in wide range. According to Dahlan & Bathlimus (April 2001), the term of "law community unit" is a definition that has juridical-technical in nature, it is refer to a group of people who live in a residence area (*ulayat*/communal) and in certain circumstances, has a resources and leader in charge of maintaining the interest of group (internally and externally), and has regulations (system) of law and governance.[24]

Based on the concept brought by Van Vollenhaven, T. Djuned (2001) was mentioned that, each customary law communities have the authority of *origins right*, in the form of authority and rights: (1) run the system of self-government; (2) control and maintain the natural resources within its territory, especially for the benefit of its citizens; (3) acting to the inside, to regulate and manage the society and the environment, while to the outside, acting on behalf of customary law community as legal entity; (4) has the right to participate in any transaction related to the environment; (5) has the right to establish the customary rights; and (6) has the right to organize a kind of legal court.[25]

Thus concept has similarities with the explanation of article 67 of the Law no. 41/1999 on Forestry, which confirms that indigenous people or customary law community would be recognized, if, in fact consists the elements of: (1) the society of indigenous people still in the form of community (*rechtsgemeenschap*); (2) there is a institution in the form of customary authorities; (3) there is a clear area/territory of customary law; (4) the existences of legal institutions and legal instruments, particularly related to the customary court, which still be adhered; and (5) Still apply the harvesting activities in the surrounding woods areas to meet the needs of everyday life.

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[20] In this function, as if as a mirror, custom and customary law could not be separated from the purpose of regulating life. Faridah Jalil, *Peranan 'Hukum' dalam Menjaga 'Hukum Ada' untuk Kesatuan Masyarakat*, Jurnal Kanun, No. 61 Tahun XIV Desember 2013, hlm. 406.

[21] Sanusi M. Syarif, *Gampong dan Mukim di Aceh, Menuju Rekonstruksi Pasca Tsunami*, Pustaka Latin, Bogor, 2005, hlm. 67.

[22] In this time, Aceh was a residency in Sumatra under the governor of Mr. Teuku Muhammad Hasan based in Medan. In the early independence of the Republic of Indonesia, the territories were divided into eight (8) provinces: West Java, Central Java, East Java, Sumatra, Borneo, Celebes, Moluccas, and Lesser Sunda). S.M. Amin, *Kenang-Kenangan dari Masa Lampau*, Pradya Paramita, Jakarta, 1978, hlm. 40.

[23] Mahdi Syahbandir, *Op. Cit*.

[24] Dahlan dan Bathlimus, "*Hak Masyarakat Hukum Adat Atas Tanah di Propinsi Daerah Istimewa Aceh "* , Jurnal Kanun, No. 28 Tahun X April 2001. In certain fields, the history of custom is different depends on its development process. Emily Kadens, *The Myth of the Customary Law Merchant*, Texas Law Review, 90, 5, 2012 (pp. 1153-1206). Even in certain areas, custom and sharia cannot be separated. Jan Michiel Otto, *Rule of Law, Adat Law and Sharia: 1901, 2001, and Monitoring the Next Phase*, Hague Journal on the Rule of Law, 1: 15–20, 2009.

[25] T. Mohd Djuned, *Kesiapan Sumberdaya Mukim dalam Mengemban Amanat UU No. 18 Tahun 2001*, *Makalah* Diskusi Lembaga *Mukim* Dulu, Sekarang, dan Masa Akan Datang, LSM PUGAR, Banda Aceh , 3 Mei 2003 .

Therefore, referring to the authority of *origins right* as argued by T. Djuned (2001), as well as the explanation of article 67 on the Law no. 41/1999 above, it can be understood that the *mukim* of Aceh is a form of customary law community, because the six requirements above can be found within the *mukim* institution in Aceh.

As the implications of this position, the number of natural resources lies within the *mukim* territory automatically considered as the wealth of *mukim*, as well as the resources that further be controlled and ruled by the *mukim* in the future, such as forests, soil, water rod, estuary, lake, sea, mountains, marshes, swamps, and others which also be called as *ulayat mukim*.

However in fact, in the other areas, the collaboration between government and indigenous people is difficult to be formed in managing such wealth and property.[26]

3. The Arrangement of *Mukim* Boundaries

The Article 2 of the Law no. 11/2006 on Governing of Aceh, has affirmed the *mukim* – juridically – as one level of institution in the Government of Aceh. In juridical concept, *mukim* is a unit of customary law community under sub-district (*Kecamatan*) that consists of several *gampong* (village) which have certain boundaries led by *imeum mukim* or the other name, and legally put under the sub-district administration (in the article 1 (19) of Law no. 11/2006).

As explained before, *Mukim* has been put in two forms: *First*, in the article 98 (3)(b) on the Law no. 11/2006, mentions that *imeum mukim* as one of the traditional institution (the institution, functioning and acting as media of public participation in governing Aceh along with district/municipal in the areas of security, peace, harmony, and public order (article 98 (1)), as well as the settlement of social issues through customary/traditional institutions (article 98 (2)). The executorial *Qanun* as derivation from this Law in accordance with the article 98 (4) was enacted in the form of *Qanun* Aceh no. 10/2008.

Second, the regulation in the article 114 (1) and (2) on the Law no. 11/2006, which has stated the rules concerning the formation of *mukim* consisting of several villages which led by *imeum mukim* as organizer and being helped by *tuha peut mukim* or by the other names. These provisions gave birth to two mandates to formed *Qanun* of district/municipal on institution, duties, functions, and apparatus of *mukim* (article 114 (4)), and *Qanun* regarding the election procedures for imeum *mukim* (article 114 (5)).

As the implications of these provisions, one of the district in Aceh namely West Aceh (Kabupaten Aceh Barat), had enacted the *Qanun* of District regarding the Government of *Mukim*. This *qanun* was promulgated on June 7, 2010.

Related to this study, there are two important features that necessary to be explained, which are: the issues of wealth of *mukim* (*ulayat mukim*) and the boundaries. Article 1 (8) on the *Qanun* of West Aceh no. 3/2010 mentioned that "*the wealth of mukim is the wealth controlled by Mukim or by other names, and have not be submitted to gampong (village), as well as other legal sources of income*." Whereas, article 1 (10) states that, "*tanah ulayat (communal land) is the land within the territory of mukim and regulated by customary law.*"

Moreover, in the article 7 (1)(j) describes one of the duties and obligations of *Imuem mukim* is to foster and promote the economy and welfare of the community, also maintain and preserve the ecological functions of environment and natural resources.

The mechanisms to achieved this success being asserted in article 21 (1) which has stated, wherein the *mukim* wealth (*ulayat mukim*), or which then ruled by *mukim*, such as forests, soil, water rod, estuary, lake, sea, mountains, marshes, swamps, and others would become the *ulayat mukim*, as long as have not contradicted with other higher law and regulations.
Article 21 (2) has stated that, the types of *mukim's wealth* have to be inventoried and registered, and the utilization have to be governed by *Bupati* (Regent) based on consensus or agreement in the *Mukim*'s council. The wealth itself would be one of revenue for *mukim* (article 22 (1)).

This *Qanun* also confirmed the *mukim*'s sources of incomes, either taxes or retribution that had been collected by the District government, and there should not be additional charges from the *mukim*. The District government can distribute the part of income proportionally, decent and fair, which later on regulated by Regent Decree (*Peraturan Bupati*) (article 25).

The *mukim* wealth (*ulayat mukim*) itself associated with the boundary of the *mukim*. Article 18 defined: "*the alteration of mukim's boundaries can be arranges through the agreement of mukim council and the other mukims which in directly adjacent*." And this alteration of *mukim* boundaries regulated by separated *Qanun* District. Therefore, this *Qanun* has not provided the regulations regarding the arrangement of *mukim* boundary.

Indeed, *Qanun* on *Mukim* (*Qanun* No. 4/2003), *Qanun* on District/Municipalities (*Qanun* no. 2/2003), and the *Qanun* on *Gampong* (village) (*Qanun* no. 5/2003), have mentioned that the coverage of *mukim* is the combination of several *gampong*s. In the explanation of *Qanun* on *mukim*, every *mukim* respectively has own borders, which is marked by natural boundaries (*krueng* (river), *alue* (water rod), *teureubeng* (cliff), *glee* (mountain), etc. These borders should be certificated (must be formulated in writing), so the boundaries of *mukim* would be obvious in fact and legally, and can be used as a guide for the future generations.

[26] Ahmad Maryudi & Max Krott, Local Struggle for Accessing State Forest Property in a Montane Forest Village in Java, Indonesia, Journal of Sustainable Development; Vol. 5, No. 7; 2012 (62-68).

The border of *mukim* is the outer lines of *gampong*s which belong to a *mukim* which directly adjacent with the other *mukim*s.[27] This term of border referring to the article 2 on the Law no. 11/2006 on Governing Aceh, which Province of Aceh divided into Districts/ Municipalities, each District/ Municipalities divided into Sub-Districts, Sub-Districts divided into *Mukim*s, *Mukim* divided into *gampong*s.

The boundaries of *mukim* set into a map, and promulgated within *Qanun* of District/ Munipality as an integral attachment, along with the formation of *mukim*s. The territorial map has to be created by *cartometric* mechanism, using scale and coordinates point, along with consideration towards natural characteristic and local wisdom. It is necessary to avoid the territorial dispute, including the clarity of assets and potencies in the area around the borderline.

In accordance of *Qanun mukim* (*Qanun* no. 4/2003), the alteration of *mukim* boundaries can be made through the consensus of *mukim*s, and the changes itself promulgated with *keputusan Bupati/Walikota* (Regent/ Mayor Decree).

From the aspect of demography, in the Law no. 6/2014 regarding the Government of Village, it is requires in minimum 4,000 peoples (800 head of family) for one village in Sumatera. It is fantastic, since previously through Minister of Interior Decree no. 28/2006 was stated that, the village in Sumatera could be candidate for the expansion only if to have a minimum 1,000 people (200 head of family). Thus, if within one *mukim* consists two *gampong*s, so there would be 8,000 peoples in minimum, it is fantastic figure which difficult to achieve in Aceh.

Regarding the *mukim* that have territorial disputes, there are two mechanisms of settlement within the concept of *mukim*: *Firstly*, the concept of settlement by following the regulation from higher hierarchy, as stated by Minister of Interior Decree no. 76/2012 on Confirmation of Territorial Borders. *Secondly*, by settlement from below hierarchy as being defined in Minister of Interior Decree no. 27/2006 regarding the Boundaries of Village. The second option should be easier, if the numbers of village that included in one *mukim* has already confirmed. Therefore, the boundaries of *mukim* have to be determined by village borders within the *mukim* itself.

Meanwhile, related to demarcation of *mukim*, the process is conducted by a team led by *Bupati/Walikota* (Regent/Mayor) or their Vices, Secretary of District (or vice), which consists each members of: (1) Assistant in charge of governmental affairs; (2) The Head of Section in charge of administration; (3) The Head of Legal Department and the Head of Departments in charge with local development planning; (4) The Head of National Land Agency; and (5) Officials that related to the issue (article 19).

The process is carried out through a series of steps, starting from forming the Confirmation of Territorial Borders (CTB) team. And the team leader can assign his vice and/or member of the team or appointed or assigned official to attend the activity to confirm the territorial border. Vice-leader and/or members or appointed or assigned official has authority and responsibility to sign each stages of activities related to the confirmation of territorial borders (article 21).

While in Minister of Interior Decree no. 27/2006, has mentioned that the village is a unit of legal community that has boundaries with the authority to regulate and manage the interests of society, based on the origin and customs that are recognized by the State.

4. Problems of Boundaries Arrangement

In the life of nation, the legal recognition of customary law community could create dilemma for the state. In one hand, customary law community is seen as threatening the unity of the state, because the spirit of pluralism to be put in front to do a legal thing. On the other hand, by the strict requirements of the concept of recognition and have to be consistent with the fact in the field, the existence of customary law community is not contradicted with the national interest, in line with the States principles of Republic of Indonesia, and regulated by the Law.

Thus impression could also be captured in the life of heterogeneous countries. With the most of system of law descended from the former colonial law. Three basic legal concepts have to be considered as part of it, namely, *indigenous law, imported law, and development law*. The principles have to be based on *community, market and command.*[28]

By leaning to the living law, the reality of the law itself cannot be ignored. Law which lives within society could be binds the people, because it comes from religious values, traditions, and beliefs.

Therefore, the diversity of values and customs should reinforce the spirit to strengthen the legal concept of nation in accordance with Indonesia legal paradigm.[29] This paradigm describes and explains legal life could not be separated from *Pancasila* and 1945's Constitution.[30]

[27] In the concept based on local wisdom, forest that belong to *mukim* measured by indicator of "*siuroe jak*" or "*Sehari pergi*". This concept have to elaborated based on the present context, given the various development that could increasingly debatable, such as the "limit" that can be reached in one day travels.

[28] Nobuyuki Yasuda, "Law and Development from the Southeast Asian Perspective: Methodology, History, and Paradigm Change", in Christoph Antons (Ed.), *Law and Development in East and Southeast Asia*, Routledge Curzon, London, 2005, p. 25-67.

By such paradigm, the recognition of customary law community can be a force for developmental concept in a broad sense. Customary law community that being recognized by such requirements, based on Indonesian legal paradigm, may increase the awareness of the spirit on nationhood.

By referring to the *Qanun* of West Aceh regarding the government of *mukim*, there would be one thing to assert regarding the boundaries of *mukim* that has to be implemented by *Peraturan Bupati* (Regent Decree). In *Qanun* of West Aceh it is determine that the arrangement of *mukim*'s boundaries can be done in conjunction along with the inventoried and registration of *mukim* assets.
By that assumption, two questions would be comes up: *Firstly*, if *Mukim* has to be interpreted only in the context of customary institution, is it *mukim* could manage the natural resources? *Secondly*, how the extent of *Imuem mukim* actually realized his position not only merely limited as customary institution? So when he doing his activities, he thoroughly knew his authority, thereby understand what should be fought of?

From these two important questions, to be expected, there would be appeared the understanding of *mukim* on the importance of regulation on co-ownership and collaboration in natural resources management. This regulation should be an answer for the expectations of welfare in one hand, and sustainability assurance in the other hand.

Thus concept of regulation and arrangement, have to concretize the *mukim* rights and responsibilities in the management, utilization, and preservation of natural resources in the *mukim* level.

However, such concept would not without challenges. Empowering governance in the *mukim* level should be done. In the derivation of regulation, several features have to be accommodated, such as *mukim* boundaries and inventory assets of *mukim*.

Conclusion

On the basis of the explanation, it can be conclude that the legal recognition of customary law community in Indonesia has not so much developed within four (4) periods of national development. The development of recognition on customary law community requires the condition of community to be alive and thrive. In their existence, it should in line with the State principles of Indonesia and regulated by the Law.

With the development of legal recognition for customary law community in Indonesia, it should not be doubted, as the Constitution itself has recognized its existence. Even with the concept in reinforcing the spirit of Indonesian law paradigm based on Pancasila and the 1945's Constitution, it should further have empowered the spirit and awareness of customary law community to be in the life of nationhood.

Since the reformation era, several laws and regulations have been issued by the government to regulate the Government of *mukim* in Aceh, ranging from the Law no. 44/1999, the Law no. 18/2001, and the Law no. 11/2006. Especially, the Law no. 18/2001 became the basis for the formulation of *Qanun* Aceh no. 4/2003 on Government of *Mukim*.

After the enactment of the Law no. 11/2006, the position of *mukim* has to be regulated/ derived to *Qanun* of District/Municipal. The District of West Aceh is the only one that already enacted the *Qanun* of *mukim*. Thus, several things that should be regulated in relations with the government of *mukim* in district have been promulgated.

Based on the *Qanun*, it is necessary to followed up with *peraturan bupati* (Regent Decree) to answers various enforcements belong to the Government of *mukim*. By this offered arrangement and model, it is expected, that *Qanun* of *mukim* could become operationalize and implementable in the field.

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