LEGAL PROTECTION AGAINST RAPE VICTIMS OF CRIME IN THE CRIMINAL JUSTICE SYSTEM

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ABSTRACT

Crime Rape is a form of violence against women which is an example of the vulnerability of the position of women, particularly against male sexual interests. Sexual image of women that have been placed as sexual objects of men turns away implications on the lives of women so he had to always face violence, coercion and physical and psychological torture. Attention and protection of the interests of victims of criminal acts of rape either through the criminal justice process and through the means concern certain social an essential part that needs to be taken into account in criminal law policy and social policies, whether by executive, legislative and judicial as well as by social agencies which exists. Based on the objectives to achieve distributive justice and the general welfare, the criminal offense of rape victims' rights to be protected is essentially an integral part of human rights in the field of social security. Police duties as an investigator in the case of rape is a very difficult task, because in cases of rape in general there are no witnesses. In addition, there are also difficulties in terms of finding evidence in accordance with the provisions of Article 285 of the Criminal Code. Trouble finding evidence of the rape would not be difficult, if a rape victim immediately reported the rape, otherwise if the alleged victim did not immediately report the rape, then such evidence can not be known by the investigator and difficult to be rediscovered. Legal protection of the victims of the crime of rape is still regarded as objects, and the victims are often blamed and not given what kind of protection they need.

Key words: Legal Protection, Victim, Rape Crime, Criminal Justice System

Introduction

Currently the criminal offense of rape is a crime that sufficient attention among the public. Often in newspapers or magazines reported the criminal act of rape. If you study history, the actual type of criminal offense has been there all the time or it can be regarded as a classic form of crime that will always follow the development of human culture itself, he will always be there and growing all the time though probably not too much different from before. Criminal offense of rape is not only happening in the big cities that are relatively more advanced culture and the awareness or knowledge of the law, but also occurs in relatively rural areas still hold traditional values and customs. As is well known that in today's social development prevalent crime of rape, especially among the weak economy.

Although many criminal acts of rape that have been processed up to the court, but of the cases the perpetrators are not sentenced to the maximum in accordance with the provisions of the legislation listed in the Code of Penal (Penal Code) of the Crimes Against Decency (Article 281 s / d 296), in particular those set on the Crime of Rape (Article 285) which states: "Whoever by violence or threats of violence to force a woman have sex with her outside of marriage, threatened because of rape, with a maximum imprisonment of twelve years ".

The problems faced by victims of the crime of rape is very complex. The problem faced not only rape that happened to him, but also occurs in the case of legal proceedings against him. Victims of crime can be a victim of a double in the proceedings and were given the unfair treatment as cornered with questions that discredit that he also took part in the event and snapped during the trial, in the process of seeking justice itself, so it is necessary to obtain protection law of the law enforcement authorities as well have been regulated by law.

Sudarto found to tackle crime required an effort that is rational from the public, by way of criminal politics. Policies or efforts to control crime is essentially an integral part of efforts to protect society (social defense). Therefore, it can be said that the main purpose of criminal politics is the protection of society to achieve the welfare of the community.

Reason rape cases are not reported by victims to law enforcement officials to proceed to trial because of several factors, including the victims feel ashamed and do not want to disgrace that befell him known by others or the victim feel scared because it has been threatened by the perpetrator that he will be killed if report the incident to the police. This of course affects the mental development / mental health of the victims and also affect the law enforcement process itself to create a sense of justice for the victims and society.

Victim factors play an important role in order to overcome or resolve these rape cases, this requires the courage of victims to report this incident to the police, since most victims of rape under threat will be performed again from actors and this makes the fear and trauma victims. Expected of this complaint, the case can be opened and can be done the inspection process so that victims will get justice for what happened to him. Based on the positive law, the victim can claim damages or compensation against the convict.

Rape Victim

According IS Susanto, the victim was divided in two senses, namely in the narrow sense and in a broad sense. Victims in the narrow sense is a victim of crime while the victims in a broader sense includes also the victims in various fields such as pollution victims, victims of abuse and others.

According to Boy Mardjono Reksodiputro, there are four notion of victims, namely:

1. Victims of conventional crimes, such as murder, rape, assault, theft.
2. Victims of non-conventional crimes such as terrorism, piracy, illegal drug trafficking, organized crime and crime through a computer.
3. Victims of abuse of economic power unlawfully (illegal abuses of economic power), such as the violation of labor laws, consumer fraud, violations of environmental regulations, irregularities in marketing and trading by firms trans-national, division rule violation, violation tax regulations and so on.
4. Victims of abuse unlawfully general rule (illegal abuses of public power) such as violations of human rights, abuse of authority by means of the authorities, including arrest and detention were unlawful, and so forth.

According to Arif Gosita, a rape victim is a woman, who by force or by threat of violence forced intercourse with another person outside marriage.

From the definition above can be some understanding as follows:

1. Victims of rape should be a woman, no age limit (object), while there are also men who raped women
2. Victims should be subjected to violence or threats of violence. This means there is no consent of the victim of the intentions and actions of the perpetrator treatment.
3. Intercourse outside marriage is a goal to be achieved by violence or the threat of violence against a particular woman.

The development of the science of victimology in addition invites the public to pay more attention to the position of the victim also sort out the type of the victim until later came the various types of victims, namely:

a. Non-participating victims, to those who do not care about crime prevention efforts
b. Latent victims, those who have a certain character trait that tends to be a victim
c. Procative victims, that they are provoking the crime
d. Participating victims, namely those with behavior ease himself into a victim
e. False victims, those who become victims because of what he made himself.

According to Arif Gosita, the kinds of rape victims are:

a. Pure victim consists of:
1. Victims of rape who have been in contact with the offender before rape
2. Victims of rape who had contact with the offender before rape

b. Victims double, are victims of rape in addition to suffering during raped, also experienced various mental anguish, physical and social, for example, suffered threats that disturb the soul, gets the service was not good during the trial, did not receive compensation, spend treatment , excluded from society because it has special handicapped and others.

c. Apparent victims, is the actual victims as well as perpetrators. He pretended to be raped with the purpose of obtaining something of the perpetrator.
1. It's possible he did so because of his own volition
2. There is a possibility he did so because was told, was forced to do so for the sake of the order. In a certain sense, the perpetrator becomes the victim of other malicious actions.

Ezzat Abdul Fathah, distinguishing categories of victims as follows:

a. Victims of non-participatory, ie those who have refused or anti stance against crime and criminals, and did not participate in the emergence of crimes directed against them
b. Victims latent, are those that have certain characteristics that tend to place themselves as the victims of a particular form of crime
c. Victims who are not related are those that are completely unrelated to the perpetrators. Perpetrators usually undertake actions solely on his own decision and there is no relationship at all with the condition of the victim
d. Provocative victims, made up of victims that have to be or do something against the offenders, so that the perpetrators are encouraged to make them as victims. Thus for this category that the victims who precedes do something so that the perpetrators are driven to commit a crime.
e. Presipitatif victims, are those who are victims even though they do not do anything against the perpetrators. Someone who because of careless and reckless pose a temptation for criminals to commit crimes against them.

f. Victims of physical weakness, consists of a group of people who have physical characteristics or a certain mental so with these characteristics encourage someone to commit a crime. They are included in this group are women and children under age who are victims of crime.
g. The victim himself, is among those who are victims and perpetrators at the same time, for example, drug addicts, alcoholics, gambling and others.

Judging from the role of the victim in the crime, Stephen Schafer said the victim's principle, there are four types, namely

1. People who do not have anything wrong but still fall victim to this type of fault is the perpetrator.
2. The victim knowingly or unknowingly do something that stimulates others to commit a crime, for this type of victim stated participate have contributed to the occurrence of the crime so that the fault lies on the offender and the victim.
3. Those that are biologically and socially potential victim, children, the elderly, the physically or mentally handicapped, the poor, minorities and so on, are people who easily become a victim, the victim in this case can not be blamed but it is society that must be responsible.
4. The victim because he himself is an actor. This is said to be a victimless crime. Prostitution, gambling, adultery, a crime classified some crimes without victims, the guilty party is a victim because he is also a doer.

In terms of understanding crime victims contained in point 1 of the Declaration of basic principles of justice for victims of crime and abuse of power, on September 6, 1985, that victims of crime are:

1. In view of its nature, there are individual and there were collective. Because the individual victim can be identified so that the real victim protection is done while the collective victims is difficult to identify victims.
2. In view of its kind, there are victims of crime, namely the direct victims of crime itself and indirectly (apparent victim / abstract), namely public

Sellin and Wolf makes a classification of victims into five groups, namely:

1. The primary victimization, is individual victims. So the victims individual or not group
2. Secondary victimization, in which the victim is a group as a legal entity
3. The mutual victimization, occur because of the attitude or behavior of the victims who agree to crimes against her
4. Tertiary victimization, the victim arising from the implementation of the social order
5. No victimization, here does not mean no casualties were incurred, but the victim was not immediately known.

Suffering Rape Victim

Acts of sexual violence occurring in the reality of everyday life resulted in the woman raised the fear, anxiety and insecurity. Moreover, supported by the position of victims who are often helpless in which the practice of criminal justice. meaning that the victim suffered is not bridged by law enforcement, in this case the judge, who is obliged to pass sentence. Proven decisions handed down are not comparable with the crimes committed on the victim.
Phasing suffering of victims of the crime of rape can be divided as follows:

1. **Prior to the trial.**

The crime of rape victims suffer from mental, physical and social as he tried to report to the police in a state of pain and disturbed. Then in the framework of data collection for evidence of the crime of rape, he should tell the events that cause trauma to the police. Victims also fear the threat due to report offenders so that there will be retaliation against him.

2. **During the trial**

Victims of crime of rape must be present in court proceedings on their own costs to be a witness. Victims of testifying had to repeat the story of bitter experience and make reconstruction of the events of the rape. He confronted the perpetrators have ever raped once people hated. Besides, he had to face a defender or lawyer of the offender who tried to eliminate errors offender. Prosecutors in criminal justice, representing the victim. But it can happen representatives not in favor of the victim. Not infrequently happens that victims face criminal rape is more capable mentally, physically, socially therefore himself. Here it turns necessary to provide escort or advocate for the victims of the crime of rape

3. **After trial**

After completion of the trial, the crime of rape victims still face many difficulties, especially not receive compensation from anyone. Health maintenance remain dependents. He remains seized with the fear of threats from the perpetrator. There is a chance he is not received within the family and the environment as before, therefore he has a disability. Increased mental suffering, the knowledge that the perpetrators of the crime of rape has been sentenced not problem countermeasures.
The problems faced by women victims of sexual violence are complex, the problems faced not only rape that happened to him, but also occurs in the case of legal proceedings against him. Women victims of sexual violence can become double victims in proceedings and may also receive unfair treatment in the process of seeking justice itself.

Rape victims suffer during rapes and continues for weeks, months or even for the rest of his life. They deeply regret itself. In simple terms the impact of rape can be distinguished:

a. A physical impact, among other things, asthma, migraines, insomnia, pain during intercourse, sores on the lips (lesion on lip the caused by the scratch), sores on the genitals, bowel problems, forget the chin, infection of the tool sex, the possibility can not bear children, venereal disease, an infection of the pelvis and others.
b. Impact mentally, among others, are very afraid of being alone, fear in others, nervous, hesitant (sometimes paranoia), often suprised, very worried, very careful with strangers, it is difficult to trust someone, do not believe anymore in men, fear with men, fear of sex, feeling that others do not like it, cool (emotionally), it is difficult to deal with the public and his friends, hate anything, withdraw / isolate themselves, nightmares and others.
c. Impact in personal and social life, among others, were left close friends, feeling betrayed, the relationship with her husband deteriorated, not like sex, it's hard to fall in love, difficult relationships with men, afraid to talk to the man, avoiding every man and others.

Types of Rape

Rape can be classified as follows:

a. Sadistic Rape, rape sadistic, meaning that in this type of sexuality and aggressive chime in the form of destructive. Perpetrators of rape has seemed to enjoy the erotic pleasures not through sexual intercourse, but through the terrible attack on the genitals and the victim's body.
b. Anger rape, sexual abuse that characterized the sexuality became a means to express and vent fury and anger were restrained. Here the victim's body as an object of who the perpetrators are projecting solution to the frustrations, weaknesses, difficulties and disappointments of his life.
c. Domination rape, which is a rape that occurred when the offender tried to staunch the power and superiority of the victim. The goal is sexual conquest offenders to hurt the victim, but still have the desire to have sex.
d. Seductive rape, a rape occurs in situations that stimulate created by both parties. At first the victim decided that personal intimacy should not be restricted as far as intercourse. Perpetrators generally have confidence requires coercion, because without it does not have feelings of guilt regarding sex.
e. Victim precipitated rape, the rape happened (in progress) by placing the victim as originators.
f. Exploitation rape, rape showed that on each occasion having sexual relations obtained by a man by taking advantage opposite the women who depend on them economically and socially. For example, a wife who was raped by her husband or household help raped by her employer while aides do not question or complain about this case to the authorities.

Types of Rape can also be distinguished:

a. **Rape perpetrators have been known to the victim**

1. Rape by a husband or ex-husband. Rape can also occur in a marriage, because the husband was entitled to force his wife to have sex at any time in accordance with his wishes, regardless of the wishes of his wife. Even sometimes happen much ex husband who was still entitled to impose sex on his ex-wife.
2. Rape by a date or boyfriend, a date or boyfriend could force the victim to have sex with various excuses, because he had already spent money to please the victims, because they never had sex before, because the victim is considered deliberately provoke lust, or because the boyfriend had promised to marry the victim, an invitation to the fair sex still included if the woman still had a chance to reject and refusal was honored by her boyfriend. Persuasion can still be considered normal if the failure to persuade not followed by actions of coercion. But if the female girlfriend to impose its will, it has refused to say "no" but her boyfriend desperate to do that mean rape. Rape cases like this are very rarely heard anyone else because victim shame and fear of blame people.
3. Rape by employer / employer, rape occurs among others when a woman is forced to have sex by a supervisor or employer with threats of layoffs if refused, or with other threats related to the power of the boss or employer.
4. Sexual abuse against children. A girl or boy can be raped by a grown man. This issue is very sensitive and slit. Children who are victims do not fully understand what happened to them, especially if the child was believed offenders. Even if the child reports to the mother, grandmother or other family members, most likely the report was ignored, not trusted, even accused of lying and fancies, they usually deny it was only by reason of "not possible father / grandfather / uncle / etc heart to do so ,

b. **Rape by a stranger**

Type of rape is extremely scary, but it is less common than rape where the perpetrator is known to the victim.

1. Rape gang. A woman could be ambushed and raped in turn by a group of unknown people. There are times when the case of rape by a stranger, then others who witnessed the incident involved to do so. Often occurs several teenagers raped a girl in order that they are considered male or to prove manhood.
2. Rape in prison. Around the world, many women raped by the police or prison guards after they were detained or sentenced to confinement. Even rape is also common among the inhabitants of the male penitentiary, to indicate that the rapist is more robust and powerful than the victim.
3. Rape in war or unrest. The soldiers who were in the midst of battle are often raped women in the occupied territories, to scare the enemy or to embarrass them. Rollicking rape and systematic rape (deliberately done in order to meet certain political objectives or tactical), for example, what happened to the Bosnian Muslim women. This kind of rape goal is to show the strength and power in front of the enemy. Likewise that is in Indonesia, formerly in the colonialism the Netherlands and Japan, many indigenous women locked up in barracks or army camps, forced into the sex trade or into slave of lust of the soldiers and that denying them would be killed just so many who are forced to do so in order to save lives , Can also women were forced to

placate the army in order to save the children and their families (including her husband), or in order to get food that is difficult to obtain in the midst of war.

General Characteristics of the Crime of Rape

a. Aggressiveness, a trait that is inherent in every rape
b. Motivation, violence is more prominent than the purely sexual motivation
c. Psychologically, the crime of rape contains more control problems and hatred compared with lust
d. The criminal act of rape can be divided into three forms, namely anger rape, power rape and sadistic rape. And this is reduced from anger and violation, control and domination, erotic.
e. Characterize rape, the perpetrator over the victim's misperception, suffered a bad experience, especially in personal relationships (love) isolated socially, low self-esteem, there is an emotional imbalance.
f. Rape victims is participatory. According to Meier and Miethe 4-19% the crime of rape occurred due to negligence (participation) victims
g. Criminal acts legally difficult to prove rape.

Among the characteristics of rape, violence and the difficulty traits do seem to need to get a proof of major concern. Violence against the victim not only adversely impact physical endurance, but also the psychological resilience. Adverse conditions that makes the victim helpless further adverse impact on law enforcement issues.

Provided the form of the Legal Protection to Victims of Crime of Rape

The treatment received by the victim during the criminal justice process is one form of legal protection for the victims of (the crime of rape). As for the legal protection given to victims of the crime of rape during the proceedings in different courts among judges as law enforcement officers with the actual or practice. Concerning the legal protection given to victims of the crime of rape during the examination process in court is:

1. The judge in the trial of criminal cases of rape are women with the aim that the victim more freely and not feel awkward in giving testimony. It is not always judge a woman, but most often handle cases of rape are female judges
2. The judge during questioning at the hearing does not aim to discredit the victims, are only required to tell the chronological events which have suffered rape.
3. If the witnesses in the trial would not meet with the offender, the judge has the discretion to require the offender to come out so that witnesses can testify without feeling any suffering.
4. For child victims of rape judge can request information from witnesses outside the trial. This meant that the child victims of rape do not feel depressed because of fear of the perpetrator and the atmosphere of the trial which he felt alien.

From this, there is the treatment and excellent protection from law enforcement officers. Law enforcement officials considered less concern against the victim, causing bottlenecks in handling criminal cases of rape. These barriers include:

1. Judge in providing victim cornered question (subjective assumptions / gender bias that blaming the victim) and considered to take part in the event
2. Not infrequently judges forming the victim while testifying
3. Obstructing a companion to accompany victims when testifying
4. Do not make the trauma or psychological disorders suffered by victims as a result of the rape she experienced as a consideration to incriminate the perpetrator.
5. The existence of levies was not clear (without wanting to give a receipt / proof of traffic).

In providing protection to victims of rape during the examination process in the courts, law enforcement officers (judges) still treat women victims of violence (rape) as an object, not a subject, which must be heard and respected their legal rights. They are mostly still makes women rape victims become victims a second time (revictimisation) on his case. Victims are often blamed and not given what kind of protection they need. Officials (judges) do not have the perspective of women victims of rape.

Verdict on rape cases are still relatively low and does not meet the sense of justice for the victims and their families. So that law enforcement situation for rape victims who have not been able to fulfill a sense of justice for victims of rape is one reason why some cases of rape victims and their families choose the path of peace. Victims and their families choose the path of peace / family make the perpetrators of rape can not be caught by the law of free. Because the victims and their families then pull reports / complaints made in the police on the grounds has been no peace agreement or kinship between the perpetrator and the family of the perpetrator to the victim and his family.

This is because after the criminal justice process is quite complicated and requires a relatively long time to complete. Relating to the treatment of victims in criminal proceedings, law enforcement officers are very influential in handling the cases reported to him because the victim is also a witness that will determine the success of the judicial process until the verdict. Where it is feared by the victims and their families that the offender was found not guilty or acquitted or also just get a lighter sentence from the judge after what he experienced and endured by the victim during the criminal justice process.

Efforts Can Do To Provide Legal Protection Against Rape Victims of Crime

Legal protection for crime victims of rape committed during the judicial process that is before the court, during the trial and after the trial.

1. Before Hearings

Legal protection given to victims of the crime of rape was first given by the police when the victim reported. Currently the police have formed a Special Service Room (RPK), represented by police women who are embodied in the Special Unit for stand-alone to handle cases of violence against women and children. Special Service Room (RPK) is a special room that is sealed and placed in the unity of the Police, where women and children who are victims of violence or sexual harassment may report the case to secure the police woman empathetic understanding and professional.

2. During Court Session

During the trial, the victim testified accompanied by members of LBH / NGO so that the victim can be calmer and not afraid in the trial. Given the victim is still unstable psyche and feeling depressed after being examined during the judicial process, the assistance effort is needed by the victim. Especially in the trial, the victim must be reunited again with actors who can make that will affect the trauma victim's testimony to be given in the trial.
Forms of protection during the trial was also stipulated in Government Regulation No. 2 of 2002 on Procedures for the Protection of Victims and Witnesses Article 4 states:

a. Protection of personal security of victims or witnesses of physical and mental threats.
b. Concealment of identity of victims and witnesses
c. The provision of information during the examination in court without face to face with the suspect.

The same protection is also contained in Law No. 31 Year 2014 on the Amendment of the Act No. 13 of 2006 on the Protection of Witnesses and Victims in Article 5, paragraph (1) letter a till letter g asserts:

a. The protection of personal safety, family and property, and free from the threat with respect to the testimony that will be, is being or has been given.
b. Participate in the process of selecting and determining the form of protection and security support
c. Provide information without pressure
d. Got translator
e. Free of questions that ensnare
f. Get information about court decisions
g. Information received in the convict freed

3. After the Court of Justice

Once the offender was sentenced by the judge, then in accordance with Article 5, paragraph (1) letter h till letter m Witness and Victims Protection Act, victims are entitled to protection are as follows:

h. Information received in the convict freed
i. Unidentified
j. Gets a new identity
k. Received a temporary residence
l. Got a new residence
m. Obtain reimbursement for transportation costs in accordance with the needs
n. Received legal advice
o. Obtaining temporary living expenses until the time limit expired protection and / or
p. Get assistance.

So far there has been no officials that provide maximum protection. The country's efforts to provide protection to the legislation was not maximized. Only companion (NGO / LBH), which provide services for women victims of rape who has been engaged maximized. Although the existing Law on Witness and Victim Protection but what is in it has not been implemented by law enforcement officials.

The handling of rape cases is too long because it must follow legal procedures that make the victim became reluctant to deal with the legal process is very tiring. Therefore, the need for legal and policy reforms, especially the law enforcement system of gender justice.

Conclusion

Forms of legal protection given to victims of the crime of rape during the trial was that the law enforcement officers (judges) still considers women victims of violence (rape) as an object, not a subject that should be listened to and respected legal rights. They are mostly still makes women rape victims become victims a second time (revictimisation) on his case. Victims are often blamed and not given what kind of protection they need. Officials (judges) do not have the perspective of women victims of rape.

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TERRORISM IN NIGERIA: AN OVERVIEW OF TERRORISM (PREVENTION), ACT 2013, AMENDED

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ABSTRACT

The paper focuses on terrorism in Nigeria and an overview on the Terrorism (Prevention) Act in Nigeria. The paper aimed to discuss terrorism with a view to explore the definitional concept of terrorism and with reference to its scope, various form and categories of terrorism were also considered. The paper aim at discussing Nigeria in relation to the current practices of terrorist that is affecting the nation and thus has been one of the major issues facing the nation. Although so many mechanisms has been put in place so as to address this menace, as there is progress in the fight. The objective of the paper also looks into the Terrorism (Prevention) Act 2013, as amended by outlying the offences related to the terrorism. The methodology adopted in the paper is doctrinal approach method wherein both primary and secondary sources of data were analysed. The primary sources include legislations on the subject area particularly at the international level and the secondary sources are the relevant literature consulted on the area. The finding of the paper reveals that there is no provision or section dealing with computer devices and the paper recommends for a few words indicating an inclusion of computer devices in the Act.

Key words**:** Terrorism, Nigeria, an overview of the Act

Introduction

The paper focuses on terrorism in Nigeria and an overview of the Terrorism (Prevention) Act, 2013 as amended. Terrorism is not new, even though it has been used in the early times of human existence. Terrorism has been termed as both a tactically and executed crime as holy duty and also as a justified response to oppression and an unpardonable abomination. Apparently, a lot depends on what point of view is being signified. Terrorism has often been an operative tactic for the weaker side in a conflict. As an unequal form of conflict, it confers coercive power with many of the advantages of military force at a little cost. Due to the mysterious nature and small size of terrorist organizations, they often offer opponents no clear organizational structure to defend against or to deter others. Terrorism has been a means of a continued conflict without the opponent realizing the nature of the threat, confounding terrorism for criminal activity. Because of these characteristics, terrorism has become gradually common among those dogging extreme goals throughout the world.

2. Meaning of Terrorism

There is neither a consensus academic nor an accurate legal consensus regarding the definition of terrorism, various government agencies and legal systems use different definitions. Besides, governments have been averse to formulate an agreeable, legally binding definition. These difficulties arise from the fact that the term is politically and emotionally motivated. Terrorism being a criminal act that sways an audience afar the immediate victim, the definition of terrorism seems controversial as it depends on how one views it from his own perspective. The International Law Commission has provided the definition of terrorism with an expansive application of legal theory, as such it includes:

(a) Any act causing death or grievous bodily harm or loss of liberty to a Head of state, persons exercising the prerogatives of the Head of state, their hereditary or designated successors, the spouse of such persons, or person charged with public functions or holding public positions when the act is directed against them in their public capacity.

(b) Act calculated to destroy or damage public property or property devoted to public purpose

(c) Any act likely to imperil human lives through the creation of public danger, in particular the seizure of aircraft, the taking of hostages and any form of violence directed against persons who enjoy international protection or diplomatic immunity.

(d) The manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act.

However, the United Nations General Assembly 1994, in condemnation of terrorist acts described terrorism as:

> "Criminal acts intended or calculated to provoke a state of terror in the public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."[1]

This definition by the United Nations did not achieve an Inclusive perspective on International Terrorism that incorporates a single, all-embracing, legally binding definition of terrorism. Though, Bockstette, proposed a definition, based on psychological and tactical aspects of terrorism; thus

> "Terrorism is defined as political violence in an asymmetrical conflict that is designed to induce terror and psychic fear (sometimes indiscriminate) through the violent victimization and destruction of non-combatant targets (sometimes iconic symbols). Such acts are meant to send a message from an illicit clandestine organization. The purpose of terrorism is to exploit the media in order to achieve maximum attainable publicity as an amplifying force multiplier in order to influence the targeted audience(s) in order to reach short- and midterm political goals and/or desired long-term end states."[2]

However, according to Hoffman even if an all-inclusive definition of terrorism could not be proffered he identified certain characteristics that terrorism could be viewed from. He suggests that; Terrorism could occur from an ineluctably political aims and motives of violence or threat of violence designed to have far-reaching psychological repercussions beyond the immediate victim or target, conducted by an organization with an unrecognizable chain of command or conspiratorial cell structure, whose members do not wear uniform or identifying emblem.[3] In the same manner Saul observed the following on the lack of a generally agreed, all-encompassing, definition of the term:

> "'Terrorism' currently lacks the precision, objectivity and certainty demanded by legal discourse. Criminal law strives to avoid emotive terms to prevent prejudice to an accused, and shuns ambiguous or subjective terms as incompatible with the principle of non-retroactivity. If the law is to admit the term, advance definition is essential on grounds of fairness, and it is not sufficient to leave definition to the unilateral interpretations of States. Legal definition could plausibly retrieve terrorism from the ideological quagmire, by severing an agreed legal meaning from the remainder of the elastic, political concept. Ultimately it must do so without criminalizing legitimate violent resistance to oppressive regimes – and becoming complicit in that oppression."[4]

It should be noted that each act of terrorism is a performed plan to have an impact on many large targets; they attack national symbols to show power and also an attempt to weaken the foundation of the country or society they are opposed to. This may adversely affect the government, thereby uplifting the status of the terrorist group and their ideology.

Terrorist acts usually have a political aim and purpose as it often achieved where there is an inter-relationship between terrorism and belief. When a political struggle is integrated into the framework of a religious struggle, failing in such a struggle becomes equated with spiritual failure, which, for the highly committed ones, is worse than their own death or the deaths of innocent civilians. The suffering or danger posed by terrorism act accomplishes their goals of instilling fear, getting their message across to an audience or otherwise satisfying the demands of their often radical religious and political agendas.[5] The calculated aim of terrorism is the use of unlawful violence or threat of unlawful violence to inculcate fear, which is intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological. The key element of terrorism includes; violence, fear, and intimidation, and each element yields terror on its victims. The strategy of terrorists in carrying out the act of violence is to draw the attention of the local populace, the government, and the world to their cause, they plan their attack to obtain the highest publicity, choosing targets that represent what they are opposed to. The effectiveness of the act of terrorism does not lie on the act itself, but on the public's or government's reactions to it. The next segment of the paper discussion will be on the act of terrorism and its forms.

3. The acts of Terrorism

Terrorists do not see themselves as evil. They believe they are legitimate combatants, fighting for what they believe in, by whatever possible means to attain their goals. A victim of a terrorist act sees the terrorist as a criminal with no regard for human

[1] 1994 United Nations Declaration on Measures to Eliminate International Terrorism annex to UN General Assembly resolution 49/60, "Measures to Eliminate International Terrorism", of December 9, 1994, UN Doc. A/Res/60/49.
[2] Bockstette, Carsten., *Jihadist terrorist use of strategic communication management techniques*, George C Marshall Center Apo AE 09053 European Center for Security Studies, 2008.
[3] Hoffman, Bruce, *Inside terrorism*, Columbia University Press, 2013.
[4] Ben Saul, "Defining 'Terrorism' to Protect Human Rights" in Sydney Law School Legal Studies Research Paper, No. 08-125 (2008) p. 11.
[5] Juergensmeyer, Mark. "Terror in the Mind of God" *Theological Studies* 61, no. 4 (2000): 779-779, at

life. Consequently according to the National Advisory Committee on Criminal Justice Standards and Goals,[6] there are six separate forms of terrorism, all share common characters of being violent that destroy property, raise fear and effort to harm the lives of innocent civilians. The forms of terrorism are as follows;[7]

3.1 Civil disorder

This sometimes is a violent form of protest organized and held by a group of individuals, usually in opposition to a political policy or of a government. They are intended to send a message to a political group that the people are unhappy with their policies and for demand change. The protests are intended to be non-violent, but they do sometimes result in large riots in which private property is destroyed and civilians are injured or killed in the process.[8]

3.2. Political terrorism

This is used by one political faction to intimidate another, though government officials are the ones who are intended to receive the ultimate message, but it is the citizens who usually suffer and eventually become the victims of the violent attacks.[9]

3.3 Non-political terrorism

It is a terrorist act carried out by a group for any other purpose, mostly of a religious nature. The anticipated goal is rather other than a political objective. But the tactics and the style of the attack involved are usually the same.[10]

3.4 Quasi terrorism

This is a violent act that uses the same methods terrorists employ, but does not have the same inspiring factors. Cases like this regularly involve armed criminals who are trying to escape from law enforcement using civilians as hostages or shield to help them escape. The law violators are acting in a similar manner to that of terrorists, but terrorism is not the ultimate goal.[11]

3.5 Limited political terrorism acts

These are essentially one time plots to make a political or ideological statement to send a warning to the government. The aim is not to take over the government, but to protest against a governmental policy or action.[12] Every form of terrorism uses distinct methods of violence to get their message across. They can be in form of assault weapons or explosive devices or toxic chemicals that are released into the air. These attacks may occur at any time or place, which makes them an extremely effective method of infusing terror and uncertainty into the general public.[13]

4. Categorizations of Terrorist

Having highlighted some of the forms of terrorism we will now briefly look at the categories of terrorist groups; thus there are many different categories of terrorism and terrorist groups that are currently in use. These categories serve to differentiate terrorist organizations according to specific criteria, which are usually related to the field or specialty of whoever is selecting the categories. Similarly, some categories are simply labels added arbitrarily or redundantly, usually by the media. For example, every terrorist organization is by definition "radical", as terrors tactics are not ascribe norms of any group, but it is through their ack. Some of the groups are as follows;[14]

4.1 Separatist

The separatist groups are those with the goal of separation from existing entities through independence, political autonomy, or religious freedom or domination. The ideologies separatists subscribe to include social justice or equity, anti-imperialism, as well as the resistance to conquest or occupation by a foreign power.

4.2 Ethnocentric

The groups of this persuasion see race as the defining characteristic of a society, and therefore a basis of unity. There is usually the attitude that a particular group is superior because of their inherent racial characteristics.

4.3 Nationalistic

[6] Byrne Commission, "National Advisory Committee on Criminal Justice Standards and Goals" (1976).
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] http://www.crimemuseum.org/crime-library/types-of-terrorism, accessed on 26th September,2015, 9:12pm.
[13] Ibid.
[14] Ibid.

The loyalty and devotion to a nation, and the national consciousness derived from placing one nation's culture and interests above those of other nations or groups. This can find expression in the creation of a new nation or in splitting away part of an existing state to join with another that shares the supposed national identity.

4.4 Revolutionary

This is a group dedicated to the overthrow of a recognised order and replacing it with a new political or social structure. Although often associated with communist political ideologies, this is not always the case, and other political movements can advocate revolutionary methods to achieve their goals.

4.5 Political

Political ideologies are concerned with the structure and organization of the forms of government and communities. While observers outside terrorist organizations may stress differences in political ideology, the activities of groups that are completely opposed on the political range are similar to each other in practice.

4.6 Religious

Religiously inspired terrorism is on the increase, while Islamic terrorists and organizations have been the most active, and the greatest recent threat, all of the major world religions have extremists that have taken up violence to further their perceived religious goals. Religiously motivated terrorists see their objectives as holy summons, and therefore dependable and non-negotiable

4.7 Domestic

These are terrorists group that are home-based and operate within and against their home country. They are frequently tied to extreme social or political factions within a particular society, and focus their efforts specifically on their nation's socio-political arena. For instance, the Boko Haram terrorist in Nigeria.

4.8 International or Transnational

Often describing the support and operational reach of a group, these terms are often loosely defined, and can be applied to widely different capabilities. International groups typically operate in multiple countries, but retain a geographic focus for their activities. Transnational groups operate internationally, but are not tied to a particular country, or region. For instance, Al Qaeda is transnational; being made up of many nationalities, having been based out of multiple countries simultaneously, and conducting operations throughout the world. Their objectives affect lots of countries with opposing political systems, religions, ethnic compositions, and national interests[15]

5. Terrorism in Nigeria

Terrorism in Nigeria was unknown in the early years of Nigeria's independence in 1960. It became rampant in the late 90's and further culminating in today's epidemic proportion. A closer look at terrorism will reveal from its definition that it reflects a breakdown in law an order in society.[16] It is a sign that formal authority is ineffectual and that checks and balances in governance are not working since little or no prosecution of cases abound. The terrorist based his assumption on the fact that there is no justice and equality provided by organisation of the society to encourage people to work and conscientiously earn a decent living. They see the common wealth of the nation as belonging to all, but only use by the more powerful in the society. In that light they take up arm to become powerful in order to join the loot. However, where there is proper education and civic orientation perhaps this impression could be changed but not in Nigeria at the moment where money is held too high surpassing every other virtue in the pursuit of survival. This stage of the history of terrorism in Nigeria is so delicate as the institution of the state is overheated because its inadequacies in solving the problems, consequently the problem has political root, since from its inception.[17]

Again one factor that risen the terrorism in Nigeria is unemployment saga; it has deteriorate the system by the rising numbers of uneducated young person ascending from low quality of education and life. This is against a background of amazing inexplicable wealth and display by those whose rise to fame could only be traceable to few moments of lawlessness or defiance of order.

The Nigerian community and government have struggle against the attacks of terrorism activities and has been reported to be the 4th largest impact of terrorism out of 162 countries on the Global Terrorism Index. The summary accounts for almost 2,000 innocent citizens of Baga town in Maiduguri State of Nigeria Boko Haram.[18] That the increase and rapid spread terrorist act is what lead to the growth of Boko Haram in Nigeria, which means 'Western Education is forbidden'. This sectoral Islamic

[15] http://www.terrorism-research.com/groups/categories.php, accessed on 26th September,2015, 9:20pm.
[16] https://www.causes.com/causes/559771-war-against-terror-in-plateau-state/updates/443350-history-of-kidnapping-and-terrorism-in-nigeria, accessed on 27 Sep. 15, 3:22pm.
[17] Terrorism, in Nigeria, available at http://www.visionofhumanity.org/#page/news/1117, accessed on 20/9/2015 and the report of Global terrorism Index 2014 on Nigeria, published on 6, January 2015.
[18] Ibid.

institution has grown and leads the most heinous terrorist groups across the globe, accounting for eight lives in an attack. They live in the north-East of Nigeria.[19] The nature of terrorism in Nigeria is dramatically different from other terrorist countries, the strategy applies by the terrorists in Nigeria is more of like gang crime and violence than bombings or suicide attacks. Armed assault caused 85% of Nigeria's terrorism deaths in 2013, as opposed to just 5% for bombings and explosions. However, a kidnapping also falls under the operations of terrorist in Nigeria. In 2013, Boko Haram kidnapped law enforcement agencies such as the police officers, members of the military as well as women and children. Sadly, in 2015 they also kidnapped over 200 Chibok schoolgirls which gained international media attention and has been a subject of discussion daily both in Nigeria and the global community. Although a group has been formed to stand for the released of the kidnapped children, named as 'Bring Back Our Girls' (BBOG), the BBOG pleaded seriously with the government to secure the release of this innocent children, as any delay in securing their freedom, could possibly turn them into slaves and wives of the terrorist.[20]

6. Overview of the Terrorism (Prevention) Act, 2013, Amendment

The overview of the Terrorism Act 2013 is an amendment[21] made by the National Assembly of the Federal Republic of Nigeria that dwelt on the offences regarding the terrorism under the Act. The Act provides for the Principal Act that 'all acts of terrorism and financing of terrorism are hereby prohibited.´- [22] and a person or body corporate who knowingly in or outside Nigeria directly or indirectly willingly.-[23]

(a) does, attempts or threatens any act of terrorism,
(b) commits an act preparatory to or in furtherance of an act of terrorism,
(c) omits to do anything that is reasonably necessary to prevent an act of terrorism,
(d) assists or facilitates the activities of persons engaged in an act of terrorism or is an accessory to any offence under this Act,
(e) participates as an accomplice in or contributes to the commission of any act of terrorism or offences under this Act,
(f) assists, facilitates, organizes or directs the activities of persons or organizations engaged in any act of terrorism,
(g) is an accessory to any act of terrorism, or
(h) incites, promises or induces any other person by any means whatsoever to commit any act of terrorism or any of the offences referred to in this Act,

commits an offence under this Act and is liable on conviction to maximum of death sentence.´

The Act also provides for the Office of the National Security Adviser (in this Act referred ONSA) shall be the coordinating body for all security and enforcement agencies under this Act and shall -[24]

(a) provide support to all relevant security, intelligence, law enforcement agencies and military services to prevent and combat acts of terrorism in Nigeria;
(b) ensure the effective formulation and National Coordinating Bodies implementation of a comprehensive counter terrorism strategy for Nigeria;
(c) build capacity for the effective discharge of the functions of all relevant security, intelligence, law enforcement and military services under this Act or any other law on terrorism in Nigeria; and
(d) do such other acts or things that are necessary for the effective performance of the functions of the relevant security and enforcement agencies under this Act.

The Attorney-General of the Federation shall be the authority for the effective implementation and administration of this Act and shall strengthen and enhance the existing legal framework to ensure-[25]

(a) conformity of Nigeria's counter-terrorism laws and policies with international standards and United Nations Conventions on Terrorism;
(b) maintain international co-operation required for preventing and combating international acts of terrorism; and
(c) the effective prosecution of terrorism matters.

That the law enforcement and security agencies (in this Act referred to law enforcement agencies) shall be responsible for the gathering of intelligence and investigation of the offences provided under this Act.[26] And further to subsection (3), the law

[19] Ibid.
[20] Ibid.
[21] By the Amended Act of No 10 2011.
[22] Section 1(1), Ibid.
[23] Section 1(2), Ibid.
[24] Section 1A(1), Ibid.
[25] Section 1A(2), Ibid.
[26] Section 1A(3), Ibid.

enforcement agencies shall have powers to -[27]… in addition, the act provides for a wide power to law enforcement agencies[28] which includes:

(a) to investigate
(b) execute search warrant
(c) investigate evidence
(d) seizure
(e) seal up properties
(f) adopt measures to identify, trace, freeze and seize terrorist properties
(g) operate under Attorney-General of the Federation plus other agreement with national and international body
(h) request a data from any person, agencies, organizations
(i) appoint experts or professionals where deems fit

It further provides that the law enforcement agencies may initiate, develop or improve on specific training programmes for its officers charged with the responsibility for the prevention, detection, investigation, elimination and prosecution of terrorism activities in Nigeria.[29]

While the Act provides that any person who intentionally-[30]

(a) murders, kidnaps or commits other attacks on the person or liberty of an internationally protected person,
(b) carries out a violent attack on the official premises, private accommodation or means of transport of an internationally protected person in a manner likely to endanger his person or liberty, or
(c) threatens to commit any such attack, commits an offence and is liable on conviction to life imprisonment.

That the Act provides that any person who-[31]

(a) arranges, manages, assists in arranging or managing, participates in a meeting or an activity, which in his knowledge is concerned or connected with an act of terrorism or terrorist group,
(b) collects, or provides logistics, equipment, information, articles or facilities for a meeting or an activity, which in his knowledge is concerned or connected with an act of terrorism or terrorist group, or
(c) attends a meeting, which in his knowledge is to support a proscribed organisation or to further the objectives of a proscribed organization, commits an offence under this Act and is liable on conviction to imprisonment for a term of not less than twenty years.

Also provides that any person who knowingly, in any manner, directly or indirectly, solicits or renders support -[32]

(a) for the commission of an act of terrorism, or
(b) to a terrorist group,

commits an offence under this Act and is liable on conviction to imprisonment for a term of not less than twenty years.

It further provides that for the purposes of subsection (1) of this section, "support" includes -[33]

(a) incitement to commit a terrorist act through the internet, or any electronic means or through the use of printed materials or through the dissemination of terrorist information;
(b) receipt or provision of material assistance, weapons including biological, chemical or nuclear weapons, explosives, training, transportation, false documentation or identification to terrorists or terrorist groups;
(c) receipt or provision of information or moral assistance, including invitation to adhere to a terrorist or terrorist group;
(d) entering or remaining in a country for the benefit of, or at the direction of or in association with a terrorist group; or
(e) the provision of, or making available, such financial or other related services prohibited under this Act or as may be prescribed by regulations made pursuant to this Act.

Lastly, it provides that in this section, it is not necessary to prove that the material or information or facilities or financial assistance was actually collected or provided if it can be reasonably established that the person collected or provided the material, information or facilities or financial assistance to terrorists, or terrorist groups.[34]
Any person, who knowingly harbours, conceals or causes to be harboured or concealed, hinders or interferes with the arrest of a person whom to his knowledge has-[35]

(a) committed or about to commit an act of terrorism,
(b) likely to commit an act of terrorism,
(c) is a member of a terrorist group,

[27] Section 1A(4), Ibid.
[28] Section 1A(5), Ibid.
[29] Section 1A(6), Ibid.
[30] Section 3, Ibid discusses offences.
[31] Section 4, Ibid, discusses on terrorist meetings.
[32] Section 5(1), Ibid, on soliciting and giving support to terrorist groups for the commission of terrorist.
[33] Section 5(2), Ibid.
[34] Section 5(3), Ibid.
[35] Section 6, Ibid discuss on harbouring terrorist or hindering the arrest of a terrorist.

(d) has been convicted of an act of terrorism but escaped from punishment, or
(e) against whom he knew that a warrant of arrest had been issued, commits an offence and is liable on conviction to imprisonment for a term of not less than twenty years.

The Act further provides that any person who, knowingly, agrees to provide or receive training, training material or instructions-[36]

(a) in the making or use of any form of explosive or other lethal devices,
(b) in carrying out a terrorist act, to a member of a terrorist group,
(c) to a person engaging in or preparing to engage in the commission of a terrorist act, or
(d) in the practice of a military exercise or movements but who is not an authorized officer acting in the performance of an official duty, commits an offence and is liable on conviction, to imprisonment for a term of not less than twenty.

That subject to the provisions of subsections (2) and (3) of this section, where a person has information which he knows or believes to be of material assistance in-[37] and the Act provides that any person who knowingly offers to provide, or provides any explosive or other lethal device to a terrorist group, a terrorist or any other person for use by, or for the benefit of, a terrorist group or a member of a terrorist group, commits an offence and is liable on conviction to imprisonment for a term of not less than twenty years.[38] That any person who knowingly agrees to recruit or recruits another person to be a member of a terrorist group or participate in the commission of a terrorist act commits an offence and is liable on conviction to imprisonment to a term of not less than twenty years.[39] In addition, the Act provides for any person who knowingly-[40]

(a) incites or promotes the commission of a terrorist act,
(b) incites or promotes membership in a terrorist group, or
(c) solicits property for the benefit of a terrorist group or for the commission of a terrorist act,

Commits an offence and is liable on conviction to imprisonment for a term of not less than twenty years.
That any person who being who the owner, occupier, lessee, agent in relation to building, a charterer of a pilot, operator, aircraft, vessel commits an offence and is liable on conviction to life imprisonment.[41] And proceed to provide for any person or entity involves in the financing of terrorism within Nigeria and outside.[42] That any person who deals with person or entity that involves property or funds in relation to terrorism, commits an offence under this Act and is liable on conviction to imprisonment for a term of not less than twenty years.[43] Whereas any person involves in hostage taking in whatever manner commits an offence under this Act and is liable on conviction to life imprisonment.[44]

That any person who is a member or professes to be a member of a terrorist group commits an offence and is liable on conviction to imprisonment for a term of not less than twenty years.[45] That any person who conspires with another to commit an offence under this Act in Nigeria, or to commit a terrorist act in any place outside Nigeria being an act, which if done in Nigeria would have constituted an offence under this Act, shall be deemed to have conspired to do that act in Nigeria and is liable on conviction to-[46]

(a) life imprisonment where the act of terrorism is committed; and
(b) an imprisonment for a term of not less than twenty years, where the act of conspiracy is committed.

A person who knowingly, directly or indirectly-[47]

(a) aids and abets,
(b) induces, incites, instigates, instructs,
(c) counsels or procures another person by any means whatsoever to commit an act of terrorism,

commits an offence and is liable on conviction -(a) where the act of terrorism is committed, to life imprisonment; and (b) where the offence of terrorism is not committed, to an imprisonment for a term of not less than twenty years.

The Act provides that any person who -[48]

(a) being in lawful custody, escapes; or

[36] Section 7, ibid, on provision of training and instruction to terrorist groups or terrorist.
[37] Section 8(1), Ibid, on concealing of information about acts of terrorism.
[38] Section 9, Ibid on provision of devices to terrorist.
[39] Section 10, Ibid on recruitment of persons to be members of terrorist groups or to participate in terrorist act.
[40] Section 11, Ibid on incites promotion or solicitation of property.
[41] Section 12, ibid on provision of facilities in support by a terrorist act.
[42] Section 13, Ibid on financing terrorism.
[43] Section 14, Ibid on dealing on terrorist property.
[44] Section 15, Ibid on hostage taking.
[45] Section 16, Ibid on membership of a terrorist group or proscribed organizations.
[46] Section 17, Ibid on conspiracy.
[47] Section 18, Ibid on aiding and abetting.
[48] Section 19, Ibid on escape or aiding or abetting escape.

(b) aids, facilitates or abets the escape of a person who is in lawful custody of any law enforcement or security agency or a person suspected to have committed an offence under any of the provisions of this Act,

commits an offence and is liable on conviction to life imprisonment.

Further, that any person who attempts to commit any offence under this Act is liable on conviction to life imprisonment.[49] That where a person is charged with any of the offences under this Act and the evidence establishes an attempt to commit that offence, he may be convicted of having attempted to commit the offence and is liable on conviction to a life imprisonment.[50] And where a person is charged with an attempt to commit an offence under this Act, but the evidence establishes the commission of the full offence, the offender is not entitled to acquittal but is convicted for the commission of the offence and is liable on conviction to life imprisonment.[51]
That any person who engages in any conduct in preparation to commit acts of terrorism or assisting another person to commit an act of terrorism commits an offence and is liable on conviction to life imprisonment.[52] That any person who, with intent to deceive, unlawfully assumes the name, character or designation of an officer of any law enforcement or security agency commits an offence under this Act and is liable on conviction to imprisonment for not less than five years.[53]

Also a person who tampers with-[54]

(a) a witness by intimidation, threats, blackmail or similar acts, or
(b) evidence or exhibit by falsification, conversion, destruction or forgery,

commits an offence under this Act and is liable on conviction to imprisonment for a term not less than five years.

That any person who - willfully obstructs any authorized officer of a relevant enforcement or security agency in the exercise of any of the powers conferred on it by this Act, or…[55] It further provides for prosecution [56] as well as witness protection.[57] In addition the Federal high Court shall have the jurisdiction to try any related offence under the Act[58] and provides penalty.[59]

7. Findings

The findings of the paper reveal that terrorism is a global phenomenon and the international community were concerned on the act and encourages country's to strengthen their fight against terrorism. It also reveals that the Nigerian government intensify its efforts in fighting the Boko Haram terrorist in the North-East of Nigeria where a thousand numbers of people killed and several properties both movable and immovable were destroyed. The record of Boko haram throws threw country unbalanced as the current ranking index reported by the Global Terrorist Index ranked Nigeria 4th out of the numbered countries indexed. This is due to the consistent attacks into the lives and properties in the community that lead to the increased and spread of internally displaced persons in Nigeria. it is correct to say that, the government and the military are fully committed into the fight so as to being the end of Boko Haram terrorism in Nigeria, moreover to justice. The amended Act 2013 is remarkable where it addresses the offence under the Act and most be expanded so as to meet up with the current strategy and tactics employed by the terrorists in their attacks.

8. Conclusion

The paper centred on terrorism in Nigeria with an outline on the Terrorism Act as terrorism has been one and major obstacle to the nation. Boko haram has terrorize the North –East of the country, people are fleeing and number of internally displaced persons are increasingly and spreading in the nation's states and its neighbouring countries. The act of terrorism is a global phenomenon having looked at the way it is formed, their categorizations and it clearly gives you an insight of the act. The Terrorism (Prevention), Act identified various offences in relation to the act of terrorism, of course the current government of Nigeria is fighting the terrorist to the last minutes, the commitment of the government is quite remarkable in the fight of terrorist whereas the government energy, resources, and it head of defence, military and intelligence are all fully engrossed into the fight. Thus score a credit to the government in the international community. Therefore the paper recommends that full strict adherence to the Act as well as the international best practices. The local community in the areas affected should commits in sharing any relevant information to the law enforcement agencies that will be helpful in the fight of terrorist. Further, the paper recommends new strategies and counter measures should consistently be adopted in tackling these menace.

[49] Section 20(1), Ibid on attempt to commit an offence under this Act.
[50] Section 20(2), Ibid.
[51] Section 20(3), Ibid.
[52] Section 21, Ibid on preparation to commit terrorist attack.
[53] Section 22, Ibid on unlawful assumption of character of office of any law enforcement or security agency.
[54] Section 23, Ibid on tampering with evidence and witness.
[55] Section 24, Ibid on obstruction of any officer of the law enforcement or security agency
[56] Section 30, Terrorism (Prevention) Act, 2011, Act No. 10.
[57] Section 31.
[58] Section 32.
[59] Section 33.

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CLOUD COMPUTING IN E-COMMERCE IN PALESTINE: LEGAL ISSUES AND CHALLENGES

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ABSTRACT

Today's infrastructure of e-commerce increasingly depends on cloud computing. Companies use cloud computing in e-commerce, because it prevents data loss and provides a complete network with hardware and software, which further enables the merchant to manage their e-transaction in the best possible manner. On the other hand, cloud computing provider is obliged to provide the merchant with the best solution based on their respective agreements. In addition, providing adequate levels of security while using the cloud computing service is equally important because any breach of security will affect the reputation of the merchant and provider, and affect the users via loss or leakage of their data. Although the benefits of cloud computing to the merchants and consumers in e-transaction are clear, there are undoubtedly some challenges and concerns. This paper will discuss these challenges of using cloud computing within e-commerce including the liability surrounding the data security and privacy in the cloud. In addition, this paper seeks to clarify the provider's liability for loss or destruction of the information during cloud computing. Furthermore, this study aims to examine the legality of unfair contract terms in the cloud computing contracts under the Palestinian laws. This study mainly used the analytical and library research to examine the main issues of cloud computing. The laws of Palestine and the Directive 95/46/EC are used in this study to clarify the legal positions on the relevant issues above. It is found from this study that the current laws in Palestine are inadequate to regulate the cloud computing issues. The outlying contract should include a high level of security to the customer to protect their data and information in cases of cloud computing. The cloud provider should provide the appropriate technical means and the procedures to protect personal data against any accident of loss, unauthorized disclosure, and access or transfer of the data via the Internet. The benefit of this paper is to propose some recommendations to develop the Palestinian laws in order to address the issues of cloud computing which will contribute in the development of e-commerce in Palestine.

Key words: Electronic Commerce, Cloud Computing, Liability, Security, Privacy

Introduction

Cloud computing (Cloud service providers) service refers to the development and implementation of models that allow users access to different resources of computing (e.g. networks, servers, storage, applications, and services). This includes the network access techniques that the service provider provides to cloud users.[1] Computing resources in cloud computing are used for different purposes through short periods of time. The process of requesting and receiving resources are completed automatically within a few minutes. Cloud computing contains hardware, software, networks, storage, services, and provides share resources, software, and information to the computers. People do not need to buy and build an IT infrastructure or understand the basics of technology, as all of the operations are done on cloud computers.[2]

A cloud service provider plays an essential role in e-transactions as they provide hardware and software services relating to computing resources. In general, there are many legal issues which may arise from using cloud computing in e-commerce such as the standards provided by cloud computing services, regulatory issues and unfair contract terms. In addition, security is the main concern that faces the users when they use cloud computing services. Therefore, the researcher will discuss all these important issues and the liability of a cloud service provider if he fails in fulfilling his obligations in e-transactions.

Cloud Computing In E-Commerc

[1] Mendhe, T., Kamble, P.A., Thakre, A. K. (2012). Survey on Security, Storage, and Networking of Cloud Computing. *International Journal on Computer Science and Engineering (IJCSE)*, ISSN: 0975-3397, Vol. 4 No. 11, 1780–1785.
[2] Gampala, V., Inuganti, S., Muppidi, S. (2012). Data Security in Cloud Computing with Elliptic Curve Cryptography. *International Journal on Computer Science and Engineering (IJCSE)*, ISSN: 2231-2307, Vol.2, Issue.3.

The businesses in e-commerce rely on hardware and software as their technical architecture, which enables them to determine the best techniques and strategies vis-à-vis e-marketing. Therefore, cloud computing service is an increasingly essential element in building, implementing, and maintaining the technical architecture of e-commerce today.[3]

Cloud computing is essential for e-commerce because it provides a high level of data reduction in an efficient, professional, and safe manner. Furthermore, cloud computing is an increasingly popular option in reducing the loss of data due to safety problems.[4] For the merchants, cloud computing enables them to manage and operate data processing in an effective and flexible manner.[5] Cloud computing is user friendly because the users do not necessarily need to install the software on their system; they just need an Internet connection and a web browser.[6] In short, the infrastructure of e-commerce understandably now depends on cloud computing both on services of the computing software and hardware.

The role of cloud computing in e-commerce indicates its liability, especially because e-commerce depends on software and hardware. Therefore, the cloud provider should be potentially liable if there is any failure in e-transaction due to software and hardware. Hence, cloud computing provider is obliged to provide the merchant with the best software and hardware based on their respective agreements. As a result of this, the provider of cloud computing would be potentially liable under the provision of contractual liability if they do not provide the merchant with the software and hardware that were previously agreed upon. Furthermore, the cloud provider would be liable according to the contractual liability if there were any failure in e-transaction due to failure in software and hardware. On the other hand, the cloud provider would be liable to the end user in e-commerce if there is any harm that befall them due to defects in software and hardware, or if there are any infringement in data security.

In 2011, the percentage of Palestinians aged ten years and above who used the Internet for e-commerce was 3.4% of the whole populations, compared to 11.2% of the firms which implemented e-transactions in the same year. In addition, the percentage of the firms which had a website was 4.8% of the whole firms in the Palestinian Territory in 2011.[7]

In fact, the Palestinian Information Technology Association (PITA)[8] provides many types of products and services such as software development (29%), sale of hardware (28%), internet provision and website design and hosting (11%), training and consulting (10%),services of telecommunications (7%), integration of system and outsourcing(5%), the services of marketing and declaration (5%), industrialization (3%), and electronic equipment design and manufacturing (2%).[9]

On the other hand, the output of communication and information services in Palestine was $588.9m in 2010.[10] In addition, the ICT revenue (percentage of GDP) of this sector was 0.8% in 2008, compared to 3.5% in Egypt and 1.4 in Lebanon.[11]

However, the percentage of spending on the public and private clouds was 15% of the worldwide IT spending in 2011; growing at four to five times the rate of the overall IT market. In 2014, this study expected that 80% of new software offerings will be available as cloud services with over one-third of software purchases will be via cloud. In addition, this study, expected that cloud and traditional service providers will account for 12% of IT infrastructure spending, growing to 20% in 2014.[12]

These statistics reflect the importance of cloud computing around the world, and that the individuals are interested in spending a sum of their money on IT sectors. In addition, the companies are competitive in offering new types of software to the customers. On the other hand, using the Internet in Palestine has increased in the last few years; this encourages the legislator to regulate

[3] Wang, D. (2013). Influences of Cloud Computing on E-Commerce Businesses and Industry. *Journal of Software Engineering and Applications*, Vol. 6 No. 6, pp. 313-318. Accessed on: 6/9/2014.
[4] Sun, Ch. (2012). *Research of E-Commerce Based on Cloud Computing*. Advances in CSIE, Vol. 2, AISC 169, pp. 15–20.
[5] Liu, T. (2011). E-commerce Application Model Based on Cloud Computing. *International Conference of Information Technology, Computer Engineering and Management Sciences (ICM)*. Papers presented at Nanjing, Jiangsu, 24-25 Sept (pp, 147 – 150).
[6] Hashemi, S.M., Bakhtiari, S. (February 2013). Cloud Computing and its Effects on Electronic Commerce: A Survey. *ARPN Journal of Systems and Software*. Vol. 3, NO. 2,. Pp. 25-30.
[7] Palestinian Central Bureau of Statistics. (2011). *Results on ICT Business Survey 2011: About Half of economic establishments Use Computers*. http://www.pcbs.gov.ps/portals/_pcbs/PressRelease/Press_En_ICTBS2011E.pdf. Accessed on: 23/11/2015.
[8] The Palestinian Information Technology Association (PITA) is a non-profit organization that is created by the business men in 1999, and it attends the interests of the Palestine's Information and Communication Technology (ICT) sector. PITA contains more than 160 Palestinian ICT companies. http://www.pita.ps. Accessed on: 23/11/2015.
[9] Wihaidi, Rami. (2009). The Palestinian ICT Sector: A Three-Year Outlook. Based on Economic Indicators. The Palestine Information and Communications of Companies (PITA). http://www.lacs.ps/documentsShow.aspx?ATT_ID=2181. Accessed on: 30/6/2015. At: 10
[10] Palestinian Central Bureau of Statistics. (2012). National Accounts at Current and Constant Prices (2009, 2010). http://www.pcbs.gov.ps/Portals/_PCBS/Downloads/book1838.pdf.Accessed on: 23/11/2015. At: 46.
[11] United Nations Economic and Social Commission for Western Asia. (2009). Regional Profile of the Information Society in Western Asia. http://isper.escwa.un.org/Portals/0/Regional%20Profiles/Regional%20Profile%202009-E.pdf. Accessed on: 23/11/2015. At:141
[12] Gens, F. IDC (International Data Corporation) Predictions 2011: Welcome to the New Mainstream. http://www.ris.org/uploadi/editor/1295368911IDCPredictions2011_WelcometotheNewMainstream.pdf. Accessed on: 23/11/2015. At: 3

new laws organizing this issue; including cloud computing to protect the individuals during the purchase of their goods and services through the Internet.

In general, Palestinian firms have not fully utilised the cloud computing technology with all its features because they face many hindrances in adopting the cloud computing technology such as inadequate financial resources, lack of experts in the issues of cloud computing, insufficiency in network bandwidth, legal and regulatory issues and data sensitivity.[13] Nevertheless, these issues need solution to encourage the adoption of cloud computing in Palestine. In view to support the use of Clouds in Palestine, the researcher recommends that Palestinian legislator creates new laws that motivates the use and addresses the issues of cloud computing as well as clarifies the liability of the Cloud Service Provider regarding any failure or problem in the system which may result in damage to the users or institutions that adopted the cloud computing system. In addition, the Cloud Computing Provider is obliged to take all the procedures to protect the security of the users and their data against unauthorized access and security threats. Finally, there is a need for cooperation between the Palestinian government and the cloud computing firms to organize training courses in the issues of cloud computing to attain professional experience in such issues.

Standards Provided By Cloud Computing Services

The cloud-based e-service model is still dissimilar in its implementation. In other words, the cloud computing services are specific to each cloud provider such as Amazon's S3 and IBM's Blue Cloud. In addition, the cloud providers try to keep their users by providing the services in a way that makes it hard to move to another cloud provider. Given this potential difficulties, it is arguably important to develop and implement a unified industrial standard if we want to develop our system and implement new models into it.[14] Creating such a standard would help principally in service quality, format of data, providing of resources, and the issues of privacy and security.[15]

Creating standard services of the cloud is important to protect the privacy and security of the users such as protecting the data against unauthorized access which potentially comes from ubiquitous sources globally. It is necessary to find the best method to introduce cloud computing services. Furthermore, there is a need to find a manner that obligates the cloud computing providers to fulfil these standard services. As an example, the ISO (the International Organization for Standardization) and IEC (the International Electro-technical Commission) form a specialized system for worldwide standardization; it introduced the ISO/IEC 27018:2014 – Information technology-Security techniques-Code of practice for the protection of Personally Identifiable Information (PII) in public clouds acting as PII processors.[16]

The purpose of the above standard is to ensure that the Cloud Service Provider offers the appropriate controls of information security which maintain the privacy of their customers by securing Personally Identifiable Information (PII).[17] This standard contains various provisions that protect the customer in the case of concluding a contract with the Cloud Service Providers. For example, the Cloud Service Provider is obliged to take permission from the customer if he wants to use the Personally Identifiable Information (PII) for advertisements.[18] This requirement is important to protect the privacy of the users as the cloud provider is obliged to use their information for the specific purpose of the cloud only; he is forbidden from using this information for other purposes. It is an increasing trend that individuals do not like to publish their personal information in an advertisement. In addition, there are many advertisers which bother the customers when the commercial companies had obtained the customers' email addresses; they try to send several messages to them every time, causing a nuisance. In addition, the standards provide that the cloud provider should have the procedures to transfer, delete, or return the data in the case contract termination of the cloud services.[19]

Normally, the cloud services contract contains the provisions of contract termination such as the reason of termination and the period of the cloud computing contract. Therefore, the cloud computing provider is obliged to protect the privacy of the users after terminating the contract, and he is obliged to maintain the users' privacy and information from any unauthorized person, delete them or return them to the users after the cloud contract is terminated. Furthermore, the cloud provider is obliged to apply

[13] Almabhouh, AlaaEddin. (January 2015). Opportunities of Adopting Cloud Computing in Palestinian Industries. *International Journal of Computer and Information Technology* (ISSN: 2279 – 0764). Volume 04 – Issue 01.Pp, 103-109.
[14] Hashemi, S.M., Bakhtiari, S. At: 5
[15] Rashmi., Sahoo, G., Mehfuz, S. (August 2013). Securing Software as a Service Model of Cloud Computing: Issues and Solutions. *International Journal on Cloud Computing: Services and Architecture (IJCCSA)*, Vol. 3, No.4. Pp, 1-11.
[16] International Standard. ISO/IEC 27018. Information technology- Security techniques- Code of practice for protection of personally identifiable information (PII) in public clouds acting as PII processors. First edition: 2014-08-01. https://webstore.iec.ch/preview/info_isoiec27018%7Bed1.0%7Den.pdf. Accessed on: 21/7/2015
[17] ISO/IEC 27018:2014 — Information technology — Security techniques — Code of practice for protection of Personally Identifiable Information (PII) in public clouds acting as PII processors. http://www.iso27001security.com/html/27018.html. Accessed on: 25/11/2015.
[18] Information Integrity Solutions. ISO/IEC 27018 Prime. http://www.iispartners.com/downloads/IIS%20Primer%20on%20ISO%2027018.pdf. Acceded on: 24/7/2015. See also, Beckham, J.A., Hawa. K,. Ramson, A. F., and Sutin, A.N. (November 2014). ISO 27018 - Data Protection Standards for the Cloud. Greenberg Traurig, LLP. http://www.martindale.com/business-law/article_Greenberg-Traurig-LLP_2184114.htm. Accessed on: 24/7/2015.
[19] McCann FitzGerald. (October 2014). *ISO/IEC 27018* – the New Cloud Security Standard. Pp, 1-3. http://www.mccannfitzgerald.ie/McfgFiles/knowledge/5809-ISOIEC%2027018%20%E2%80%93%20the%20New%20Cloud%20Security%20Standard_0.pdf. Accessed on: 21/7/2015.

the procedures in case of data breach such as clarifying the damage if there is any data loss or disclosure, informing the users about the breach, and maintaining the records of this incident.[20]

Breach to users' information security during the use of the cloud services is another worrying issue for both the providers and the consumers. In fact, protecting the privacy of users is an obligation on the cloud service provider; it also upholds the reputation of the Cloud Service Provider. The users look for the Cloud Service Provider who preserves their data privacy at most. Therefore, the Cloud Service Provider must take all that necessary to prevent malicious or accidental breach into their system and to protect the personal information of the users.

In relation to this, the Cloud Service Provider bears some duty to keep their customers updated about their data management procedures and to inform them about the third parties who process their data and who can access their information.[21] This is because in practice many cloud computing companies outsource their work to third parties and allow these parties to access the users' data. Therefore, the Cloud Service Provider is obliged to inform the users about this arrangement and the arising legal relations with the third party. This information is subsequently important to grant the users the right to accept or reject this third party to maintain their personal data from disclosure by an unauthorized party. In other words, this requirement grants more protection to the data of users from disclosure by unauthorized parties.

In light of the above, it is desirable that the companies of Information Technology in Palestine adopt these standards to guarantee more protection to the Palestinian users. Conversely, this can be adopted by the legislators to be accommodated in the local laws or by-laws that regulate ICT in the commercial activities in Palestine. Besides, business associations and consumers group alike may contribute by helping to determine the best practice and specialized cloud computing standards for the Palestinian computing industry, and that includes adopting the international ISO standards in Palestine. This would necessarily lead to a better protection of the information security and privacy of the users vis-à-vis the cloud computing services in Palestine. Needless to say, they should make it open for any new and additional standards to be applied in so long as they are suitable for the Palestinian cloud computing companies and users.

Need for regulatory framework on Cloud Services

Cloud service providers provide many services in cloud computing environment, such as information processing, data storage, security, maintenance, and other works. Therefore, regulating and controlling cloud computing services is important to protect the security of users, especially if the provider plays a role in dealing with the user's information.[22]

Regulating the duties and tasks of the cloud provider on data storage is a crucial matter, because the storage contains many types of the users' personal information. The Cloud Service Provider is obliged to protect the users' data during its processing and storage, and prevent any access of this data by any unauthorized person. In addition, there is a need for regulating the duties of the Cloud Service Provider in the issue of using the users' data. The providers can use the data for the cloud purpose, and forbid using the data for other purposes such as selling them to commercial companies for advertisement purposes.

On the other hand, the laws that organize cloud computing activities in e-commerce in Palestine are insufficient. Therefore, problems will arise when we want to apply the law to organize the activities of cloud computing.[23] In short, legislating new laws that organizes the work of cloud computing in e-commerce activities is important, especially for Palestine. This is crucial to ensure clarity on the liability of cloud computing in e-commerce activities and especially in protecting the data of users during e-transaction. In line with that, laws that clarify the liability of cloud computing in cases of failure in its services or equipment are equally important.

Unfair Contract Terms

The majority of cloud computing provider uses complex contracts containing unfair terms. They use the standard contracts in realizing the interest of the cloud provider against the users and consumers in e-commerce. In addition, many cloud computing contracts are non-negotiable, and they contain disclaimers on the liability for data integrity, confidentiality, or service continuity.[24]

This unfair term has been a long-standing issue in many types of contracts. Indeed, it is equally controversial when it comes to cloud service contracts. Generally, there are many unfair terms in these contracts that exclude the liability of merchants in case of damage or failure in submitting the same agreement services, allowing unilateral changes of the contract terms and the terms of

[20] ACT | The App Association. White Paper on Cloud Privacy Standard ISO 27018. Pp, 1-4. http://actonline.org/wp-content/uploads/2015/02/ISO.pdf. Accessed on: 24/7/2015.
[21] Ibid.
[22] Saleh, A. A. (2012). A Proposed Framework based on Cloud Computing for Enhancing E-Commerce Applications. *International Journal of Computer Applications* (0975 – 8887) Volume 59– No.5. Pp, 21-25.
[23] Liu, T.
[24] European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Unleashing the Potential of Cloud Computing in Europe. Brussels, 27.9.2012 COM (2012) 529 final. http://www.beuc.org/publications/2013-00143-01-e.pdf. Accessed on: 4/9/2014. At: 11

arbitration. Furthermore, the contracts between the merchants and consumer contain unfair terms that do not protect the right of consumers, such as the authority in processing unnecessary data for services.[25]

One wonders what Palestinian law has to say on this issue. It is worthy to note a provision from the article 150 of the Palestinian Civil Draft Law No. 4/2012, which provides that: "If the contract is concluded by way of adhesion, and contains unfair terms, the court can modify these terms or exempts the compliance party from it in accordance with fairness and justice. Any agreement provides otherwise is void."[26] The law gives the court the authority to modify the adhesion contract to protect the weaker party. The court can modify or cancel unfair terms from the contract, and the parties cannot agree to cancel the right of the court because the authority of the court in this issue is derived from public order. In addition, the Palestinian Consumer Protection Law, No. 21/2005 provides: "The council can review the reasonableness and justice of the terms in consumption contracts and standard contracts, and recommends to the minister or the party who issues these contracts to remove unfair terms on the rights of consumer, or requires to reconsideration in these terms. The Council of Ministers releases the system that defines the standards for estimating the terms that can be considered unfair in consumption contracts."[27] This law gives the council of consumer protection the power to review the contract and to oversee the terms inside, and the council can compel the removal of unfair terms from these contracts.

Data Security And Privacy Of Cloud Computing

Cloud computing leads to concerns about the security of users in e-commerce, especially the loss the important data of **e-**commerce transaction and the threats of breach of privacy during e-commerce, because cloud platform stores all the IT resources, such as hardware, software, data, and network applications.[28] In general, security remains the main issue of cloud computing vis-à-vis users, especially via the Internet. It is therefore imperative that Internet users be provided a secure platform that will guard their personal data during their cloud computing sessions.

Cloud computing is made up of multiple technologies, such as networks, databases, operating systems, virtualization, scheduling of resource, management of transaction, load balancing, and memory management, which makes it open to security issues, such as the security of the network systems, security of data, security of memory management, and the security of sources allocation.[29] **Businesses are concerned about the security and safety of its data during cloud services. Any breach of security in cloud computing leads to financial losses for businesses and affect its reputation and customers' confidence. Service provider organizes cloud computing, and any breach of security will affect its future business.**[30] Therefore, providing high levels of security during cloud computing is important because any breach of security in clouding will affect the reputation of the merchant and provider, and effect the users via loss or breakage of their data.

Cloud computing solved many traditional security requirements, such as authority, information integrity, non-repudiation, and problems relevant to authentication, but there are many security problems that still exist, such as data confidentiality and network security.[31] The provider should provide the appropriate technical means and the procedures to protect personal data against any accident of loss, unauthorized disclosure, and access or transfer of the data via the Internet. Therefore, the provider would be liable for loss or destruction of the information during cloud computing if they did not address the technical issues and measures to protect the user's data.

In this respect, not much we can trace from the Palestinian law. Attention is then made to look at the European Union's Opinion 05/2012 on Cloud Computing[32] examines the relationship between the cloud service provider and the cloud client on the basis of EU Data Protection Directive (95/46/EC). Firstly, the cloud client determines the ultimate purpose of the processing, and decides on the outsourcing of this processing and the delegation of all or part of the processing activities to an external organization. The cloud client therefore acts as a data controller.[33] The Directive defines a controller as "the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of

[25] The European Consumer Organisation. EU Cloud Computing Strategy. BEUC Position Paper. Ref.: X/2013/014 - 28/02/2013. http://www.beuc.org/publications/2013-00143-01-e.pdf. Accessed on: 4/9/2014. At: 7
[26] This article is in parimateria with article 204 of the Jordanian Civil Law. Number: 43 of 1976
[27] The Palestinian Consumer Protection Law, number 21/2005. Article: 23
[28] Wang, D. At: 3
[29] Sen, J. Security and Privacy Issues in Cloud Computing. http://arxiv.org/ftp/arxiv/papers/1303/1303.4814.pdf. Accessed on: 28/4/2014. At: 7
[30] Vincent, M., Hart, N., Morton, K. Cloud Computing Contracts, White Paper, A Survey of Terms and Conditions. http://www.itnews.com.au/pdf/Cloud-Computing-Contracts-White-Paper.pdf. Accessed on: 28/4/2014. At: 10.
[31] Hashemi, S.M., Bakhtiari, S. At: 4
[32] Opinion of the European Data Protection Supervisor on the Commission's Communication on "Unleashing the potential of Cloud Computing in Europe". https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2012/12-11-16_Cloud_Computing_EN.pdf. Accessed on: 26/8/2014
[33] See Opinion of the European Data Protection Supervisor on the Commission's Communication on "Unleashing the potential of Cloud Computing in Europe". https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2012/12-11-16_Cloud_Computing_EN.pdf . Accessed on: 26/8/2014. At: 12. See Also, Article 29 Data Protection Working Party. Opinion 05/2012 on Cloud Computing. http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2012/wp196_en.pdf. Accessed on: 28/8/2014. At: 7

personal data."[34] Therefore, the cloud client, as a controller, must accept responsibility for abiding by data protection legislation, and is responsible and subjected to all legal duties that are addressed in Directive 95/46/EC.[35] Next, when the cloud provider supplies the means and the platform and act on behalf of the cloud client, the cloud provider is regarded as a data processor according to Directive 95/46/EC,[36] is the natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller.[37] Moreover, there may be situations where a provider of cloud services may be considered either as a joint controller or as a controller in their own right, depending on concrete circumstances. For instance, this could be the case where the provider processes data for its own purposes."[38]

Therefore, the researcher examines the Directive 95/46/EC of the European Parliament in the issue of security in cloud computing. Article 17(1) of Directive 95/46/EC stipulates: "Member States shall provide that the controller must implement appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.[39] The technical security measures should be provided and protect the providers. If the provider works through a processor, they should choose a processor that guards technical measures and security.

Article 17(2) of Directive 95/46/EC provides: "The Member States shall provide that the controller must, where processing is carried out on his behalf, choose a processor providing sufficient guarantees in respect of the technical security measures and organizational measures governing the processing to be carried out, and must ensure compliance with those measures."[40] Furthermore article 17(3) of the Directive provides: "The carrying out of processing by way of a processor must be governed by a contract or legal act binding the processor to the controller and stipulating in particular that the processor shall act only on instructions from the controller, and that the obligations set out in paragraph 1, as defined by the law of the Member State in which the processor is established, shall also be incumbent on the processor."[41]

The Directive 95/46/EC defines the processor in article 2(e), where it defines 'processor' as a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller.[42] The processor is subjected to instructions of the controller according to the contract that clarifies the obligations of the parties. The parties can prove the obligations or measures on the protection of the security of data by writing another equivalent form according to the article, 17(4) of Directive 95/46/EC: "For the purposes of keeping proof, the parts of the contract or the legal act relating to data protection and the requirements relating to the measures referred to in paragraph 1 shall be in writing or in another equivalent form."[43]

The contract obliges the cloud service providers to provide the customers with security. The provider can help customers evaluate the risks and open their security equipment to protect their data during cloud service. The cloud service provider are obliged to provide high levels of security for data in the process of clouding.[44] The parties can include the terms in the contract, where the vendor is obliged to notify the customers in case there were breaches in security.[45] In other word, the contract organizes the obligations of the parties in cases of cloud computing, such as the level of security and the types of information that should be protected. Therefore, the provider would be liable according to the provisions of contractual liability if there were any breaches in the security of information or losses. Therefore, the cloud service provider are obliged to provide security for customers according to the laws and the contract stipulating the obligations of the parties. The contract should include a high level of security to the customer to protect their data and information in cases of cloud computing.

The technologies play an essential role in cloud computing as it depends on multiple technologies. Therefore, the security of these platforms is an essential issue that concerns the users when they provide their personal data. In general, providing a high

[34] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Article: 2/d.
[35] See Opinion of the European Data Protection Supervisor on the Commission's Communication on "Unleashing the potential of Cloud Computing in Europe". At: 12. See Also, Article 29 Data Protection Working Party. Opinion 05/2012 on Cloud Computing. At: 8.
[36] Ibid. At: 8
[37] Ibid. At: 8
[38] Ibid. At: 8
[39] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Article, 17/1
[40] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Article: 17/2
[41] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Article: 17/3
[42] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Article: 2/e
[43] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Article: 17/4
[44] Vincent, M., Hart, N., Morton, K. At: 10
[45] McDonald, S. Legal and Quasi-Legal Issues in Cloud Computing Contracts. http://net.educause.edu/section_params/conf/ccw10/issues.pdf. Accessed on: 28/4/2014

level of security during cloud computing is an essential obligation to protect the user's data, and maintain the reputation of the cloud service provider. As a rule, the provider should provide the appropriate technical means to protect personal data against any threats. In this case, the Directive 95/46/EC obliges the controller in implementing the appropriate technical measures to protect personal data against any threats; the controller is still liable when he chooses the processor. In brief, a cloud service provider is obliged to provide the customers with a high level of security according to the laws and the contract. Therefore, the provider would be liable if there were any losses or breaches in the security of information.

Liability in the Cloud

Liability in the cloud is a main challenge, especially if there are any loss or destruction of the customer's data. The problem arises when clarifying the liability of the merchant or cloud service provider. Therefore, limiting the liability for security or risks in clouding is an important issue.

An important issue for the cloud providers is their reputation; they provide the customer with services that keep their data from being lost or hacked. There are also other threats to customers of cloud computing, such as server crash or hard drive failures.[46] An example of this is the failure of Microsoft cloud in 2009. Data such as contacts, calendars, and other data of mobile phone users are stored on the cloud of Microsoft. Microsoft sent a message its cloud customers after their cloud facility failed, stating "Regrettably, based on [Microsoft's] latest recovery assessment of their systems, we must now inform you that personal information stored [in our cloud] almost certainly has been lost as a result of a server failure at [Microsoft]."[47]

The person should be able to claim compensation from cloud service provider for any damage that results from unlawful processing operations. Article 23(1) of Directive 95/46/EC provides: "Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered."[48] Therefore, the provider would be liable for any damage to the customer from damage in the cloud, or if they can prove that the damage was not a result of their own negligence or wrongdoing. Article 23(2) of Directive 95/46/EC provides: "The controller may be exempted from this liability, in whole or in part, if he proves that he is not responsible for the event giving rise to the damage."[49]

The problem is that there are many contracts containing terms that exclude the liability of the cloud provider from the loss or breach the security of the data. For example, "The Service is provided with no warranties regarding security, reliability, protection from attacks, data integrity, or data availability (including without limitation data integrity or availability related to cloud storage features of the Service)."[50]

In this term, the cloud provider escapes liability in the issue of security breach, and the users bear this liability as weak parties. In fact, the provider creates these terms and obligates the user to agree with the content without having any chance to negotiate or remove these terms. In other words, these terms are unfair as they were created by the providers and protect their interest over the interest of users. Therefore, the researcher recommends creating official and specialized committees to review the cloud contracts, especially the terms of the exclusion clauses. In addition, these committees can organize standard contracts relating to the cloud computing services, particularly the terms of the cloud providers' liability in case of security breach and privacy.

Based on these discussions, it can be concluded that, the cloud service provider would be liable in cases of breach in contract. They would also be liable if they fail to provide the same level of clouding, or in cases of breach in the security of the customers or loss of their data. The service provider is obligated, as per their contract to guard the security of their customers in cloud computing. Unfortunately, Palestinian legislations do not indicate the liability in the case of cloud computing in e-transaction. In other word, Palestine needs new legislations that organizes cloud computing, and protect the consumer's data from any threats, such as loss or damage during cloud computing. Learning from the EU Directives may provide some practical guidance to the Palestinian legislators.

Conclusion

The breach of a contract leads to the liability of the Cloud Service Providers. They would also be liable if they fail to provide the same level of clouding or in cases of breach in the security of the customers or loss of their data. The service provider is obligated, as per their contract to guard the security of their customers in cloud computing. In addition, the contract should include a high level of security to the customer to protect their data and information in cases of cloud computing. The cloud provider should provide the appropriate technical means and the procedures to protect personal data against any accident of loss, unauthorized disclosure, and access or transfer of the data via the Internet. Therefore, the provider would be liable for loss or destruction of the information during cloud computing if they did not address the technical issues and measures to protect the

[46] Calloway, T. J. Cloud Computing, Click wrap Agreements, and Limitation on Liability Clauses: A Perfect Storm. *Duke Law & Technology Review*. Vol. 11 No. 1, 164-174.
[47] Ibid.
[48] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Article: 23/1
[49] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Article: 23/2
[50] Vincent, M., Hart, N., Morton, K. At: 10

user's data. On the other hand, the cloud provider would be liable to the end user in e-commerce if there any harm that befall them due to defects in software and hardware, or if there are any infringement in data security.

At this juncture, it is very obvious that the working mechanism of cloud computing service in electronic commerce activities has not been adequately regulated. Many legal aspects of the service are far from clear. In Palestine this is more obvious because of lack of legal and regulatory infrastructure. This paper therefore exposes those potential problems and challenges posed by the cloud computing services and how the law should respond. Learning form international instruments including EU Directive and the ISO standards would certainly be helpful.

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THE ABUSE OF THE DUE PROCESS DOCTRINE

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ABSTRACT

Under the Malaysian evidence law, evidence procured by illegal methods, even by reprehensible methods such as entrapment is still admissible as long as it is relevant. Even though, there is a discretion to exclude, it is exercised in very circumscribed circumstances. In England, although entrapment is not a defence – the judiciary has adopted the 'abuse of due process' doctrine to overcome the unjust effects of admitting such evidence by staying the proceedings. Recently, in Wan Mohd Azman bin Hassan v PP [2010] 4 MLJ 141, the Federal Court was asked to consider receiving the doctrine, it was reluctant to do so. This paper seeks to propose that this valuable instrument should be considered strongly because it can go a long way in promoting justice and avoiding serious miscarriage of justice in the Malaysia criminal justice system.

Key words: Abuse of Court Process, stay of proceedings.

Introduction

At common law, all courts claim inherent jurisdiction to control their own proceedings in the interest of justice. This notion was articulated as far back as 1914 in *R v Christie* [1914] AC 545 HL, and confirmed recently in *R v Sang* [1980] AC 402, HL. This is fertile soil in which the doctrine of abuse of process took root, and subsequently blossomed. . In *Azahan bin Mohd Aminallah v Public Prosecutor* [2005] 5 MLJ 334, the Court of Appeal (Putrajaya) referred to the Federal Court case of *Kiew Foo Mui v Public Prosecutor* [1995] 3 MLJ 505 which clarified the meaning of justice to mean: '*… the expression 'justice' comprehends not merely a just decision but also a fair trial. ….. a denial of fair trial is denial of justice. One of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked*.' The same Court of Appeal too was mindful of what Lord Denning MR in *R v Police Commissioner of the Metropolis ex parte Blackburn (No 2) [1968] 2 QB 150* said: '*All we would ask is that that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.*'

Hence, the trial judge's first duty in criminal litigation is to ensure a fair trial. Trial judges retain a residual background jurisdiction to prevent or correct injustices for which there would otherwise be no remedy.

Research Objective and Methodology

This paper evaluates the extent courts in Malaysia are willing, in the lights of developments in the United Kingdom and Europe, to jealously protects its own process from being degraded and misused and must where appropriate, stay proceeding when the extent of abuse of process offended the court's conscience as being contrary to the law. This paper, therefore, seek to propose that this valuable instrument i.e. doctrine of abuse process should be considered strongly because it can go a long way in promoting justice and avoiding serious miscarriage of justice or failure of justice in the Malaysia criminal justice system. The methodology for this research is qualitative, using library based materials, particularly relevant decided cases.

Entrapment, Illegally Obtained Evidence and Abuse of Process

"Entrapment" refers to the enticement of a person by an agent provocateur to commit an offence he would not have otherwise committed. It has been well established for nearly thirty-five years (in England and followed in Malaysia and Singapore) that

there is no defence of entrapment in criminal law but entrapment can be taken into account in mitigation of sentence (*R v Sang* [1980] AC 402; *Wan Mohd Azman bin Hassan@ Wan Ali v PP* [2010] 4 MLJ 141; and *PP v Han Kong Juan* [1938] CLJ Rep 773). The absence in England, Australia, Malaysia and Singapore of the substantive defence of entrapment is in clear contrast to the position in the Federal jurisdiction of the United States which recognises in its criminal law a defence of entrapment [*R v Sorrels* v US 287 US 435(932); Jacobsen v US (1992) 503 US 540.

There has, however, been recent rise to prominence towards excluding evidence obtained through entrapment where there is an abuse of process. Abuse of process according to Lord Steyn in *R v Latif* [1996] 1 WLR 104, 112 means '*an affront to public conscience*' or to Lord Bingham in *Nottingham City Council v Amin* [2000] 1 WLR 1071, 1076 matters '*deeply offensive to ordinary notions of fairness*.' What the meaning amounts to is that entrapment involves agents of the state luring or enticing persons to commit offences or otherwise instigating the crime. This was explained by Lord Nicholls in *Loosely* [2001] UKHL 53, [2001] 4 All ER 897, [2001] 1 WLR 2060, where the House of Lords reviewed the law governing abuse of process and the relationship between this concept and the discretion to exclude evidence.

'*It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so*' ([2001] 1 WLR 2060 at [11]).

Entrapment Amounting to Unfair Trial

In a situation where it is clear that there has been an abuse of process, it may not be sufficient for the court to merely decide on the admissibility of the evidence obtained through entrapment but to consider staying the entire proceeding against the defendant too. This is because the defendant is validly arguing that he should not be tried at all as he was 'lured' to commit the crime he would not have otherwise committed. Where the defendant fails in his application to stay the proceeding, it will still be open for him to seek to exclude the evidence. To stay a proceeding, and the admissibility of the evidence are distinct matter and different tests apply to these two decisions.

Both the Court of Appeal in *Shannon* [2001] 1 WLR 51 and the House of Lords in *Loosely* [2001] UKHL 53, [2001] 4 All ER 897, [2001] 1 WLR 2060, additionally measured the question of entrapment against the yardstick of European Human rights law. Notably, the courts referred to the leading European decisions of *Teixeria de Castro v Portugal* (1998) 28 EHRR 101, which distinguished covert investigation of crime which was acceptable, and the positive instigation of offences which could not be countenanced. Lord Hoffman in *Loosely* took note that in *Teixeria*, the European Court of Human Rights concluded the two police officers had not merely operated undercover but had actually instigated serious crime without following the customary procedure in Portugal of conducting their investigations under judicial or police supervisions, ought not to have been admitted because it violated *de Castro's* right to a fair trial.

Taking the hint from *Loosely*, the appropriate test for entrapment is whether or not the police's law enforcement methods were part of a bona fide investigation as opposed to being merely a means of 'preying on the weaknesses of human nature to create crime for an improper purpose' (per Lord Hoffman at [58]). The case is not the same as held by the Strasbourg court in *Khan v United Kingdom* (2000) 8 BHRCC 310, in that a listening device had been unlawfully applied to the wall of a suspect's house in breach of art. 8, violating K's right of privacy, did not of itself render K's trial unfair under art. 6.

As to what form of entrapment will trigger the trial unfair hence staying the proceeding, this can be gleaned from the House of Lords's view of the Court of Appeal's decision in *A-G's Reference* (No. 3 of 2000) [2001] UKHL 53, [2001] 4 All ER 897, [2001] 1 WLR 2060. The Court of Appeal had determined that the trial judge had wrongly stayed proceedings against a drug dealer, with a previous record of dealing in soft drugs, who had twice obtained and supplied heroin at the insistent request of undercover police officers. The Court emphasised that when deciding whether an abuse of process has occurred, the judge must bear in mind that there exists a spectrum of possibilities: at one end, there is the defendant who has simply been offered the market price for drugs – who can hardly argued that he has been entrapped; towards the other extreme, a judge might view in a different light, the perspective of police officers dangling large sums of cash under the nose of someone in urgent need of money, thereby, persuading the person to do something that he might not otherwise have done. *Texiara de Castro*, it was urged, has to be considered in the context of its particular facts and of Portuguese criminal procedure. In *A-G Reference* (No. 3 of 2000) the Court of Appeal concluded that the police had done no more than give the accused an opportunity to breach the law, of which he had freely availed himself. In the view of the House of Lords, however, the trial judge had been entitled to stay proceedings in that case: the accused had never before dealt in heroin and he had been induced to procure heroin by the prospect of a profitable trade in smuggled cigarettes – something not normally associated with the commission of this offence. The judge could therefore justifiably take the view that the police had caused the accused to commit an offence that he would not otherwise have committed (cf *Loosely*, at [81] and [116] per Lord Hoffmann and Hutton).

Stays for Abuse of Process

A judicial stay of proceedings for abuse of process is a jurisdictional remedy which operates irrespective of the substantive merits of the case. It authorises the judge to 'stay' i.e. to stop or suspend, a prosecution indefinitely where the judge decides that a fair trial cannot take place either because of something which has already happened in the course of litigation, or due to circumstances likely to prevail were a trial to take place. An example of the former would be a case where the police or prosecutor has behaved in such an outrageous way – torturing a suspect or joining a criminal conspiracy, when proceedings are seriously compromised, even though the accused may well be guilty of the crime charged. An example of the latter would be a case where an accused has attracted such unfairly prejudicial pre-trial publicity that his right to receive a fair trial by unbiased trier of fact is seriously jeopardised. In *Wan Mohd Azman bin Hassan@Wan Ali v PP* [2010] 4 MLJ 141, the facts showed that

the accused was an 'unwary criminal' who readily participated in the offence, and thus, there was no entrapment. Though the Federal Court was of the view that entrapment is not a substantive defence in Malaysian law, it nevertheless said that in any event, if there ever was entrapment, the burden falls on the accused to prove defence of entrapment in that he was an 'unwary innocent' who would not, but for the entrapment, have committed the offence. This same stance was also taken by the Court of Appeal (Putrajaya) in *Suzimi Bin Shaari v PP* [2011] 5 MLJ 164 which followed Wan Mohd Aznan and held the common law position that entrapment is not a substantive defence remains the law. It is for the accused to prove that he committed the offence as a result of an entrapment. In *Suzimi*, the accused failed to show that he was actually an 'unwary innocent' who would not, but for the entrapment, have committed the offence. On the contrary, the evidence was clear that the accused readily participated in the offence. In *PP v Zul Bin Hassan & Ors* [2013] MLJU 495, the court took note that the law allows the use of agent provocateurs, and is not uncommon technique employed by the police in apprehending drugs traffickers or organized crimes where it is difficult to secure evidence in the usual method

In entering a stay, the judge effectively says the prosecution is so flawed or tainted that he cannot be confident that the accused would receive a fair trial; such an abusive proceeding must therefore be stopped without even examining the evidence on the substantive charge. A stay is not the legal equivalent of an acquittal, nor even, a final determination of the case. But it operates in practice to terminate proceedings without any real possibility of the case being recommenced. In fact, it would probably be a further abuse of process, absent some material change of circumstances, for a prosecutor to attempt to resurrect a charge previously stayed for abuse of process.

In civil case, in *Mills v Cooper* [1967] 2 Q.B. 459 DC, where Lord Parker C.J. said at p 467, '*Every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court*.' The doctrine of abuse of process is over 100 years old but its application to criminal proceedings in effect starts with landmark case of *Connelly v DPP* [1964] AC 1254 HL which also discussed the Malayan case of *Sambasivam v PP* [1950] MLJ 145. The issue in *Connelly* was whether the accused could be prosecuted and acquitted of a murder arising out of the same underlying incident, an armed robbery of known Co-op. Although it was concluded that the second prosecution was permissible in these particular circumstances, at least three of the Law Lords affirmed the existence of a general jurisdiction, extending beyond the narrow ambit of the formal 'double jeopardy' pleas in bar *autre fois acquit* that would prevent vexatious or otherwise unfair repeat prosecution even of technically different offences. Lord Morris explicitly based this judicial power on the court's inherent control over the integrity of its own process. Three general grounds may be identified on which a judge might stay proceedings: (i) prosecution manipulation or misuse of process; (ii) undue delay; and (iii) police impropriety in the conduct of criminal investigation (see Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (1993) CLJ 2-4; Halting Criminal Prosecutions: *The Abuse of Process Doctrine Revisited*." [1995] Crim LR 864.

Within each of these general categories, it is possible to identify distinctive categories of stays, unfair repeat prosecutions (double jeopardy), breach of promise made to the accused by police or prosecutions (e.g. *R v Croydon Justices ex p Dean* [1993] QB 769 DC), prosecutions in bad faith, and illegal or irregular extradition. Adverse pre-trial publicity has also emerged as a ground for judicial stay in principle though the test is very difficult to satisfy in practice. For example, in the notorious case of *R v West* [1996] 2 Cr App R 374, CA, in which a stay was refused despite very extensive and patently prejudicial pre-trial media coverage of the notorious crimes *Fred and Rose West*. Lord Taylor CJ articulated at p 386:

'*the question raised on behalf of the defence is whether a fair trial could be held after such intensive publicity adverse to the accused. In our view it could. To hold otherwise would mean that if allegations of murder are sufficiently horrendous so as inevitably to shock the nation, the accused cannot be tried, that would be absurd'*.

The House of Lords took another major stride forward in its second landmark decision on abuse of process in *Ex.p. Bennet* [1994] 1 AC 42 HL. Bennet, a New Zealand national was wanted for offences in England connected with his allegedly fraudulent acquisition of a helicopter, but he had fled to South Africa beyond the reach of the then existing extradition regimes. Seemingly, the British and South African police (apparently with the blessing of the Crown Prosecution Service) colluded to have Bennet deported from South Africa to New Zealand via London Heathrow Airport where he could be apprehended en route by the British police without supposedly transferring between flights. The plan seem to have work perfectly until the authorities tried to bring Bennet to trial when he objected to having been brought within the jurisdiction by unlawful means, effectively amounting, he argued, to official kidnap. Departing from earlier authority, that it is no business of the courts to inquire into the manner in which a person properly charged with a criminal offence was brought within the jurisdiction, the House of Lords held the proceeding against Bennet had to be stayed for abuse of process if the British and South African authorities had truly colluded in the way alleged. Lord Griffith noted that –

'*it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also it should be in the field of criminal law and if… there has been a serious abuse of power, it should… express its disappointment by refusing to act upon it. The courts … have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution*.'

Lord Lowry also said in these memorable words:

`*The Court … to protect its own process from being degraded and misused must have the power to stay proceeding … and have only been made possible by act as offend the court's conscience as being contrary to the law. The acts by providing a morally*

unacceptable foundation for the exercise of the jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the courts' process has been abused.'

Bennet's principle has since been applied in other important extradition cases (*R v Mullen* (no.2)[2007] QB 520 CA; See Laura Davidson, "*Quashing Convictions for Pre-Trial Abuse: Breaching Public International Law and Human Rights* [1999] CLJ 446). However, the significance of the decision extends far beyond its immediate subject matter. The idea of the Court's conscience as a litmus test for the moral legitimacy of criminal prosecution, expressed too lucidly by Lord Lowry, has already been extended to cases concerned with propriety of undercover police operations and the serious question of entrapment as discussed above.

Conclusion

In the light of *R v Loosely*; *A-G's Reference* [No. 3 of 2000], there is now a distinct doctrine of entrapment in English law, requiring proceedings made possible by improper entrapment to be stayed as an abuse of process of the court. It will be wise for the Malaysian Courts to consider this doctrine of abuse process, in view of the fact that so much evidence that it is often procured by such illegal and reprehensive means is repugnant to notions of justice or a fair trial.

The Court too must jealously protects its own process from being degraded and misused and must where appropriate stay proceeding when the extent of abuse of process offended the court's conscience as being contrary to the law. It is when the deception actually implants the criminal design in the mind of the accused. Silence is not an option when things are ill done, and the court should be prepared nor will it be deterred from doing what is right where the occasion requires, provided that it is pertinent to the matter in hand i.e. the conduct of the law enforcement agency was so seriously improper that it bought the administration of justice into disrepute. The judge could, therefore, justifiably take the view that the police had caused the accused to commit an offence that he would not otherwise have committed i.e. he was actually an 'unwary innocent' who would not, but for the entrapment, have committed the offence

LEGAL PROTECTION AND CERTAINTY IN FINANCING ACTIVITIES BY COMPANY FACTORING RECEIVABLES (FACTORING) AS EFFORTS TO ACHIEVE ECONOMIC DEVELOPMENT IN INDONESIA

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ABSTRACT

Financing Company Factoring as stipulated in Article 1 point 6 Regulation of the President of the Republic of Indonesia Number 9 of 2009 on Financing Agency stated that Factoring (Factoring) is a financing activity in the form of purchase of accounts receivable short term a company follows the maintenance on these receivables. Activities Factoring is done by means of a takeover or the purchase of receivables. Presidential Decree No. 9 of 2009 following the implementation regulations are not substantively regulate how the transfer of receivables carried out. Transfer of receivables under the provisions of Article 613 the Code Civil (Civil Code) that can be applied to the transfer of receivables also can not fully guarantee the protection and legal certainty, especially against this type of factoring without notification. There are three parties in financing activities Factoring among others Factoring company (Factor), Client and Customer. In the course of Factoring, the agreement was made only agreement between the Company Factoring (Factor) to the Client alone. To ensure the protection and legal certainty for the parties urgently needed a legal construction structuring financing activities through the Company Factoring as an effort to support economic development.

Key words: Protection and Legal Certainty, financing activities, the Company Factoring, Economic Development.

Introduction

The Company is one of the institutions, where people conduct business activities in the economic field. Article 1 letter (b) of Law No. 3 of 1992 on compulsory registration of the Company stated that:
"The company is any form of business that is running any kind of business a permanent and continuous and established, work and domiciled in the territory of Indonesia for the purpose of gain or profit".

The gain or profit to be one of the main objectives of a company. The development of the company's business will carefully take into account the inclusion of the results of his efforts and expenses as the company's costs.

Aspects of financing is an important aspect in the development of economic activities. Economic players in Indonesia are still largely enough capital, while also attempt to seize the customers in the increasingly fierce competition situation requires them to lighten the ways of payment of their products. The means of payment are then commonly taken is to provide payment facilities futures. Payment term given to the buyer the seller is bound to disrupt the cash flow the company because sellers who bear the risk.[1]

The company uses alternative sources of funds from bank loans, in addressing the need for funds, bank credit at the present time is not reliable anymore, given the lending rates are relatively high and guaranteed in terms of the bank loan. Then it is necessary that other funding alternatives, one alternative is to utilize the funding facilities provided by the Financing Institution. Efforts to introduce Financing Institutions as one type of business in finance is meant to be able to accommodate the needs of the business will be more varied sources of financing.

Regulation of the President of the Republic of Indonesia Number 9 of 2009 on Financing Institutions (hereinafter referred to Presidential Decree 9 of 2009), in Article 1 paragraph 1 stated that the Financing Agency is an entity that perform financing activities in the form of providing funds or capital goods. One type of business Financing Agency is Factoring, in Article 1 paragraph 6, states that Factoring is a financing activity in the form of short-term accounts receivable purchase of a company following the management of receivables.

Article 1 letter e and Article 7 of the Regulation of the Minister of Finance No. 84 / PMK.012 / 2006 on Financing Company (hereinafter referred to as PMK 84 / PMK.012 / 2006), it is known that Factoring is a company with a limited liability company, has a position as a buyer in the transaction of sale and purchase of receivables or short-term bills of a company.

Presidential Decree 9 of 2009 and PMK 84 / PMK.012 / 2006 does not regulate substantively how activities Factoring financing by the Company are exercised. In the absence of regulation substantively certainly can cause problems related to the protection

[1] Budi Rahmat, *Anjak Piutang Solusi Cash Flow Problem*, PT. Gramedia Pustaka Utama, Jakarta, 2003, hal.xxi

and legal certainty for the parties in the activities Factoring, the first financing operations by the Company Factoring is providing substantial benefits for businesses, especially for small and medium enterprises where sources of funds are still very limited. Factoring Company's presence is expected to be used as working capital financing alternatives that can provide protection and legal certainty as efforts to achieve economic development in Indonesia.

Writing Purpose

1. To determine the Construction Law Financing Activities By Company Factoring in the legal system in Indonesia.
2. To know the benefits of financing activities by the Factoring Company in Indonesia
3. To determine the Protection and Legal Certainty In Financing Activities By Factoring Company in Indonesia.

Discussion

1. Construction Law Financing Activities By Company Factoring in the legal system in Indonesia.

Factoring in the Indonesian language translates to mean Factoring receivables transferred. While understanding Factoring / Factoring according to John Downes and Jordan Elliot Goodman in the Dictionary of Finance and Investment Terms is:
"Type of financial service why a firm sells or transfers title to its accounts receivable to a Factoring company, the which then acts a principal, not as an agent. The receivables are sold without recources, meaning that the Factor can not turn to the seller in the event accounts PROVE un collectible "[2]

Presidential Decree 9 of 2009 and PMK 84 / PMK.012 / 2006 provides that, Factoring is a financing activity in the form of short-term accounts receivable purchase of a company following the management of receivables.

Factoring company can be defined by companies whose activities do billing or purchase or acquisition or management of accounts payable or a company in exchange for certain payments from the company (Client).[3]

Definition of factoring is similar to the explanation of Article 6 point 1 of Law No. 7 of 1992 as amended by Act No. 10 of 1998. In the Act, factoring is defined as the activity of management of receivables or short-term bills of trade at home and abroad, which is done by way of a takeover or the purchase of the receivables.[4]

Based on the above definition, it can be mentioned that factoring is a technique of short-term funding by utilizing receivables owned by a company. The company concerned to sell or give away the rights to their receivables to the factoring company. Factoring company then handed the money to the company amounting to a certain percentage of the total value of receivables. In return, the factoring company to charge an administration fee and interest in the company.[5]

There are 3 (three) parties in the activities Factoring (Factoring):[6]
Company Factoring (Factor), which is a company that will buy or accept the transfer of receivables, which serves a sort of "middleman" between the client and customer. In practice companies factor can be done by a financing company or banking institution.
2. Client, namely as the owner of the receivables from customers and will sell or transfer its receivables to the factor company;
3. The Customer, that as the debtor is owed to the client, which further the activities of factoring, receivables that rises from the debt transferred to the company factor.

A business entity may be the company Factoring is a moving company specialized in factoring business or company that in addition engaged in factoring but engaged in other financial businesses such as the fields of leasing, consumer finance, credit cards (finance company) and the Bank.[7]

Article 1 letter f PMK No. 84 / PMK.012 / 2006 stipulates that the Seller Accounts (Client) is a company that sells short-term trade receivables to finance companies.

No further provisions regarding the seller in the Minister of Finance. In that article only provides that the seller is a company, so no matter how much individual accounts can not be sold to the Company Factoring. In many ways turned out to small companies and medium enterprises (emerging companies) who are making use of factoring services, while large corporations exploit Factoring Company, especially for transactions of foreign trade.[8]

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[2] Ibid, hal. 1.
[3] Miranda Nasihin,*Segala Hal Tentang Hukum Lembaga Pembiayaan*, Buku Pintar, Yogyakarta, 2012, hal 55
[4] Ibid.
[5] Handowo Dipo, *Sukses Memperoleh Dana Usaha*, Pustaka Utama Grafity, Jakarta, 1993, hal. 28.
[6] Munir Fuady, *Hukum Tentang Pembiayaan Dalam Teori Dan Praktek*, Cet,III, PT. Citra Aditya Bakti, Bandung, 2002, hal. 69-71.
[7] Opcit, hal,57
[8] Aniek Tyaswati Wiji Lestari, *Aspek Hukum Transaksi Anjak Piutang/Factoring (Suatu Studi entang Jasa Pembiayaan Melalui Perusahaa Anjak Piutang /Factoring Di Indonesia)*, Tesis Program Pascasarjana Ilmu Hukum, Universitas Diponegoro, 1998, hal.139.

Presidential Decree 9 of 2009 and PMK 84 / PMK.012 / 2006 as a legal basis to regulate the factoring activities in Indonesia, only regulate things that are administrative only. Concerning the rights and obligations of the parties under the factoring activity is not regulated.

Civil Code (hereinafter the Civil Code), also does not regulate factoring, but its existence is possible within the legal system of Indonesia, because Indonesia adheres to the principle of contract law freedom of contract as stated in Article 1338 of the Civil Code of paragraph (1), that:
"An agreement made legally valid as a law for those who make it".

That is the law of treaties give the widest possible freedom to the parties to an agreement about anything as long as it is not contrary to law, morals and public order. Throughout the agreement factoring is not contrary to the principles of applicable law or qualify the validity of the agreement as stated in Article 1320 of the Civil Code, then the agreement is binding in full for the parties, the parties are obliged to respect the agreement made, and shall carry the obligation or with good performance.[9]

Factoring activity raises legal events or legal relationships which begins the factoring agreement between the Company and Factoring with Client. On the basis of the factoring agreement there was a legal relationship between the parties, in relation to this law the rights and obligations of the parties that deal with the rights and obligations of another
-Legal Relationship Between Factoring Company (Factor) With Client

Judging from the legal aspect, the use of factoring by the Client is based on the agreement that the receivables purchase agreement. Factor company will purchase accounts receivable Client, next Client will immediately receive cash funds (cash) from Factor. The relationship between Factoring company (Factor) to the Client in factoring transactions set forth in the agreement referred to as the Factoring Agreement

The factoring agreement is a standard agreement, so the terms unilaterally prepared and determined by the Factoring Company

The standard contract is defined as a form of agreements based on a standard rule, where the implementation of the agreement in addition to heed the provisions of the Civil Code must also consider the provisions of the standard.[10]

According Hondius standard terms in the agreement are the terms of the written concept contained in agreements which are still to be made that the amount is not specified, without first negotiating the contents.[11]

Agreements factoring is a standard contract, because documents containing terms of agreement have been determined in advance by the factoring company (Factor) as a buyer of receivables, so the Client as a seller of receivables only choice whether to accept the terms that have been predetermined by the Factor, subsequently signed the agreement as agreement, or not to sign as agreed. If the prospective client has fulfilled all the requirements and then sign the agreement then there was an agreement and each party is bound to the terms of the signed agreement. So in principle, the contents of which are standardized agreements are fixed and can not be held negotiations again.

Factoring Agreement between the Factors Client is an agreement that contains the terms and conditions on which the Factor approve the purchase of the receivables from the sale of goods to the Customer Client.[12]

The agreement that has been signed by the client as the seller of the receivables will be binding on the parties and will be valid as a law. Of the agreement, it is known the rights and obligations of the parties in order to utilize the factoring.

Factors legal relationship with the Client in terms of civil law is the purchase agreement. However, selling is the sale and purchase transaction factoring is immovable (receivables). On sale and purchase of receivables in the Civil Code, governed by Article 1533-1540 Civil Code.
Article 1533 of the Civil Code states that:
The sale of a receivable includes everything that is attached to it, such as insurance-coverage, privileges and mortgages-mortgages.

Sales of these receivables implies that the buyer will get everything included in the sales department. Among others including the guarantees and rights precede and mortgages attached to the receivables purchased. In other words, all bearing or frills (sequeelen) of receivables that participated.[13]

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[9] Siti Hamidah, *Kajian Yuridis Perlindungan Seimbang Bagi Factor, Client dan Customer Dalam Perjanjian Anjak Piutang (Factoring)*, Fakultas Hukum Universitas Brawijaya,2012, hal.2,http://risalah.fhunmul.ac.id/wp-content/uploads/2012/02/7-Kajian-Yuridis-Perlindungan-Seimbang-Bagi-Factor-Client-dan-Customer-Siti-Hamidah.pdf, diakses 2 Nopember 2015
[10] Sri Soedewi Masjchoen Sofyan, 1980, *Aneka Peerjanjian Jual Beli*, Yogyakarta : Seksi Hukum Perdata UGM, hal 55.
[11] Purwahit Patrik, *Segi-Segi Keperdataan Masalah Kredit Macet*, Makalah Pada Dies Natalis ke-29 Tahun, Universitas Muhamadiyah Magelang di Borobudur Indah Hotel Magelang, 1993
[12] Ramlan Ginting, Factoring, *Pengembangan Perbankan Edisi nopember-Desember* , 1993, hal.38.
[13] R. Subekti, *Aneka Perjanjian*, Penerbit Alumni, Bandung, 1985, hal.31.

To find out how to transition accounts to note the provisions set forth in Article 1459 of the Civil Code as follows:
The ownership of the goods sold does not pass to the buyer during the delivery has not been made under section 612.613 and Regulation No. 10 of 1961

Obligations surrender property rights covering all actions which by law is required to transfer title to the goods traded from the seller to the buyer. Civil Code recognize three kinds of objects are moving objects, fixed objects and disembodied objects (accounts receivable, billing, claim), so the Civil Code also recognize that there are three kinds of rights that belong to each kind of goods (objects) is.

Receivables included in the disembodied objects, thereby handing the applicable property rights are property rights for goods delivery disembodied, with the act called cessie, as governed by Article 613 paragraph 1 of the Civil Code, provides that:
Will surrender in the name of debt and other disembodied material is done by creating an authentic act or under the hand, by which the rights to material that is delegated to others.

-Legal Relationship Between Factoring Company (Factor) With Customer
In the factoring transaction, the agreement is actually the principal agreement on sale and purchase of products with periodic payments or installments, giving rise to the receivables. But because the Client sell or transfer the receivables to the Company Factoring creditors to pass the replacement position. Substitution creditor position is indeed possible, as provided for in Article 1400 of the Civil Code governing subrograsi, namely the replacement of the indebted rights by a third party who pays the indebted it happens either by consent or by-laws. So here the position of Client has been replaced by the Factoring Company. The relationship between the Customer Factoring Company is not stipulated in the agreement.

-Legal Relationship Between Client With the Customer.
Client legal relationship with the customer is a purchase agreement goods with periodic payments or installments. Where the client in this case is referred to as the seller and the customer is a buyer, the buyer of goods by installments. Likewise, related to factoring activities, the relationship between the Client and Customer does not set forth in the agreement

2. The Benefits of Financing Activities by The Factoring Company in Indonesia

The utilization of factoring for the client begins the difficulty in setting the actual cash flows, and on the other hand there is a good chance to increase the company's revenue. In anticipation of this opportunity and to overcome the difficulties of cash flow, the company is pursuing several things, one of which is utilizing factoring services. This is done to speed up changes in receivables (accounts receivable) into cash, without waiting for the time to maturity, so it can be used to address the company's cash flow difficulties, particularly cash inflow company. It is expected the company has sufficient cash to meet its short term obligations and other needs.[14]

Benefits of financing of the Factoring Company to the Client, among others, may pay suppliers more quickly, so the client will receive a discount or cash discount suppliers. While the cash discount is generally much greater than the cost of factoring itself. [15] Client can improve order entry, because of cash flow problems have been resolved, and the liquidity of the company in good shape, the production process is no longer an issue because the funds are available to meet the raw material. Acceptance of a larger order can be fulfilled because this factoring facility follow the development of the turnover of companies.[16]

Factoring company (Factor) also get some benefit from financing activities were done, among others. [17]
1. The funds disbursed by the factor can be distributed with interest rates relatively high and relatively short-term. This is very beneficial factor for the cash flow becomes very fast and can reduce the risk of interest rate fluctuations.
2. Factoring transactions can bridge the terms and conditions of the funding received from the banking factor.
3. The amount of commission or administration fee management factoring services provided to the Client factors depending on the risk of the receivables transferred or financed by a factor.

Financing of the Company Factoring is by factoring in prepayment may increase the acceleration of money supply (velocity of money) which in turn is expected to contribute in the form of channeling funds to grow the economy and the welfare of society so as to realize economic development in Indonesia.

Economic development is seen as a process which resulted in higher per capita income of the community for the long term, the economic development has three important properties, namely:[18]
1. A process, which means that changes continuously.
2. The effort to raise the per capita income of the community.
3. The increase in public revenues occurred in the long term.

[14] Aniek Tyaswati W.L, Ibid hal 140
[15] Ibid
[16] Marsida Jusman, *Analisis Tahap Perkenalan Anjak Piutang Di Indonesia*, Badan Penerbit IPWI, Jakarta, hal.2.
[17] Budi Rahmat, Opcit hal. 97
[18] Sirojuzilam,2005,http://pengertian-pengertian-info.blogspot.co.id/2015/09/pengertian-dan-teori-pembangunan.html, diakses tanggal 16 Nopember 2015.

3. Protection and Legal Certainty In Financing Activities By Factoring Company in Indonesia.

The existence of Factoring as a financing company that is the business of Financing Agency has started since 1974. Starting from the issuance of Presidential Decree No. 61 of 1988 on Financing Institutions, which in practice is set in the Decree of the Minister of Finance No. 1251 / KMK.013 / 1988 Provisions and Procedures for the Implementation of Financing Institution.

In the development of Minister of Finance Decree No. 1251 / KMK.013 / 1988 successively amended by the Decree of the Minister of Finance No. 1256 / KMK.00 / 1989, the Ministry of Finance Decree No. 468 / KMK.017 / 1995 and the Decree of the Minister of Finance No.446 / KMK. 017/1998. Furthermore, regulations on Financing Institutions is replaced

by the Minister of Finance Decree No. 448 / KMK.017 / 2000, subsequently amended in the Decree of the Minister of Finance No. 172 / KMK.06 / 2002 on Financing Company and the Ministry of Finance Decree No. 185 / KMK.017 / 2002 Termination of License finance companies. Lastly replaced by Regulation of the Minister of Finance of the Republic of Indonesia No.84 / PMK.012 / 2006 on Financing Company (hereinafter referred to as PMK 84 / PMK.012 / 2006).

Regulations have been issued by the Indonesian government to regulate the activities of financing by the above Factoring Company only regulate an administrative nature, about how to finance the activities carried out by the Factoring Company, has not been set. Concerning the rights and obligations of the parties are not mentioned in the regulation, so that in practice the manufacture of factoring agreement executed based on the principle of freedom of contract. In the implementation of the factoring agreement, the parties may face the prospect of which can result in losses.

Legal certainty is a characteristic that can not be separated from the law, especially for a written legal norms. Law without the certainty value will lose their meaning.[19]

Presidential Decree 9 of 2009 and PMK 84 / PMK.012 / 2006 as the regulations governing the financing of activities by the Factoring Company has not set substantive, how to finance the Company's activities Factoring done, so it can be said there is no legal certainty.

Phillipus M.Hadjon legal protection under legal protection is a preventive and repressive legal protection. Preventive legal protection can be done at the time of making the agreement factoring (factoring) is.[20]

According Purwadarminta legal protection is an act to protect or provide assistance in the field of law. So the sanctuary through the provisions, rules and regulations that govern the lives of the people recognized, followed and implemented by members of the public.[21]

On treaty law in the Common Law system known express contract term, the actuality of a real contract to a terminology that is disclosed in accordance with the freely expressed what he wanted at the time made and expressed into a bright and explicit language, both verbal and written. [22]

Express the importance of factoring contract agreement is due to a lack of material factoring law (especially in Indonesia), so it is important to provide conception factoring in a contract made through the preparation, the clause agreed by the parties. The vagueness and indecision will be the legal terminology will result in a blurring of legal construction factoring and the status and legal capacity of parties are involved.[23]

Factoring Agreement is an agreement concerning the purchase, transfer and management of receivables from the Client to the Factor. Factoring agreement was made based on the wishes of the parties, because the agreement is a nameless agreement, an agreement which is not specifically regulated by law, but based on the wishes of the parties. To get the protection that hope rests on the good faith of each party are all set forth in the form of clauses factoring agreement.[24]

Alternative clauses that provide equal protection in the agreement factoring is, among other things:[25]

1. Clause-factor clause authority to refuse to pay the purchase price or the purchase price accounts receivable at a price which is regarded by factors must be based on evidence of factors and obtain approval from the client;
2. Clause default risk factor as the basis for the right to withdraw from the purchase price of client accounts receivable / invoices not yet due.

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[19] Titik Triwulan Tutik, *Pengantar Ilmu Hukum*, Prestasi Pustaka, Jakarta, hal.32-33.
[20] Philipus M.Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia*, Bina Ilmu, Surabaya, 1987, hal 3
[21] Purwadarminta. *Perlindungan Hukum Bagi Nasabah Bank*
[22] Law LTD, *Personal Legal Sourcebook-Contract*, Mac Millian Spectrum, USA-New York, 1996, p.10 dalam Pantouw, dalam Siti Hamidah, Ibid hal.6.
[23] Ibid.
[24] Venny Alita Andrawina, *Perlindungan Hukum Terhadap Pihak Client Pada Perjanjian Anjak Piutang (FactoringAgreements)*, Jurnal Publikasi Program Studi Kenotariatan Fakultas Hukum Universitas Brawijaya Malang, 2013, hal.5-6., http//hukum.ub.ac.id/wp-content/uploads/2013/07/Jurnal Publikasi.pdf. diakses selasa 10 Nopember 2015.
[25] Siti Hamidah, Opcit, hal 17

3. Clause factor right to choose and change the way the calculation of interest and the interest of delay, seta how to take notes or record all transactions relating to the agreement must be known and understood client.
4. Restrictions on clauses determining the delay interest according to Article 1251 Civil Code;
5. Removing clause late fee because it is veiled interest;
6. The existence of liability clause limits the client to be willing to provide additional collateral in any form as requested factor;
7. Clause eksemsi which aims to liberate or limit the responsibility of one of the parties to a lawsuit can not justify the other party;
8. Clause authorization must be limited to maintenance.

The inclusion of alternative clauses is intended to provide a balanced protection. In practice contract executed under the principles of freedom of contract was not yet provide justice the parties resulting often cause problems in the implementation of .

Position between the factoring company (factor) is not equivalent to the position of service users factoring (Client), the activities of factoring the level of trust factor against the Client is very low, but because of the position Factor strong, then the contract of factoring much contained clauses that Factor is a manifestation of the will in order to provide protection to the Factor of operating losses.[26]

Based on the required regulation in the form of legislation to ensure legal certainty the implementation of factoring, given by the company's financing activities Factoring can provide benefit in achieving economic development in Indonesia.

Conclusion

1. Presidential Decree 9 of 2009 and PMK No.84/PMK.012/2006 only regulates the administrative nature, about how to finance the Company's activities Factoring is carried out, has not received substantive regulation on the rules , but the presence Factoring (Factoring) is possible within the legal system of Indonesia, because Indonesia adheres to the principle of contract law freedom of contract as stated in Article 1338 of the Civil Code. On the basis of an agreement between the Company's factoring with Client, there was a legal relationship between the parties, in relation to this law the rights and obligations of the parties that deal with the rights and obligations of the other. The legal relationship include:

-Legal relationship between the Company and Factoring (Factor) to the Client:
The relationship is based on accounts receivable purchase agreement.
-Legal relationship between the Company and Factoring (Factor) by Customer:
The relationship arises because of the replacement of the quality of creditor (subrogation).
-Legal relationship between the Client to Customer:
Legal relationships arising from the purchase agreement of goods / services with periodic payments.

2. Financing of the Company Factoring by factoring in pre paymnet (prepayment) may increase the acceleration of money supply (velocity of money) which in turn is expected to contribute in the form of channeling funds to grow the economy and the welfare of society so as to realize economic development in Indonesia.

3. Presidential Decree 9 of 2009 and PMK No. 84 / PMK.012 / 2006 can not provide certainty and legal protection, legal protection for the parties merely on the goodwill of each of the parties that are all set forth in clauses factoring agreement receivables, it is necessary to set forth an alternative clauses so as to provide equal protection for the parties. Regulation is needed in the legislation to ensure legal certainty the implementation of factoring, given the activity of financing by factoring company that can provide benefits to grow the economy and the welfare of society so that they can participate in realizing economic development in Indonesia.

Recommendation

At any legal relationship between the parties in the factoring activity, should be made an agreement that contains a balanced rights and obligations

Socialization financing activities by the factoring company should be expanded so that it can be used by many people, especially the business world.

Rules must be made in the form of legislation that could ensure certainty and protection for the parties to the financing of activities by the factoring company

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Kitab Undang Undang Hukum Perdata

THE STATE RESPONSIBILITY IN THE PREVENTION AND CONTROL OF AIR POLLUTION CAUSED BY FOREST FIRES IN INDONESIA

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ABSTRACT

Forests have the functions for the life of flora and fauna including the very important functions of supporting the environment and should be preserved. The provisions of Article 28 of the Constitution of the Republic of Indonesia and the Explanation of Article 2 paragraph a of Act No. 32 of 2009 mention that the state guarantees citizens' rights to good and healthy living environment. The article regulates the principle of the state responsibility, meaning that the occurrence of air pollution caused by forest fires is the state responsibility in terms of the prevention and mitigation. The problems that arise in Indonesia every year in the dry season are always the case of forest fires and it is more severe in 2015 that began from the beginning of September to the end of October. It cannot be extinguished so that the smoke results in air pollution exceeding the threshold as occurred in Sumatra, Borneo, and even spread up to the neighboring countries, such as Singapore and Malaysia. The forest fires result in air pollution and environmental damage that harm the country's economy, aircraft flight disruption, and social impacts, including human health that caused the death of 11 (eleven) people because of respiratory disorders. The Government has not made any regulations on pollution control and / or environmental damage as mandated in Article 56 of Act No. 32 of 2009. In order to combat forest fires every year and environmental damage, the Government through the Ministry of Forestry and Environment should immediately make regulations on the prevention and control of pollution, and they should tighten the license to the holder of forest tenure rights, and environmental risk analysis and environmental audit should be conducted regularly and openly as well as the implementation of the application of strict punishment to the perpetrators and the legal entities of Forest Tenure License holders that cause environmental damage.

Key words: State Responsibility, air pollution, forest fires

Introduction

Forest is a gift of God that can provide benefits to human beings and animals, including the development of the plant species, so forest as one of the earth's life support systems support the ecosystem that can absorb CO2 and should be preserved.

Forests in Indonesia in the era from 1960 to 1980 are the widest and largest forest in the world in the third rank after Brazil, and researchers said that the forests in Indonesia are tropical forests which are the habitat for flora and fauna with their unmatched abundance compared to forests in other countries. Forests can certainly bring prosperity to the people, so the people who live around a forest in their everyday life always rely on forests, such as the lives of children in *Anak Dalam*[1] tribe who collect forest products and hunt animals for the needs of their family life

Forests in Indonesia tend to decrease. This case has begun since 1985, and then after the reform in 1997 Indonesia's forests suffer very serious damage because of several factors, such as the existence of illegal logging explicitly performed by unaccountable perpetrators. In addition, the fires are suspected to be performed deliberately by the people with investors behind them. Forest fires are annual events that always happen, and the most severe occurred from September to November 2015 in Kalimantan and Sumatra. The smoke pollution affected the air pollution that spread to Malaysia and Singapore.

During the period of thirty-five years, the facts in the field due to forest damage caused by illegal logging and fires are severe, so the forest area in Indonesia is now reduced up to approximately 10 million hectares.

The fires are caused by human activities and lightning strikes, but the ones that often occur during the dry season is the forest fires caused by human who deliberately burned forests that would be prepared to open farmland or plantations. It was sometimes not for personal gain, but under the command of the holders of HPH (forest tenure rights).

The fires that occurred from October to early November 2015 did not only have the impact on air pollution but it also resulted in loss and destruction of habitats and wildlife, destruction of ecology, the rising of greenhouse gas emissions resulting in climate

[1] Rd. Hasan Basri, Thesis, on The Social Change of Anak Dalam Tribe). [A Case Study of Government Intervention through the program of PKSMT in the residence of Bukit Tembesi, Jebak Village, Muara Tembesi sub-district, Batang Hari District) downloaded from http://lib.ui.ac.id/opac/themes/green/detail.

change, damaging health and human activities such as respiratory illness resulting in 15 people died, all schools were closed, harming economies of the state such as the cessation of the aircraft.

For almost a full month of the fires in Kalimantan and Sumatra, the central, provincial, district and city governments and the community who assisted the Indonesian National Army and Police, the activists of environment, and even from other countries such as Malaysia, Singapore, Australia, and Japan had earnestly tried to extinguish the forest fires. Furthermore, the Central Government, the President including the relevant ministries and BNPB (National Agency for Disaster Handling), had spent the budget for forest fire fighting reaching up to IDR 600 billion. The state had been present and responsible for dealing with forest fires, but the results were not satisfactory. Fortunately, because of the continuous rains by the time of rainy season, all the hotspots of forest fires have been extinguished itself.

With the extinction of all the hotspots of forest fires due to rain, it does not mean that the Government or the State have completed their responsibilities. There is still much work to be done, such as the restoration of forest destruction, restoration of health for citizens, law enforcement process against the perpetrators of forest fires resulting air pollution. There must be decisive actions to do in order that in the future the forest burning actions will not happen again.

Problems

From the description above, the problems discussed in this paper are as follows:

1. How is the the state responsibility in forest management for ecological balance?

2. How is the concept of the Future Prevention and Reduction of Air Pollution due to forest fires in Indonesia?

Discussion

1. *The state responsibility in forest management as an effort for ecological balance*

In Article 5, paragraph (1) of Act No. 41 of 1999, it states that forest, by its status, is divided into state forests and public forest. State Forest can be an indigenous forest, which is the state forest delegated to indigenous people for its management. The forests managed by the customary law community are included in the definition of state forests as a consequence of the right to control by the state as the power organization of the whole people at the highest level and the principles of the Unitary State of the Republic of Indonesia. In line with Article 33 of the 1945 Constitution as the constitutional basis, it requires that earth, water and natural resources contained therein shall be controlled by the state as much as possible for the prosperity of the people, so the forestry management always contains the soul and spirit of democracy, equitable and sustainable. Therefore, the implementation of forestry has to do with the principle of benefit and sustainable, democracy, justice, solidarity, openness and integration based on noble character and accountable.[2]

In the general explanation of Law No. 41 of 1999, the control of state forest does not mean that the state is the owner, but the state gives authority to the government in the management of state forests, and the government on behalf of the state is obliged to supervise the forests. Therefore, forests have 3 (three) functions, i.e.:

a. Conservation function

b. Protection function

c. Production function

Among the three functions of conservation, protection and the production, the functions of conservation and protection are not well controlled, but the production function is mostly performed by people. Because the forests as the functions of conservation and protection have been deforested into plantations, rice fields, in Aceh Tamiang, there are approximately 42,500 hectares of protected forest in Tamiang that have changed into production forests as a result of the issuance of the Decree of the Minister of Forestry Number SK.865 / Menhut-II / 2014 dated September 29, 2014 on Forest and Water Conversion in Aceh Province. Now in Aceh Tamiang, there is only 625 hectares or 1.5 percent of protected forests.[3] Furthermore, in the area of Garut, there are about 59,914 hectares of forest area that reached 170 thousand hectares switched their function. The most serious damage is in the production forest area covering an area of 36,530 hectares. It was followed by the damage of 19,122 hectares of protected forests and conservational forests reaching up to 4,263 hectares. Forest lands turned into plantation areas covering 10,022 hectares, consisting of 8,106 hectares of rainfed ricefield, 21,600 hectares of shrubs, 17,909 hectares of fields, 1,781 hectares of

[2] the General Explanation in Act No. 41 of 1999;
[3] http://aceh.tribunnews.com/2015/01/16/puluhan-ribu-hutan-lindung-berubah-fungsi, downloaded on 23 November 2015, at 13.10.

residence and 565 hectares of grassland area. The changes in the forest function occurred in the Districts of Cilawu, Garut Kota, Samarang, Talegong, Cisewu, Pamulihan, Pakenjeng, Cihurip and Singajaya.[4]

Of the functions of conservation and protected forests in Indonesia, they have turned into production forests, paddy fields, farms, and the changes are clearly in the system of forest management which is not well ordered. The function change of conservation and protected forests into production forests, including agricultural and residential lands, must be adjusted to the RTRW (the spatial plans), at the level of national, provincial, and district/ city spatial planning as this will affect the ecological balance and ecosystems in a region.[5]

In accordance with the strategic plan of the Ministry of Forestry in the year of 2010- 2014, there is a priority to save the forests, i.e.:

1. Stabilization of forest area based on sustainable forest management,
2. Rehabilitation of forests and increasing the carrying capacity of DAS (watershed);
3. Forest protection and security,
4. Conservation of natural resources and ecosystems,
5. Revitalization of forests and forestry products,
6. Empowerment of communities around the forest,
7. Reduction and adaptation to climate change in the forestry sector, and
8. Forestry institutional strengthening

When the Eight (8) Plans of the Ministry of Forestry (now the Ministry of Environment and Forests) can be carried out, it can restore the function of forests as an ecosystem between humans and the free plants forming forests, animals and wild animals, free environmental nature, which each another interplay in plants, humans and other living things so that the ecological functions of ecosystems remain well-maintained.

Forest fires occur every year in Indonesia causing ecological damage, causing damage to biodiversity, flora and fauna, the death of wildlife forest dwellers as one of supports to the life on earth. Therefore, Indonesia as a tropical country with most of the region has a quite high rainfall, hilly and mountainous areas which are sensitive to the disturbance of water balance, should always give priority to forest areas to be saved and managed well. The provincial and district/ city governments with the forest areas over 30% (thirty percent) should not be freely reducing the forest area of the specified area. Therefore, the minimum area should not be used as a pretext for converting an existing forest, but as a state of alert awareness on the importance of forests to the quality of life. Instead, the provincial and regency / municipality governments with the forest area of less than 30% (thirty percent) need to increase its range.[6]

2. The future concept for the Prevention and Reduction of air pollution due to the forest fires in Indonesia

In every dry season in Indonesia, forest fires have always occurred, both large and small. Even in October - November 2015 in Kalimantan and Sumatra, forest fires occurred in a great scale causing smog and resulting in air pollution. Forest fires in the regions of Kalimantan and Sumatra result in smoke that spread to the Territory of Malaysia and Kuala Lumpur since the haze of forest fire was carried by the wind so that it affected on the activities of local community which was not only on health, but also have an impact on the economic sides, environment, flora and fauna and the decrease in forest area.

In the event of forest fires, some parties blamed the perpetrators, and some claimed that the perpetrators of forest fires were the people who would open the forest land to be used as farmland. On the other hand, there are some stating that the forest fire perpetrators were some people who were sent by the forest tenure holders. The forest fires in September-October had made Joko Widodo, the President on behalf of the Government and the state, go to the field with his ministers and governors to perform the measures of forest fire fighting. The President had ordered the Police to act firmly against the perpetrators of forest fires. For example, now the Police of the Republic of Indonesia is currently handling 244 cases of forest fires. The cases are investigated by several parties, namely:

1. the Police Criminal Investigation Department has conducted the investigation process for 4 cases, and then South Sumatra Police has handled 35 cases;
2. Riau Regional Police has handled the investigation of 69 cases;
3. Jambi Provincial Police has handled 21 cases,
4. Central Kalimantan Regional Police has handled the investigation of 63 cases;
5. West Kalimantan Regional Police has handled the investigation of 29 cases,

[4] http://nasional.tempo.co/read/news/2010/03/03/058229465/puluhan-ribu-hektar-hutan-di-garut-beralih-fungsi, downloaded on 23 November 2015 , at 14.00.

[5] http://www.mongabay.co.id/model-pengelolaan-hutan-lewat-konsep-kesatuan-pengelolaan-hutan-kph/ downloaded on 23 November 2015, at 14.23.

[6] Article 18 paragraph (2) of the Explanation in Act No. 41 of 1999;

6. South Sulawesi Regional Police has handled the investigation process of 11 cases;
7. East Kalimantan Police has handled the investigation of 12 cases.

The General Information Section of Public Relation Division of the Indonesian National Police, Police Commissioner Suharsono said, until now, the police have arrested 77 suspects of forest fires in Sumatra and Kalimantan; 72 suspects are individuals and five people are from corporations. Police can apply the provisions of the Prohibition of forest fires as stipulated in Article 50 paragraph (3) point d "any person is prohibited from burning forests", the provisions of Article 87 paragraph (5) "anyone who through negligence violates the provisions of Article 50 paragraph 3 (d) is punishable by imprisonment of 15 (fifteen) years and a maximum fine of five (5) billions". The articles clearly provide strict sanctions to the perpetrators of forest fires, but these penalties are doubted to provide a deterrent effect to the perpetrators as it turns out that forest fire, every year, is always the case in Kalimantan, Sumatra and Riau.

On the other hand, forest fire is actually allowed in Paragraph 1 that states "the customary law community who perform the burning of lands with total area of a maximum of 2 (two) hectares per household to plant local varieties shall inform the village head. The village head gives the notice referred to in paragraph (1) to the agency dealing with government affairs in the field of environmental protection and management of the districts / cities. However, the burning permits are not allowed to lands on the condition of below-normal rainfall, droughts and dry climat as stated in paragraph (3). Then, in article 69 paragraph (2) of Act No. 32 of 2009, it states "opening land by burning is allowed regarding the local wisdom of each area".

The provisions of article 50 paragraph (3) letter (d) contradicts the Rule of Village Head, as well as the provisions of article 69 paragraph (2) of Law 32 of 2009. It makes it difficult for law enforcement process for the perpetrators of forest fires. Therefore, concerning the future concept in order to prevent forest fires, the government should conduct a review or perform harmonization of local regulations issued by the Provincial and Regency / City Government with village regulations relating to forest clearing by burning.

Of the forest fires, it does not only have an impact on air / water pollution alone but it has an impact on the ecological damage, loss and destruction of wildlife, climate change that enhances greenhouse gas emissions, and harming the country's economy such as the cessation of air flights.

The impact of air pollution caused by forest fires can be seen in several areas such as Sumatra, Riau, Kalimantan and Jambi that has exceeded the threshold of air pollution.

- In Jambi, the area of air pollution (ISPU), on Sunday (13/9), had reached 408 or was at a dangerous level.
- In the area of Palangkaraya, on Wednesday, the standard index of air pollutant (ISPU) showed the concentration of particulate pm 10 was more than 1,000 micrograms per cubic meter throughout the day, which was between 1095.93 micrograms per cubic meter and 1991.93 micrograms per cubic meter.
- In West Sumatra, the air quality in the global monitoring station of Kototabang, the level of aerosols concentration or dust particles (PM10) ranged from 384 to 442 micrograms per cubic meter; the air quality was highly unhealthy to dangerous.
- Land and forest fires in Indonesia regions at the moment clearly increase the production of CO2 and carbon monoxide (CO). The threshold of CO in air is 35 thousand parts per billion (ppb) or 35 parts per million (ppm) for one hour or 9,000 ppb or 9 ppm for 8 hours. The data of MOPITT satellite owned by NASA showed that CO gas concentrations in Southern Sumatra reached 12 thousands ppb.

From some provinces, the air quality had exceeded the threshold of air pollution caused by forest fires, so when associated with the Decree of the Minister of Environment No. KEP-45 / MENLH / 10 / 1997, 17 Oktober 1997, the criteria of Air Quality seemed to exceed the threshold:

CATEGORY	RANGE	EXPLANATION
GOOD	0 – 50	Levels of air quality that do not have effect on the health of human or animal and no effect on plants, building or aesthetic value

MODERATE	51 – 100	Levels of air quality that do not have effect on the health of human or animal, but has effect on sensitive plants and aesthetic value
UNHEALTHY	101 – 199	Levels of air quality which are harmful to human or group of sensitive animals can damage plants and aesthetic value
HIGHLY UNHEALTHY	200 – 299	Levels of air quality that can damage the health of a number of exposed population segments
DANGEROUS	300 – 3000	Levels of air quality which are dangerous in general and damage the health of population seriously

From the table above, the environmental impact of Carbon monoxide (CO), when related to the air quality due to the smoke of forest fires that exceed the threshold of air pollution when inhaled into the lungs, will follow blood circulation and it will obstruct the oxygen and the entry of oxygen needed by human body. Therefore, when CO reacts with human blood metabolism, it will endanger human health. If it is found that human contacts with CO at high concentrations, it will cause death.[7] To prevent air pollution in the environment, it is set the air quality standards that can be distinguished on the ambient air quality standards and emission air quality standards. Ambient air quality standard is the level limit permissible for substances or pollutants contained in the air, but do not damage living creatures such as plants or objects.[8]

The future concept of addressing the Prevention and Reduction of air pollution due to the forest fires in Indonesia includes prevention, reduction, and recovery and supervision of damage control and / or the environmental pollution related to forest and / or land fires.

Furthermore, the Governors / Regents / Mayors set the regional standard criteria of environmental damage. The regional standard criteria of environmental damage are provided with the same or more stringent provisions than the provisions of the national standard criteria of environmental damage.

Everyone is prohibited from conducting activities that result in pollution (Article 69 of Act No.32 of 2009) and everyone is prohibited from burning forests and/ or land as well as obliged to prevent the occurrence of damage and/ or pollution of the environment associated with forest and / or land fires (Article 50 paragraph 3 letter d). Any one who causes forest and / or land fires shall conduct environmental impact restoration and accompanied by a compensation due to environmental law known as polluter pays principle.

Conclusion

From the description above, it can be concluded that:

[7] Srikandi fardiaz, Water and Air Pollutions, Penerbit Kanisius, Yogyakarta, 1992, page 99.

[8] Wisnu Arya Wardhana,The Impacts of Environmental Pollution, Penerbit Andi, Yogyakarta, 1995, page 116

1. The state responsibility in forest management is an effort for the ecological balance. In fact, forest's functions as the functions of conservation and protection are not performed in an optimum way because the facts in the field show that the forests have been deforested, and more forests are optimized as production forests and no longer as a protected function;

2. The future concept of the Prevention and Reduction of air pollution due to the forest fires in Indonesia should have a harmonization in making regulations. The Regional Regulations must not contradict the higher laws. Regarding the air pollution caused by forest fires in Kalimantan, Act No. 41 of 1999 on article 50 paragraph (3) letter forbids to burn forests, while there are regional regulations in Kalimantan that allow to burn the forests to open the lands;

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Rd. Hasan Basri, Thesis, tentang Perubahan Sosial Masyarakat Suku Anak Dalam (The Social Change of Anak Dalam Tribe). [Studi kasus intervensi pemerintah melalui program PKSMT] Di pemukiman Bukit Tembesu Desa Jebak Kecamatan Muara Tembesi Kabupaten Batang Hari) (A Case Study of Government Intervention through the program of PKSMT in the residence of Bukit Tembesi, Jebak Village, Muara Tembesi sub-district, Batang Hari District) downloaded from http://lib.ui.ac.id/opac/themes/green/detail.

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BASIC RIGHTS TO EXPRESS OPINION IMPLICATION THE CRIME OUTRAGEOUSLY

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ABSTRACT

Criminal contempt criminal provisions intended to protect the dignity and honor of every person not only officials or state institutions . Understanding outrageous including defamation. Incitement is very broad sense, not only accuse someone doing something bad, even though that's not its purpose but only criticism or comments in order to become better in the future . The provisions of criminal contempt is often misused in the application to violate the constitutional rights of citizens. The absence of clear limits on insult and defamation in the Criminal Code leads to multiple interpretations in the application level. Given the provision / good rule is to ensure that these rules are not misused for other purposes except for the purpose for the rule itself (lex stricta) . On one side there is a provision of the Criminal Code on defamation that is often applied to citizens who exercise their rights guaranteed by constitutional to issue opinions or thoughts in the form of protest or criticism of government policies or ruler. As a democratic country, Indonesia guarantees freedom of expression of its citizens in the form of protest or criticism. In carrying out these basic rights must be in accordance with applicable law with the aim to uphold the values of unity, and maintain public order. That is the fundamental right of expression does not mean freedom to freely according to his own will or without any restrictions. However, the basic rights in the 1945 Constitution does not provide clear boundaries and detail when criticism and protest against government policies can be categorized as a criminal offense insult. Therefore, needs to be studied further, namely, what the concept of insult or defamation in the Criminal Code, what limits the basic rights of expression guaranteed by constitutional, and any court decision relating to defamation.

Introduction

Since the reform movement that managed to depose President Soeharto, lovers of the life of a democratic society should be grateful because the right to issue opinions / thoughts and the right to organize in the form of delivering criticism or protests against government policies have a place that is guaranteed by the Constitution of 1945. The right to express their opinions very useful generate participation in the wider community to come together to improve and supervise the performance of the government. Criticism or protest is a fundamental right to submit demands to the government should not be inhibited because of constitutional Article 28 states that freedom of thought and conscience is a human right that can not be reduced role in any circumstances. This means that all organs of government must achieve the objective as the regulation contained a fundamental right set forth in order to achieve legal certainty. Violations of the rules that have been made by those who are authorized to create legal uncertainty.

In the state system that recognizes the existence of democracy, the right to expression, the right to obtain information and convey information by using all available channels are carried by individuals / citizens can not be avoided anymore. However, in the implementation of such rights is often restricted to achieve a balance between the fundamental right to the protection of individuals, citizens, and the state. Those rights are fundamental rights that are classic. What is referred to as a fundamental right that is both classic by *W. Duk*, distinguishes between classical basic rights and basic social rights , as quoted by Peter Mahmud Marzuki, states as follows " .... The basic rights that are classics there is an obligation for the government for not doing anything to protect human and citizens' basic social rights while in fact there is the obligation of governments to do something Segal in protecting human and citizens.[1]

Of the opinion contained the sense that there is a government's obligation not to do something to protect human and people, should not make laws that negate these rights but must respect . This differs from the definition of basic social rights which it put an obligation on the government to do everything for the sake of protecting human and peoples

Rights is something that is inherent in man by nature and because of this the necessary legal rights to safeguard the continued existence of the rights in the pattern of social life . Law as a cultural product to give any inherent substantial human beings who are in social life . The rules are made must not be robbing person and contrary to human existential aspect. Therefore, sanctions against any person who rallied as stated in the articles on defamation in the Criminal Code is clearly a law that deprives a person of the most basic essentials.

Controversy over the application of the articles of insult and defamation apparent from the number of citizens who apply for the right of judicial review of provisions relating to defamation in the Criminal Code to the Constitutional Court (MK), as an insult to the president and vice president, insult to General Authorities and insult offenses as set forth in Chapter XVI raises issues in relation to criminal law requiring legal settlement. In addition, the application of the articles on defamation pose special problems in the criminal law that must be resolved legally. How should the law enforcement agencies to apply the provisions of

[1]Peter Mahmud Marzuki, Pengantar Ilmu Hukum (edisi revisi), Kencana Media Gropup, Jakarta, 2012, h. 168-169.

defamation in a case relating to the right to expression guaranteed by constitutional Article 28. This provision aims to regulate the life of the nation and the state in order not to harm the public will have an impact on the country itself. A number of cases relating to the right to pull out of government policies have been charged with using the articles on defamation contained in the Criminal Code, one case of insult against the president conducted by *Eggi Sudjana*, and *Pandapotan Lubis*. However, these provisions have been declared by the Court has no binding legal force. The Court of consideration can be concluded that the legal rules are made must not conflict with the existent aspects and also may not deprive individuals of life related to the physical aspect. When is the right to expression, the right to obtain information and convey information by using all available channels are carried by individuals / citizens categorized as an insult or defamation?

Article insults contained in Article 310-321 of the Criminal Code, namely chapter insult intended in his personal qualities. Article 207 Penal Code Article insults addressed to the president or vice president as officials. This provision is often used by law enforcement agencies in taking action against a person, unilaterally interpreted according to taste and the law enforcement officers often referred to as "rubber article" against someone who issued a critique of government policy. This provision is clearly a law that deprives an individual basis and is a violation of human rights.

The existence of such article will eliminate the people's control over government policy, so that individuals who are critical of government policies can be categorized as a criminal offense insult. The number of cases associated with the use of the basic rights guaranteed by constitutional in its implementation used by law enforcement officials to cases related to insult and defamation, clearly the legal rules depriving basic rights, therefore the provisions of humiliation deny the existence of conflict with the nature of humanity itself. From the above explanation issue in this paper is the concept and parameters of the right to issue an opinion in the crime of insult. Therefore, the subject matter is relevant to study it can be formulated as follows: Is the right to issue opinions can categorize as a criminal offense insult, when a criticism or protests against government policies can be categorized as a criminal offense insult.

Ii. Right To Issue Opinion Guaranteed By Law

Why the right is placed as something very precious. The existence of rights can not be separated from the nature of humanity itself, which is created by God, as stated by Peter Mahmud that the right is a package in the creation of humans as beings that have physical aspect and existential aspects. Recognized or not by the law of the right to remain there as a part of human existence itself. Furthermore, Article 1 of Law No. 39 of 1999 on Human Rights said that human rights are a set of rights inherent in the nature and existence of human as a creature of God Almighty and the own grace that must be respected, upheld and protected by the state law, government and everyone for the respect and protection of human dignity".

From the provisions of the Act and opinion Mahmud Peter can be said that the legal protection in accordance with the rights of every individual for the purpose of protecting the conflict or to create equality in a society that feels more equitable.

System of constitutional law recognizes human exist to basic rights such as the right to expression and the right not to be prosecuted based on retroactive law is a human right that is inherent from birth. In social life, in the public interest is considered to be poured in the general regulation with the aim of interests were protected. But any democratic as social life of the state and nation, it is not possible the rules that can accommodate all these interests.[2] Furthermore, Peter Mahmud Marzuki stated as follows:

> "Man has the will. Freedom of the will is what distinguishes between humans and animals and other living things. What do the animals is based on instinct or instinct, but what the human being is based on the will or intention. The freedom of the will on the one hand and the fact that humans are physically vulnerable creature that makes human creates social rules as a means of integrating the group in the face of other groups in order to survive in this group[3]

Rights is something that is inseparable from the nature of humanity itself, and can be implemented for these rights must be incorporated into the legislation. The rule of law in the form of legislation contains rules of a general nature is guidelines for individuals to behave in social life, both in the individual and in the relation fellow with the community. In constitutional stated that depriving a person's basic rights guaranteed by the Constitution is a violation of human rights will lead to legal uncertainty. The provisions of the articles on defamation in the Criminal Code is contrary to the physical aspects of basic rights, namely, the right to expression and the right to organize. Application of the crime of contempt of the Criminal Code is the criminalization of the basic rights inherent in human beings. Therefore, the article of insult and defamation are clearly the rule of law made by those who are authorized to make rules that are general have taken away a person's basic rights guaranteed by the constitution and is a violation of human rights will lead to legal uncertainty. In addition, the provisions of the articles on defamation in the Criminal Code is contrary to the physical aspects of basic rights, namely, the right to expression and the right to organize. In this regard Peter Mahmud states that such regulations and the implementation of such rules give rise to legal certainty, and allow for *predictability*[4]

Definition of rights can be found in the theory of the nature of the rights, which focuses on the theory of the will to the will or choice and the other theory or theories interests of expediency.[5] The position of the right is not only in the civil law alone but

[2]Peter Mahmud Marzuki, Loc.cit
[3]Peter Mahmud Marzuki, Ibid.
[4]Peter Mahmud Marzuki, Ibid., h.137
[5] Peter Mahmud Marzuki, Ibid., h. 150

covers all aspects of the law. Laws are made because of the rights with the intention to defend the public interest rather than the interests of individuals in order to maintain a balance between respect for human rights with the protection of individual rights, the citizens and the state.

Humans are social beings cultured, born to live free with their rights inherent in human nature, the common good, so that the social gap can not be justified, therefore, necessary to safeguard the continued existence of legal rights in the pattern of social life. One of the rights that are naturally inherent in human beings is the right to issue an opinion in the sense of a restriction of freedom to do all that does not harm others, so in using their right-bat shall not exceed the limits set by other community members to enjoy their rights. These limits are not defined in the law, but because of the right to issue legal opinions it is necessary to safeguard the continued existence of the rights in the pattern of social life. One of these rights is the right not to be prosecuted based on retroactive law in accordance with the principle of legality. Deviations to this would cause legal uncertainty.

The right to expression should be in accordance with the values and norms. Critical attitude a person is defined as social criticism is a manifestation of the right to issue a mind that government action is not distorted and according to the rules is a manifestation of the role that is balanced between the interests of individuals, society and the state for not doing deviations. The government does not need to be allergic to criticism. Of criticism is an expression of the community's disappointment over government policy must be understood as an evaluation of the achievement of objectives. Forms of participation of the individual against the policies that have been taken by the government has been controversial in its implementation which give rise to the impression of criminalization.

Definition of defamation offense has been developed in accordance with the values that exist and live in the community, thereby defamation can not be used to inhibit freedom of expression, in the form of criticism and protest against government policies, or official authority. Article defamation in the Criminal Code is very vulnerable to be used by the holders of power and law enforcement agencies dealing with Article 27 and 28D (1) and Article 28F of the 1945 Constitution was inevitable therefore necessary restrictions on the aforementioned article by seeking a balance between freedom is a fundamental right man with the protection of individuals, society and the State. Additionally, freedom of expression should be limited by moral, paying attention not to violate the procedures and should not harm others in order to maintain the integrity of national unity.

Moral and ethical element to be put forward in the speech in order to bring public order, national security, public morality, and ensuring the rights of the community. Freedom of expression should not be done freely without regard to further restrictions exist. Therefore, the role of law enforcement officers is needed in order to maintain public security and order together to avoid humiliation in the Penal Code chapter and impress their criminalization. Limitations or parameters of freedom of expression guaranteed by the 1945 Constitution is something that should agreed by the parties so that deviations to the rules that have been created by those authorized to make rules lead to legal uncertainty. So far the government should not create rules that negate this fundamental right because it would hamper the efforts of communication, information, right to express thoughts verbally, in writing and expression of the attitude that is guaranteed by Article 28, 28E paragraph (2) and (3) of the 1945 Constitution. The provisions of article should be interpreted as an insult formal it will limit the right to issue opinions.

III. The Implication Of Right To Issue An Opinion In Crime Of Insult

In Chapter II is set on Crimes Against the dignity of the President and Vice-President, in which there are articles 134 and 136bis and Article 137 of the Criminal Code relating to defamation against the President, then in Chapter VIII regulate Crimes Against Sovereign General, and Article foremost is Article 207 of the Criminal Code, then the Chapter XVI of the Criminal Code on defamation, which includes regulated insult against individuals, including defamation. In practice articles on defamation in the Criminal Code be retained because it is considered as a crime that is plaguing the society and is an act that is against the law. This crime is considered incompatible with the tradition or culture that upholds the tradition and culture of the east, is a form of injustice, in violation of courtesy and including defamation prohibited by religious norms.

The sense of humiliation is demonizing others, slander means to tell a lie or untrue to someone who then distributed with the intention of vilifying people. The definition of a good name, said essentially "blackened" means stain, defame the good name of the means to make it worse, tarnished or ugly.[6] In addition, to clarify rumors in Eggi Sudaja case is the right to information guaranteed by the constitution. Setting the crime of insult in the Criminal Code is intended as efforts to protect the rights of individuals and citizens against arbitrariness actors are not responsible for the use of their basic rights.

The application of the Criminal Code insult against someone who criticized government policies can create legal uncertainty for causing multiple interpretations of whether a criticism or protests against government policies is a form of insult or defamation. When a protest or criticism of government policy can be qualified as a criminal offense insult, does not need to be resolved amicably to find a solution. Are the protests, statement or opinion is criticism or insult against the president or vice president may inhibit communication and acquisition of information as guaranteed by Article 28F of the 1945 Constitution person has the right to issue an opinion which is something inherent in humans either on the physical aspect as well existent aspect that is guaranteed by law. Practice has been controversial because of the basic rights may be subject to existing defamation in the Criminal Code, so that the use of such rights must be balanced with the reason for not annihilate each other among fellow human

[6]Description of Sriyanto present to the Court as aexpert wittnes of Eggi Sudjana

beings. Reason why that restrict human freedom in the use of basic rights. The use of reason led to the freedom of the will does not negate the freedom of the will of others.[7]

Libel is defamation or insult another person, attacking the reputation or honor of others and spread public knowledge so that can be done orally or in writing, drawing and so on. Understanding is a demeaning insult or denigrate others. In the case of Eggi Sudaja, clarify the rumors are all things that convey a message through the media and so on, which one to listen to someone who is not known for certain, and the second and third is not there at the time delivered rumors, rumors could be true and not[8]. Clarifying the right to information as guaranteed by Article 28F of the constitutional provision which states that everyone has the right to communicate and obtain information ... and convey information by using all available channels in accordance with the legal principles set forth by Feurbach in theory *vom psyschologischen zwang* her. Legal rules are made must not conflict with human acknowledge aspects and also may not deprive individuals of life related to the physical aspect.

According to R. Susilo, insult is attacking the honor and reputation of a person. Honorary who attacked the honor of the good name of honor is not in the sexual field. There are six (6) kinds of humiliation, which is despised orally, despised by letter, slander, insult lightly, pitted be libelous, the allegation is slander. slander means the words lie or without justification distributed with the intention of vilifying others, tarnish or harm another person's name.[9] Defamation derived from the word that means blackened stain, defame the good name of the means to make it worse, tarnished or ugly.[10]

Meaning humiliation associated with Article 310-321 of the Criminal Code, namely chapter of insults aimed at the personal qualities and Article 207 of the Criminal Code in terms of insults addressed to the president or vice president as officials. This provision is considered contrary to the Constitution because it restricts the freedom to express opinions and are often used by law enforcement officials to cases of protests over government policies. Therefore, the provisions of this insult as the criminalization of freedom of expression.

Article humiliation in Article 310 of the Criminal Code mentioned by intentionally attacking the honor or reputation of a person with the accused committed a special action with the aim to broadcast allegations to the general public ". Use of this article should take into consideration the development of the basic social values in a democratic society because it has an important role and value of the underlying formulation of the rights possessed by every individual. The value of information and the formation of public opinion is difficult to separate, so that the law is necessary to maintain the viability of the nation, so that the necessary laws are in line adjustment.

Submission information is unbalanced and tendentious is a character assassination, usage rights are unwarranted, without any purpose without a pedestal right to harm others with the intent to disruption of the person. The right to expression is telling the truth even though pose a risk, but it must be done in objectivity, and delivered with extreme caution so as not to cause undesirable effects or interfere with the rights of others. Humans are required to convey the truth with all the risks that would be faced in a way that does not harm others. Impartial information and are based on information that is precise and accurate and true but also issue an opinion educating people for freedom itself but to the rule of law and the values of truth. The word will play an important meaning in writing the accuracy of the theme and presentation of the facts and information that is not correct. The mention anything rubbing is solely to humiliate, harass and defame.

The use of defamation of the Criminal Code is a reflection of a nation's civilization, so the existence of defamation can be seen from the absence of provisions in the Penal Code norms and application of these norms by the public prosecutor. Therefore, its existence should be limited so as not to be used to inhibit criticism and protest against government policies. In addition, the article is an insult to legal uncertainty due to multiple interpretations that are contrary to the right to freedom of thought expressed verbally, in writing and expression guaranteed by Article 28, 28E paragraph (2) and (3) of the 1945 Constitution Implementation of Article 28 E Paragraph (3) UUD 1945 is necessary to distinguish between criticism, defamation and slander and insult so that democracy can only function and be * a dead letter ". Criminal Code adheres to the principle of opportunity, whether the person acts committed an insult / defamation or criticism / protest is the authorized public prosecutor or a criminal court judge, depending on the public prosecutor whether to charge or not.

Rights to express their opinions in public is not allowed to be used to harm others, but there is an obligation to respect the rights and freedoms of others and morals that must be put forward in order to realize the integrity and unity of the nation and order in society. Therefore the basic right of the individual to express their opinions in the form of criticism / protest becomes necessary to make corrections, evaluation and assessment as the embodiment of the use of basic rights such as the realization of public reforms in order to achieve better results. Community participation should be increased with the use of these basic rights as a means to control and balance against the power of the run, so that deviations can be reduced in order to realize the fulfillment of public welfare that includes, well-being in the areas of economic, social and cultural subjects.

IV. Conclusion And Suggestion

[7]Peter Mahmud Marzuki, Loc.Cit.

[8]Description of Effendi Gozali, present of the Court as expert wittnes

[9] R. Soesilo, Kitab Undang-undang Hukum Pidana (KUHP) Serta Komentar-komentarnya Lengkap Pasal Demi Pasal, Politea, Bogor, 1996, h. 25

[10]Descriptionof Sriyanto, Loc.cit

1. Conclusion

The right to expression is something that is inherent in man either on the physical aspect and the existent aspect guaranteed by law. Critical attitude associated with the use of such rights must be placed in a relation of legal protection in accordance with the rights of every individual, community and country. so the use of such rights must be balanced with the reason for not annihilate each other among fellow human beings.

Criticisms to the government related to the performance and responsibilities in the expanding tasks assigned by the community. Therefore, the provision of criticism to the government must be understood as a manifestation on public participation in order to realize the welfare of society.

Practice, there has been a controversy for the basic rights inherent to the human being can be subjected to defamation in the Criminal Code giving rise to legal uncertainty. The existence of multiple interpretations in their application to someone who threw a criticism or protests against government policy can be charged with defamation in the Criminal Code impede the right to expression guaranteed by Article 28F of the 1945 Constitution.

2. Suggestion

Criticism or protests against government policies is a form of participation of the wider community to unite fix the work and responsibilities of the holders of power. In criticism should be based on the values that exist in society and law is necessary to maintain the viability of the nation and the State.

The right to issue an opinion that can be either criticism or protests against government policies must be done correctly, based on the fact that the objective and must be delivered is delivered with extreme caution so as not to cause undesirable effects or interfere with the rights of others. Therefore, the use of criticism or protest conducted by tendentious is a character assassination that could harm others.

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GEOPOLITICS, FREE TRADE AGREEMENTS AND THAILAND

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ABSTRACT

Free Trade Agreements (FTAs) are continuing to proliferate at an increasing rate and have, to a significant degree, sidelined the World Trade Organization (WTO) as special deals are struck between contracting parties. Thailand, although a member of the WTO has signed or is negotiating thirty Free Trade Agreements. ASEAN is very active in negotiating free trade agreements (FTAs) also. The question is being asked more and more, especially since the negotiations for the Trans Pacific Partnership (TPP) were successfully concluded in early October 2015, are free trade agreements really about trade or are they more concerned with the world's geopolitical climate? Thailand declined an invitation to join the TPP but since September 2015 there has been considerable talk in Thailand about actually joining, especially as four of its ASEAN neighbors were part of the original negotiations. Why? This paper focuses on geopolitical considerations associated with Thailand's potential membership of Free Trade Agreements and the economic and political implications. A legal analysis will show that the Agreements often provide benefits to the negotiating parties rather than to the global trading community. In Thailand's case its recent public stance has been to suggest entering into FTAs with parties who are less critical of its current political conflicts since the 2014 coup d'état than those who are more critical of a military junta replacing a democratically elected government. Even then the welfare of its people dictates that it sometimes has to negotiate FTAs with some of its more vocal critics.

Key words: Free Trade Agreements, Geopolitics, Thailand, Trans Pacific Partnership, TPP, Regional Comprehensive Economic Partnership, RCEP, World Trade Organization.

Introduction

Free Trade Agreements (FTAs) are continuing to proliferate at an increasing rate and have, to a significant degree, sidelined the World Trade Organization (WTO) as special deals are struck between contracting parties.

Thailand, although a member of the WTO has signed or is negotiating thirty Free Trade Agreements. Whilst the purpose of the WTO is to promote free trade and to reduce barriers to free trade amongst member states by reducing the levying of duties among the member states (WTO, 2015), an FTA also aims to establish long term cooperation in policy, agenda of setting activities and performing in trade, society, technology and political development (Cagnin, Keenan and Johnston, 2008). An FTA may be easier to accomplish than joining the WTO which imposes general conditions on accession (Footer, 2006).

Trade and politics are inextricably linked at both the national and international level. Trade is much more than just a legal and commercial undertaking. It also has major political imperatives as the various parties strive to exert their influence. This can clearly be seen with, for instance, the Trans Pacific Partnership (TPP) which was successfully negotiated and is now subject to legal review by the contracting parties. The text was officially released on 5 November 2015 by the New Zealand Ministry of Foreign Affairs and Trade (TPP, 2015).

This paper provides an analysis of the geopolitics surrounding the global trading system with a particular emphasis on Thailand. Initially the paper reviews the establishment of the 'New Trading Order' developed at Bretton Wood at the end of World War II. This was the start of the domination of the world trading system by the USA including the introduction of long standing trade sanctions against Cuba.

Then follows a brief discussion of the legal concept of an FTA and its standing under the WTO rules.

Two mega plurilateral trade agreements are currently being negotiated. One, the TPP has been successfully negotiated under the auspices of the USA. The other the Regional Cooperative Economic Partnership (RCEP) under the Association of South East

Asian Nations (ASEAN) and China (Smith, 2015). Both have considerable geopolitical overtones notwithstanding the fact that a number of ASEAN countries as well as Australia, New Zealand and Japan are parties to both.
Finally, the paper examines the geopolitical fallout on Thai trade following the recent political upheavals and the coup d'état of May 2014 and a temporary realignment of Thailand's trading partners.

Post World War II 'New Trading Order'

The current international economic system was established at Bretton Wood with the USA as the main power in the new economic order – the USA was the main creditor nation at that time (World Bank, 1985). This new economic world order created the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development: (IBRD) commonly called the World Bank (U.S. Department of State, 2015). The proceedings of the Bretton Wood conference were published in 1948 (Anon., 1948). Stiglitz (2002), a Nobel Prize economist, has provided an extensive review of the outcomes of the process and its negative impact on developing countries to the present day. His views are clearly controversial as they criticize both the World Bank and the IMF. As an example of badly advised intervention by the IMF, late 1996 saw foreign capital begin to be withdrawn from Thailand and Thai baht under attack from international speculators (Baker & Phongpaichit, 2009). The International Monetary Fund (IMF) intervened and forced an austerity program but by mid-1998, the IMF 'was forced to abandon its austerity programs in the face of social distress, business anger and international condemnation.'

The US paid special attention to the 'New Trading Order' that was being developed as part of the Bretton Woods process. The United States trade policy of low tariffs was driven by Cordell Hull who promoted low tariffs and introduced the first *Federal Income Tax Bill (1913)*, the *Revised Act (1916)*, and the *Federal and State Inheritance Tax Law (1916)*, in addition to being the drafter of a resolution providing for the convening of a world trade agreement congress (Anon., 2015). Clearly the plan of the US was to govern and lead the economic system from the very beginning.

During the mid to late 1940s there were a series of the meetings to develop agreements on removal of trade obstacles, trade promotion, generalized system of preferences (GSP), subsidies and government to government trade. The expectation of these meetings was the founding the International Trade Organization (ITO) to regulate the rules of trade. In 1948. International trading nations agreed to the Havana Charter that was intended to be the starting point of this New Trading Order (Interim Commission, 1948). The US was the key party in establishing the Convention. Unlike the International Monetary Fund (IMF), the ITO did not succeed due to its complicated agenda and conflict of interest among members (U.S. Department of State, date unknown). In the meantime the US developed other channels to force other countries to conform by establishing organizations such as the International Organization for Standardization (ISO) in 1946 for the purpose of facilitating 'the international coordination and unification of industrial standards' (Anon., 2015). The American National Standard Institute Inc. was a founding member together with the British Standards Institution and organizations from a further 23 countries (ISO, 1997). The ISO clearly had the potential to create Non-tariff Barriers to trade.

The US has a record of using any mechanism against its partners (e.g. see Begg, 1992). The US issued *The Cuban Assets Control Regulations (1963)* to apply trade sanctions against Cuba (U.S. Department of the Treasury, 2015). Even though the UN General Assembly has condemned the US solution since 1992, the US continued to apply sanctions against Cuba and sometimes also against other members who did not apply sanctions against Cuba. In January 2015 there was a relaxation in some sanctions (Gatti & Rothberg, 2015).

It is interesting that even in 2015, where most trading partners emphasize cooperation between the members, the United States Trade Representative clearly sees USA trade policy as protecting US industry. More recently the successful negotiation of the TPP has been seen as providing a positive legacy for the Obama administration and its pivot into Asia (Garnaut, 2015). As recently as March 2015 the U.S. Trade Representative stated that:

> '[T]rade policy done right is how we protect American workers and jobs, create a more fair and level playing field, and *ensure that it is the United States that leads in defining the rules of the road* [emphasis added].' (Executive Office of the President, 2015).

In summary, politics, economy and society in the international community have been transferred from colonization to globalization as a result of New World Order led by leading powers like the United States. It seems that their desire is to create one world policy by linking politics, economy and society by imposing their values and understanding of democracy, liberalization, and human rights.

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 Concept of a Free Trade Agreement

Whilst an FTA is an international trade agreement there is no fixed form. FTAs are usually entered into for three basic purposes: to provide efficient and convenient trade with no fortress effects; to provide substantial coverage of goods and often services; and, to set the schedule to decrease duties on goods and services in to the mutual agreement of the parties. Parties can provide flexibility in reduction of duties to the detriment of those other countries who are not a party to the FTA.

If a member of an FTA is also a state member of WTO, as most countries are, it has obligations to open its local market to the other WTO members (Eziani, 2010). The state members can give greater benefits to state members than to countries who are not the members of the WTO under the *General Agreement on Tariffs and Trade (1994)* (GATT 1994) Section XXIV Clause 5. This provision states that GATT does not prohibit members from engaging in trade integration. However the new trade group must not increase tariffs, taxes and other measures which are more onerous than before they set up the new free trade agreement. Generally the multilateral agreement under the framework of the WTO and free trade agreement have the same purpose which is to force the members to open their local markets to free trade. The WTO has the same purpose as an FTA and has its roots in *GATT 1994* (Das 1998). Whilst GATT and the WTO framework set the minimum standards, the parties to an FTA negotiate special deals and trade off benefits with each other. For example, country A will agree to give preferential tariff reductions to country B provided country B agrees that all disputes between them will be resolved through negotiation and not through the WTO Dispute Settlement Understanding. Alternatively, Country A might open its services market in return for country B accepting tariff-free manufactured goods imports.

A Free Trade Agreement has a number of features. First is 'the principle of benefits to members' which means that the Free Trade Agreement will give benefits to the FTA parties only. This does not prevent an FTA providing greater benefits to one party than the other. A Free Trade Agreement gives benefits to its members but the benefits of the trade and commerce exchange are only reciprocal between the parties to the agreement. This applies particularly to tariffs, and is called 'reciprocity'. For example the Korea-ASEAN FTA has reciprocal tariffs (Korean Customs, 2015). In this case if the FTA partner country has goods on its sensitive track the importing country will apply the same rate even if the product is entitled to tariff elimination in the importing country under the FTA. For example, Malaysia has placed Korean motorcycles on its sensitive list so preferential duty is not applied. In response, as per the reciprocal tariff agreement, Korea must then apply its normal tariff of 8% and not the preferential tariff of 3% on imported Malaysian motorcycles. But if the tariff applied in Malaysia is 5% a reciprocal duty of 5% also applies in Korea.

The 'principle of equality or unbiased treatment' between members of the free trade agreement requires trade between its members without duty and subsidies (Gupta, 2007). The members exercise these privileges to the exclusion of parties which are outside of the agreement. In reality FTAs may have lengthy phase-in periods, exclude certain matters from the FTA and/or include provisions for review of aspects of the FTA. For instance the *Thailand Australia Free Trade Agreement (2005)* (TAFTA) includes lengthy phase in periods for sensitive Thai agricultural products and progressive liberalization of services and development of the associated rules. Government procurement was explicitly excluded and subject to a Working Group recommending commencement of negotiations to bring it under the FTA. TAFTA itself is under review at 5-yearly intervals by the Free Trade Agreement Joint Commission.

Consensus and reciprocity in trade are at the heart of multilateral trade negotiation (Rivera-Batiz & Oliva, 2003). Any trade agreement whether it is bilateral or multilateral must be established by mutual agreement of all the parties who then agree to reciprocal benefits between the parties to the agreement. Whilst there are obvious advantages in achieving consensus, it does mean that negotiations can be lengthy; this can be seen by the lack of progress in the current Doha round which commenced in November 2001 and was still being negotiated as at 1 December 2015. What is happening is that FTAs are being used as a mechanism to advance the cause of free trade whilst waiting for the deliberations of the WTO to catch up. Consensus between two or several like-minded parties is much easier to achieve that that between all members of the WTO.

Whilst WTO members are free to negotiate an FTA they are still obligated to adhere to the rules of the WTO but may grant each other additional benefits and may agree to an alternative dispute resolution process.

Clearly the scope of what might be negotiated in an FTA is broad and can be developed to be advantageous to the parties and disadvantageous to the non-parties provided it meets the rules of the WTO. That is, the benefits can be greater than those provided under the WTO agreements but must not impose higher tariffs and lower quotas on non-parties than currently exist. The preference should be for a regime that treats all parties and non-parties the same. That is the aim of the WTO and its near global membership. The issue is that consensus in an international forum with such a large membership is always difficult to achieve.

Geopolitics of Current Negotiations of TPP and RCEP

As noted above the successful negotiation of the TPP has been seen by the USA as providing a positive legacy for the Obama administration and its pivot into Asia ensuring that it is the United States that leads in defining the rules of international trade. Its scale can be seen from the fact its potential founding members: USA, Japan, Canada, Mexico, Chile, Peru, Australia, New Zealand, Singapore, Brunei, Vietnam and Malaysia, represent '40 per cent of global gross domestic product, 30 per cent of global exports, 25 per cent of imports and 793 million consumers' (Huang, 2015). The USA is not alone in its desire to set the rules through the TPP. Speaking at an economic forum in Tokyo, on 6 November 2015 the Japanese Prime Minister stated that 'Rules should not be something that are imposed on you - you make them. … The TPP is the structure where Japan and the US can lead in economic rulemaking' (Anon., 2015b).

At the same time at a recent summit, China, Japan and Korea agreed 'to make efforts to speed up negotiations and reach rapid agreements on the China-South Korea-Japan Free Trade Agreement and the Regional Comprehensive Economic Partnership' (Anon., 2015c). The RCEP negotiations include China, South Korea, Japan and the 10 ASEAN member countries as well as India, Australia and New Zealand.

This led Huang (2015) in the South China Morning Post to headline his opinion piece with '*It's the geopolitics, stupid: US-led TPP trade pact less about boosting economies than about containing China's rise: Don't let the names fool you the US led TPP 'trade pact' and China's RCEP are more about influence on the global stage than economics*.' It is hard to disagree. Most of the negotiating parties probably joined for altruistic trade reasons but for the leading economies it is all about setting the agenda and making the rules.

Thailand, Geopolitics and Trade Agreements

Thailand, like other developing countries, lacks bargaining power in negotiations with powerful countries that often use their economic power to bargain or even coerce their trading partners to protect their own interests. Thailand is one of the countries who has found itself in this situation in relation to negotiations with the US over intellectual property rights. The US is still a key trading partner and ally of Thailand but for economic reasons Thailand has found it necessary to increase its ties with a number of trading partners to ensure diversification in its markets. This is really no different from Australia, for instance, which has now signed an FTA with both its key ally, the US and its key trading partner, China. The US suspended FTA negotiations with Thailand in 2006 following dissolution of the Thai Parliament and a military coup and they have not recommenced (Office of U.S. Trade Representative, 2014).

Since the 2014 Coup in Thailand, a number of countries have been highly critical of Thailand. The military government has reacted to this criticism by reaching out to its political and trading partners who are supportive or non-critical of its stance (Chongkittavorn, 2015). This has meant less interaction with the European Union and Thailand's major western ally the USA and more interaction with China and Russia.

The impact of the coup has had a significant negative impact on both Thai human rights (Human Rights Watch, 2015) and the Thai economy as described below.

On 23 June 2014 the European Union (EU) suspended official visits to and from Thailand as well as the Partnership and Cooperation Agreement with Thailand until such time as democracy is restored (Anon., 2014). The suspension of the agreement will mean a delay in the negotiation of an FTA with the EU as well. Thailand expected the new tariffs under the FTA would replace the Generalized System of Preferences that EU currently provided on tariffs on Thai products and ended in late 2015 (Lorenzzo, 2015).

During the time of political upheaval in Thailand from late 2013 until the middle of 2014 there was a significant fall in tourist numbers with a decrease in arrivals of 6.65% with some countries showing a double digit decrease in arrivals (Vanhaleweyk, 2015). Tourist arrivals from Japan, South Korea, Hong Kong and most ASEAN countries were significantly lower whilst the overall numbers from Europe (excluding) Russia barely changed. Overall the first three quarters of 2014 saw a drop in arrivals when compared with 2013 by 10.28% (around 2 million visitors less) with tourism recovering during the last quarter (Vanhaleweyk, 2015a). The first two quarters of 2015 showed the highest number of visitors on record.

Clearly, stability following the coup allowed tourism to recover. Not so the overall economy.

The impact of the coup on the Thai economy is hard to gauge as Thailand is currently affected by a 'slow global economic recovery, domestic drought, as well as lower purchasing power and weak business sentiment' which are 'hindering supportive effects from the expansion in tourism and public spending' (Kasikorn Research Center, 2015). The first three quarters of 2015 saw a contraction in exports and an expansion of the Gross Domestic Product by 2.8% (year on year).

Thai exports continued to contract for eight consecutive months to August 2015 (down 6.69% year on year) with a likely trend downwards due to a slowing of growth in China, Europe and Asia (Kasikorn Research Center, 2015a). The issue then becomes not so much what was the immediate impact of the coup on the economy but rather who can the Thai military turn to assist Thailand's ailing economy.

The Russian relationship appears to be moving from the traditional areas of trade, energy and tourism to cooperation in more strategic areas such as transnational crime, counter terrorism, intelligence and purchasing military equipment (Chongkittavorn, 2015). Thailand is also likely to apply to enter a free trade zone agreement with the Russian led Eurasian Economic Union (EEU) by the end of 2016 (Anon., 2015d). Interestingly, Vietnam which is an active TPP partner was the first country outside of the EEU to sign such an agreement. In November 2015 the Ambassador of the Russian Federation in Thailand encouraged Thailand to enter into FTA negotiations with Russia (Pratruangkrai, 2015).

Nevertheless in October 2015 Thailand signaled its intention of entering into negotiations to join the TPP (Anon., 2015e) and will seek Japan's support in joining the TPP in the future (Pratruangkrai, 2015a). Limsamarnphun (2015) argues that Thailand should join both the TPP and the RCEP and 'get the balance right'. By not joining the TPP, preliminary research indicates that Thailand will face negative consequences in the next 2 to 3 years. He considers that Thailand should also push for implementation of the RCEP to further boost the potential of the ASEAN economic community. He concludes by stating that:

> 'In this context, Thailand will have to manage both FTAs competently to maintain its international competitiveness as an exporting nation and a preferred destination for foreign investors amid the changing political economic landscape in this part of the world. On one hand, China is asserting itself more prominently in regional security and economic issues as evidenced by reclamation of the South China Sea's islands. On the other hand, the US is using the TPP as a new tool to rebalance its security and economic interests in this region. Thailand needs to adopt a fine balance to ensure optimal benefits and avoid tilting excessively towards one side or the other.'

The Thai Prime Minister has affirmed that the TPP agreement is being carefully studied with consultations being held with the Thai industrial, agricultural and private sectors to arrive at a joint consensus and 'should any repercussions arise, all sides will need to take responsibility and come together in search of solutions' (Laotharanarit, 2015).
Clearly for Thailand, international trade is more important than the associated geopolitics.

Impact of Free Trade Agreements on Thailand

The impact of FTA memberships on Thailand is difficult to measure because of the Asian Economic Crisis of 1997-1998, the Global Financial Crisis of 2008-2010, periods of political instability in Thailand between 2006 and 2015, and Thailand's membership of various FTAs. Never-the-less statistics from 2000 to 2014 are a good indicator as to Thailand's economic development since membership of the WTO in 1995. In essence the statistics show that Thailand has benefited economically and socially from its integration into the international trading community. Its political development has continued to suffer from instability leading to recent military coups.

Thailand has been successful in its agricultural development and over the last half century had made the transition from a rural agrarian to an urban industrial economy accompanied by high growth rates and major reductions in poverty and hunger (Leturque & Wiggins, 2011). Even though agriculture has declined in relative importance Thailand remains a leading agricultural exporter with low production costs. Thailand was considered to be 'a prime example of successful agriculture development in an industrializing country'.

By 2015 the economy had moved again; from a pattern of industrialization to de-industrialization as Thailand moved more into knowledge based industries, particularly in the services sector, as had Malaysia and Indonesia (Anon., 2015f). Thailand is a net exporter ranking 26th in the world with key exports being electronics, computer parts, automobiles and parts, electrical appliances, machinery and equipment, textiles and footwear, fishery products, rice, and rubber (Central Intelligence Agency, 2015). Thailand's imports include capital goods, intermediate goods & raw materials, consumer goods, and fuels. Despite the continuing crises that have impacted on Thailand in recent years, economic growth has continued (World Bank, 2015). The only negative year was 2009 with the economy recovering in 2010. The current account balance of payments is also usually in credit and since the World Bank began recording data in 1995 there have only been three negative years (1995, 2011 and 2012) and overall the total is overwhelmingly positive. That Thailand's economy is integrated with the world economy can be seen from a review of the growth in the GDP (World Bank, 2015). From 1990 until 1995 (inclusive) the GDP was growing a rate of over 8%. The Asian Financial Crisis, which commenced in Thailand, resulted in -1.4% GDP growth in 1997 and -10.5% in 1998. Moderate growth followed between 1999 and 2008 when Thailand was affected by the Global Financial Crisis of 2009 when the GDP dropped to 2.9% and then recovered strongly to 7.8% in 2010 before being affected badly by the major flooding in late 2011 which flooded manufacturing plants and affected agricultural production. GDP growth dropped to 0.1%. Growth has been patchy since with a growth rate of 6.5% in 2012 as industry recovered, 2.9% in 2013 and a low 0.7% in 2014. The low growth in 2014 was probably due to political instability.

In 1980 the contribution of agricultural (value added) to the economy was nearly 24% as was the contribution of export of goods and services (World Bank, 2015). By 2014 agriculture had dropped to around 12% and export of goods and services had risen to around 75%. Foreign Direct Investment is now a significant component of the Thai economy at around USD 12.7 billion in 2014. Even though agriculture accounts for around 12% of the GDP the percentage of the working population engaged in agriculture is still around 40% (World Bank, 2015). The greatest employment of both males and females is now in the services sector with the least in the industrial sector. The industrial sector no doubt benefits from the process of automation and hence the need for a relatively small but skilled workforce.

Social development has increased with economic development but there are still wide disparities between the rich and the poor (Peamsilpakulchorn, 2006). The impact of Thailand's domestic policy on its bilateral trade agreement policy and identified globalist versus localism tensions that have resulted in social cleavages in Thai society. The differences of opinion really revolve around whether or not globalization benefits Thailand and are very much along urban/rural lines. The segment of society and the economy becoming entwined with globalization as Thailand has become a richer and more complex society (Phongpaichit & Baker, 2008). That segment is concentrated in the Thailand's urban areas, especially Bangkok. The provincial areas of the north and north-east are less well-off caused by past neglect due to a centralized state system. This has given rise to a degree of social conflict as society seeks to resolve 'the increased social and political complexities that arise with prosperity and globalization'.

On the other hand, particularly in the health area, Thailand has reached first world status. The infant mortality rate in Thailand has fallen very significantly since 1980 to 11 deaths per 1,000 live births with a fertility rate of 1.4 births per woman (World Bank, 2015). Since 1980 there has been a significant increase in life expectancy in Thailand with females having a life expectancy of 78 years and males having a life expectancy in Thailand of 71 years. Thailand's health expenditure as a percentage of GDP at 4.6% is half that of Australia at 9.4%. The rate of malnutrition in Thailand has reduced significantly since 1980 but is

still a significant health issue with around 10% of children under five being under-weight. Whilst the access to improved sanitation facilities has improved, over 10% of Thais in urban areas do not have access. Thai access to improved water supplies has improved significantly in rural areas and now reaches around the same percentage as the urban populations at around 95%.
Political development in Thailand over the last 10 years has been described as 'contested Legitimacy' with persisting ideological and political confrontation, public controversies and crowd politics exposing a 'profound crisis of legitimacy facing the country's political system, state and power structure' (Agnew, 2010). In late 2013 the situation deteriorated and remained unresolved resulting in a military coup in May 2014. The political instability has, to a degree, taken its toll on the economic development of Thailand with changing policy directions. By and large, however, the bureaucracy continues to function albeit with changes at the top. The coup caused Thailand to come under pressure from the more democratic powers to quickly restore democracy. These partners were less willing to provide support to Thailand so the military junta turned to the less critical partners such as China and Russia. For instance, in late 2014, China signed a Memorandum of Understanding to construct over 867 km of high speed dual track railway line from northern-east Thailand to the Gulf of Thailand (Niyomyat & Lefevre, 2014).
Thailand has over the years continued to develop in spite of political situation and whether or not the government is democratically elected or a military dictatorship.

Conclusion

At the moment the international trading environment is evolving quickly and all nations, especially the smaller nations who are dependent on international trade, need to move quickly but with care to make the best of the available opportunities. Each country needs to act to protect its own interests. As the paper has shown, geopolitics is the driver as the major nations seek to protect their own economies and position in the world against their competitors. In this regard trading blocks are developing around the key trading powers of USA and China. Consequently the circumstance fit with the analogy of 'a big fish will eat a small fish'. For protection the small fish who lack power need to work together in this ever changing world.
Such an approach is critical for Thailand because of its economy which is export rather than consumer driven. Thailand, by necessity, needs to be part of the international trading community. The difficulty is ensuring that the right decisions are made and the outcome of any negotiations is fair to all negotiating parties.

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THE SYSTEM OF RESPONSIBILITY AND PUNISHMENT FOR THE PROVINCE/CITY/ REGENCY AND GOVERNOR/MAYOR/REGENT IN CORRUPTION CRIMINAL ACTION

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ABSTRACT

The subject of law in corruption criminal action is not only personal but also corporation. Corporation is not far from the system of criminal responsibility. This paper aims to find out the system of responsibility and punishment for the province/city/regency that made the decree and had inflicted the financial of country. The system of criminal responsibility for the corporation in several conducted rules consists of strict liability that burdened the criminal responsibility without see the fault and vicarious liability to others except the doer. Corporation, as the group of people or assets that organized well with law or not has responsibility and in corruption criminal action based on the chapter 20 Law Number 31 Year 1999 Juncto *Law Number 20 Year 2001 on the Eradication of Corruption. This chapter is conducted by or represents the corporation. It has members to run the company can't be freed from the punishment although the prison punishment can't be done to the corporation. The system of responsibility of the governor/mayor/regent is related to the decree, in this case it is about the committee of means and infrastructure provision that has been conducted and inflicted the financial or economic of country. It can't be separated from the responsibility of the province/city/regent as the corporation, must get punishment based on the chapter 20 on the Eradication of Corruption with the personal responsibility of the governor/mayor/regent and the committee that had been appointed. The punishment for the governor/mayor/regent is the punishing from the corruption doer because he is as the leader chosen by the society.*

Key words: Responsibility, Corruption Criminal Action, Province/city/regent

Introduction

Corruption is not only detrimental to the financial state or the state's economy, but also a violation of the rights of the social and economic society broadly. Hence, corruption in the Law Number 31 Year 1999 (State Gazette of the Republic of Indonesia Year 1999 Number 140, Supplementary State Gazette of the Republic of Indonesia Number 3874) *Juncto* Law Number 20 Year 2001 (Supplementary State Gazette of the Republic of Indonesia Number 4150) on the Eradication of Corruption, hereinafter referred to as the Law on Corruption Eradication, is classified as an extraordinary crime.

According to the data of the Ministry of Home Affairs of Indonesia, there are 318 out of the 460 heads of districts or cities in Indonesia doing corruption. Meanwhile 16 out of the 33 governors in the entire province of Indonesia also perform that action.[1] The data is increasing every year since November 2004 the President of the Republic of Indonesia issued permits for the examination of several regional heads like governors, regents and mayors getting involved in corruption cases and its permit procedure is from the president, indeed.[2]

Governors are representatives of the central government in the provincial level. They are elected by people as regional heads who must ensure adherence to the vision and mission of the central government, especially public administration tasks such as stability and national integration, governance coordination and construction, and supervision of the implementation of the county/city governance. Nevertheless, in its tenure, they have been involved in corruption and abuse of power as the head of a local public agency which is in the province and so have mayors and regents.

Perpetrators of corruption is only limited to the individual. According to the Law on Corruption Eradication, it has set other legal subjects of corruption, including the corporation. The application of the criminal rule against corporate as corruptors has been included but the limitation of corporate liability and criminal provisions have not been clear enough in relation to the responsible subject if the imprisonment is imposed.

Based on the description above, the formulation of the problem which will be the focus of this paper is the accountability system and punishment for Province/City/District as the public agency and the Governor/Mayor/Regent as the perpetrators of corruption

[1] m.republika.co.id/berita/nasional/hukum/14/03/14, "Waduh, 318 dari 460 Kepala Daerah di Indonesia Lakukan Korupsi ," 14 March 2014, accessed on 10 May 2014.

[2] antikorupsi.org/en/docs, "Daftar Kepala Daerah Tersangka Korupsi, yang Telah Dapat Ijin Pemeriksaan," accessed on 1 0 May 2014.

that has inflicted state finances or economy. This research aims to examine and analyze the accountability system and punishment for Province/City/District as the public agency and the Governor / Mayor / Regent as the perpetrators of corruption that has inflicted state finances or economy.

Research Design

a. Corporate as Legal Subject of Corruption

Legal subject is a supporter of the rights and obligations. Article 59 of the Criminal Code only recognizes that the subject of a criminal act is a human and does not recognize a corporation as the subject of a criminal act because the responsible remains are the board of the corporation itself. The legal subject of corruption does not only involve *naturlijke persoon*, but in the formulation of the articles of the Law on Corruption Eradication, it is decided that each person is the legal subject.

The phrase of each person within the formulation of the articles of the Law on Corruption Eradication refers also to the corporation both legal corporation and non-legal corporation. Limitation of definition of a corporation is closely related to problems in the field of civil law. For the definition of a corporation is a closely related terminology to the term of legal body (*rechtspersoon*), and the legal body itself is a terminology that is closely related to the field of civil law (Dwidja Priyatno 2004, 12).
According to Article 1653 of Civil code, legal body is divided into 3 kinds:

1. Legal body held by the Government / public authority, such as the Regional Level I , the Regional Level II/ Municipality and so on.
2. Legal body recognized by the Government / public authority, such as associations, churches and religious organizations, and so on.
3. Legal body set up for a purpose that is not contrary to law and morality, such as limited liability companies, insurance associations and so on.

Legal entities may also be divided into 2 types:

1. Public law agency, such as the Republic of Indonesia, the Regional Level I , the Regional Level II/ Municipality, state banks (such as Bank Indonesia);
2. Private law agency, such as limited liability companies, cooperatives, shipping, foundation.

Based on the formulation of Article 1 of the Law on Corruption Eradication determines that each person is an individual or including a corporation, while the corporation is the well-organized association and or properties which are either a legal entity or non-legal entity. This provision has incorporated corporation as a legal entity that can be sentenced to criminal.

The formulation of this article is the development of the corporation as a legal entity in the criminal law. It is not only corporate officials who are accountable but also those acting for and/or on behalf of the corporation or for the benefit of the corporation including the employees of the corporation. However, the form of criminal sanction imposed to the board as an individual and the corporation is different.

Corporate criminal liability in the Law on Corruption Eradication has developed corporate criminal law which is corporation regarded as a legal subject performing a criminal act and directly responsible to criminal as well as legal subjects in the form of human beings. Hence, if the corporation as the maker then it will be as well as responsible. So, not only corporate officials can be held accountable for criminal but the corporation itself can already be responsible for its actions.

Law on Corruption Eradication also confirms the corporation as a legal subject of corruption as referred to in Article 20 as follows:

(1) In the case of corruption made by or on behalf of a corporation, the criminal charges and imposition are made to the corporation and or the board.
(2) The criminal acts of corruption made by a corporation if the criminal act is done by people both based on working relationship or based on other relationships, acting in the corporate environment either individually or jointly .
(3) In the case of criminal charges made against a corporation, then the corporation is represented by the board.
(4) Board representing the corporation as referred to in paragraph (3) may be represented by another person.
(5) The judge may order that the corporate board represent themselves before the court and may also order that the board is brought to trial.
(6) In the event of criminal charges made against the corporation, the call for facing and submission of the summons are delivered to the board at the board residence or office.
(7) Capital criminal which can be imposed against the corporation only a fine, the maximum criminal provision be plus 1/3 (one third).

b. Corporate Crime

Corporate viewed from its legal form can be given a narrow meaning and a broad meaning. In a narrow meaning, namely as a leg al body, a corporation is a legal figure that its existence and authority are able to perform legal acts recognized by civil law. In a broad meaning, corporation can be a legal body and a non-legal body, i.e. in criminal law (Sutan Remy Sjahdeini 2007, 43).

Some terms related to the corporation often confuse the public largely to understand the various forms of corporate crime. The te rms existing in the criminal law and the banking law have different meaning and purpose in creating the occurrence of a corporat e crime. In this regard, Steven Box as cited by Arief Amrullah distinguished corporate crime as follows:

1. Crimes for corporations (corporate crimes): crimes committed by the corporation to achieve corporate objectives such as profitability for the purpose of the corporation, or in other words , corporate crime is committed clearly for the corporate and not against it.
2. Crimes against corporation (employee crime): crimes against the corporation, such as a corporate accountant stealing money. In this case the target of criminal is the corporation so that corporations are becoming victims.
3. Criminal corporations: corporations are used as a means to commit a crime (Arief Amrullah 2006, 41-42).

According to Sutherland, as quoted by Setiyono, depicting white collar crime as "... any person of higher status who commits sos ieconomic of legal violation in the course of his or her occupation" (Setiyono 2005, 30,36). The term use of white collar crime is for crimes committed by people who have high social position and honor in his occupation, especially to designate crimes commi tted by employers and executive officials who harm the public interest.

Sutherland, as quoted by Arief Amrullah, discussed about white - collar criminality and produced five propositions as follows:

1. White - collar crime is a real crime and a violation of criminal law;
2. White - collar crime is different with the crime committed by lower-class groups;
3. Criminological theories which states that the crimes are related to poverty, mental illness and the social condition of the slum is no longer appropriate;
4. Required a theory of criminal behavior that would explain white - collar crime and crimes committed by the lower classes;
5. A hypothesis against this view in accordance with the theory of differentian association and social disorganization.

c. Corporate Criminal Liability Theory

In the beginning there is a difference in the civil law regarding a legal entity which can commit an unlawful act (*onrechtmatig ha ndelen*), through *doelmatigheid* and *billijkheid* as the main base, then the science of civil law accepts that a legal entity shall be d eemed guilty of commiting an unlawful act, especially in the economic traffic. Legal entities cannot escape from the mistakes ma de by the board. Intent (*dolus*) or negligence (*culpa*) of the board shall be considered as intentional and negligence of its own leg al entity (Mardjono Reksodipoetro 2014, 11).

Accountability of the criminal law is based on the principle of not convicted if there is no error (*geen straf zonder Schuld*). That one cannot be accounted for (punished) if the person does not commit a criminal act. However, despite committing a criminal, it is not always that person who can be convicted.

According to the teachings of accountability identification, the company can carry out a number of offences directly through the people who are very closely associated with the company and are seen as the company itself. In such circumstances, they are not as a substitute and therefore company liability is not included as personal accountability (Barda Nawawi Arief 2002, 154).

Doctrine of accountability identification is related to the element of *mens rea* that must exist and be fulfilled for those who are acting for and/or on behalf of the corporation/legal entity or for the purpose of the corporation/legal entity in order to impose the accountability to the corporation/legal entity. *Mens rea* or fault is the condition at which the criminal actor is able to be reproached because in terms of people actually s/he can do the other thing if he does not want to perform these actions (Roeslan Saleh 1983, 74).

Errors are the condition at which the criminal actors are able to be reproached because in terms of people actually s/he can do another if he does not want to perform these actions. According to Chairul Huda, this definition is composed by three main components, namely: 'reproach', 'in terms of the people' and 'can do another'. 'Reproached' is merely as a result of a mistake, if it is merely understood as 'be punished'. 'Reproached' also means 'accountable'. On the legal subject of human, the relationship between the act and its actor is focused more on the relationship between the inner state of the actor and the crime. So, 'in terms of people', the actor 'can be reproached' for having committed a crime. 'Can do another' means there is always a possibility for the actor to avoid the occurrence of crime. The absence of the possibility to do other thing for the actor, besides committing a crime, causes him/her to be released from state of guilt (Chairul Huda 2006, 74-76).

Liability identification refers to directing mind as someone who is responsible for creating and implementing corporate policies, in this case the head of the corporation/legal entity as one of the organs in the company. It does not include a person who only implemements corporate/legal entity policies created by directing mind. So, the only official who is directing mind of the corporation/legal entity that is aware of corruption that has been done, which can be held responsible for an act of corruption.

According to Sutan Remy Syahdeini, that formally juridical, directing mind of the corporation can be seen from the corporate statutes, decrees of the board containing the appointment of officials or the managers to fill certain positions, and granting authority to carry out the task and obligations associated with the position. Directing mind of the corporation are personnel who have a position as a determinant of corporate policy or have legitimate authority to perform or not perform acts that bind the corporation without the approval of his superiors.

Directing the mind as someone who is responsible for creating and implementing corporate policy/legal entity may not have the presence of a justification or an excuse to release him from liability for the act of corruption so that its criminal liability can be charged to the corporation or to the directing mind itself. This is in accordance with the legal entity doctrine recognizing that the

corporation can only do or not do an act by humans, not by itself. Only when the real perpetrators can be criminally accountable, then the relevant criminal liability can also be charged to the corporation.

According to Barda Nawawi Arief, vicarious liability can be defined as the legal liability of a person for acts committed by any other person. Briefly it is defined as subtitute liability. Subtitute liability is the imposition of liability to others for the actions committed by a person so that the charged person is considered to have committed the acts (criminal offense). In this case the imposition of subtitute liability deviates from the requirement of *mens rea* on a person in order to make him responsible for the actions that have been performed. This subtitute liability is contrary to the concept of liability identification which requires the existence of *mens rea* on the perpetrators of corruption to be charged for its actions to corporate.

Vicarious liability occurs over acts committed by a subordinate in this case can be done by officials or employees or workers of a corporation/legal entity in which the superiors as the employers bear the liability for acts committed by subordinates. In this case act committed by officials or employees or workers is a must in order for duty of officials or employee or workers in accordance with the statute, authority, and policies granted by an employer to his subordinates. Thus an employer does not have to bear criminal liability for acts committed by officials or employees or workers if the act is done outside or unrelated with the statute, authority, and policies of the employer to his subordinates. The corporation as an employer must take responsibility for the acts committed by officials or employees even though the corporation does not commit the act by himself.

d. Punishment For Corporations

The description of the perpetrator is still often associated with physical actions performed by the actor (*fysieke dader*). Socio-economic environment of the actor does not always need to act the criminal physically. The act may be carried out by employees. Because the acts of the corporation is always manifested through human actions, then the transfer of the liability itself becomes acts of the corporation , it could be done if such actions are carried out in the traffic of social life as acts of the corporation.

According to Mardjono Reksodiputro as quoted by Hamzah Hatrik, that in criminal law the existence of a legal entity or business entity that bears the term "corporation" is accepted and recognized as a legal subject that can perform a criminal offense and can also be accounted for. In the development of criminal law in Indonesia, there are three systems of corporate liability as the subject of crime, namely:
1. Corporation board as the perpetrator, then the responsible one is the board;
2. Corporation as the perpetrator, then the responsible one is the board;
3. Corporation as the perpetrator and the responsible one (Hamzah Hatrik 1996, 30).

Sutan Remy Sjahdeini has other viewpoint that there are four possible systems to the imposition of corporate criminal liability, n amely:
1. Corporation managers as a criminal, and therefore they should bear the criminal liability;
2. Corporation as a criminal, but the board should bear criminal liability;
3. Corporation as a criminal and the corporation itself must bear criminal liability;
4. Managers and corporations both as perpetrators, and both also should bear criminal liability.

As a corporation, based on Article 20 Paragraph (1) and (2) of the Law on Corruption Eradication that,
1. In the case of corruption made by or on behalf of a corporation , the charge and imposition of criminal may be made to the corporation and or managers;
2. Criminal acts of corruption committed by a corporation if the criminal act is done by people both based on working relationship or based on other relationships, acting in the corporate environment either individually or jointly.

Based on the grammatical interpretation of Article 20 Paragraph (1) of the Law on Corruption Eradication there are three (3) form a system of corporate criminal liability, namely:
1. Corporation as the criminal perpetrators and should be held accountable;
2. Corporation as the criminal perpetrators but the managers who should be held accountable;
3. Corporation as the criminal perpetrators but the corporation and managers should be responsible.

To understand the provision of Article 20 verse (2) of Corruption Eridication Law is not included in the explanation so it must be given legal interpretation of the verse. Corruption that based on the working relationship or other relation of the doers with the corporation/legal body is one of liability imposition to corporation/legal body for the action commited by the offenders. Based on the employement relationship or other relationship that happened is must be in accordance with the intent and purpose oand the content of corporate budget it self. This relationship is intented as a basis and guide for the doer in his activity done inside or outside the korporation/legal body.

Those who act upon the employment relationship can be defined as those who have a working relationship with the board or as an employee of corporation. In this case, it is under the corporation budget, letter of agreement as an employee or working appointment in a corporation. Meanwhile, those who act based on another relationship can in the form of employment relationship or with the corporation. Those people will represent the corporation to do legal action for or on corporation or the importance of corporation that gives benefit for the corporation.

The actions done by the offenders for or on the corporation or its importance, either under the employment relationship or other relationship, inside the corporation domain in order to be charged for corporation must be in form of *intra vires* not *ultra vires*.

The actions of ultra vires are not based on the purpose of corporation but as personal responsibility of the offender and can be responsible to the corporation.

Corruption action is considered done by corporation/legal body if it happened in corporation domain both individually and jointly. From the explanation of Article 20 verse (2) of Corruption Eradication Law there are three imposition system of liability offender to the corporation as legal subject as follow:

a. Corporation as the offender of corruption then the corporation and the official should bear the criminal liability
b. Corporation as the offender of corruption then the corporation itself should bear the criminal liability
c. Corporation as the offender of corruption then but the official should bear the criminal liability.

Finding and Discussion

The element of authority abuse in corruption action is *species offense* of element that against the law as *genus offence* will always be associated with the position of public official. Offence of authority abuse in corruption has been regulated in Article 3 of Corruption Eradication Law as follow: *any person with the purpose of enriching himself or another person or a corporation, abusing authority, opportunity, means at its disposal, because of the position or situation that could harm the economy of state or country, with life imprisonment or 1 year imprisonment and a maximum of 20 years or a fine of 50 million and a maximum of 1 billion.*

The formulation of Article 3 of Corruption Eradication Law does not have element of unlawful but there is element of authority abuse. Inherent authority abuse and against the law does not mean as unlawful proved *mutatis*. In contrast, if the element of authority abuse has proven, the element that against the law is not necessary needed because it has proven automatically. In terms of element of authority abuse is not proven then the element is not necessarily against the law not proven.

Based on the decree of the Supreme Court of Indonesia No. 934/Pid/1999, 28th of August 2000, states that the element of authority abuse, opportunity abuse, and means abuse in Article 3 of Corruption Eradication Law is independent element or an alternative. The authority abuse in Article 3 is addressed to the subject/*offence* doer such as official or civil servant. The authority in a position or situation of the corruption crime doer is a set of power or right that related to the position or situation of the doer to take an action that needed in order to help his/her duty or job can be done properly.

Based on the decree of the Supreme Court Republic Indonesia No. 572K/Pid/2003, it must be distinguished and separated between the position liability and personal responsibility. Referred to the Supreme Court, position liability is responsibility that given to the functionary that abuse the opportunity in his or her position for corruption. The opportunity means the possibility used by the corruption doer in which written in the stipulations about the work system related to the position or situation occupied by the corruption doer. This opportunity is taken as the effect of emptiness or weakness of stipulation of the work system or deliberateness to interpret the stipulation inappropriately. The means is the requirement, way and media. Related to the provision in article 3 of Corruption Eradication Law, means is the way of work or method that correlated with the position or situation of the corruption doer. The word position is used to the official as the corruption doer that occupied a position both in structural and functional.

Corruption Eradication Law does not specifically regulate the inclusion form. In accordance with the provisions of Article 103 of the Criminal Code, Article 20, Verse (2) the Law on Corruption Eradication force participation form set out in Article 55 of the Criminal Code. One form is the inclusion of Article 55 of the Criminal Code are those who participate in a crime or *medeplegen*, where participants together as one entity perform an action such that the action or actions of each are separated only cause a portion of the execution criminal offense, while the acts or acts jointly or actions shall be implemented such offenses to be perfect (in this case corruption occurs). For each *medeplegen* participant threatened the same punishment although some participants did not meet the elements of any offense alleged, because every participant is considered as a criminal maker, then all participants were threatened with the same punishment.

Assistance form of corruption are also included in the Corruption Eradication Law referred to the Article 15, which states that everyone attempted, assisted, or conspiracy to engage in corrupt activities, is liable to the same penalties as referred in Article 2, Article 3, Article 5 through Article 14. Affirmation of the corporation as a legal subject of corruption contained in Article 20 of the Corruption Eradication Law is fundamental law of corporation that can be responsible and punished if there was any corruption, in terms the corruption done by the person that acting for and/or on behalf of the corporation or for the benefit of the corporation, either under labor relations or other relations in a corporate environment done individually or jointly.

The provision of Article 20 verse (2) of the Corruption Eradication Law in burdened criminal liability to corporation that follows the doctrine of identification and the doctrine of aggregation. Doctrine of identification indicated from the formulation *if the offense is committed by good people based on working relationship or based on other relationship*, because this doctrine teaches that in order to impose criminal liability for a corporation, who is committing a crime should be able to be identified by the public prosecutor. If the offense was committed by those who are "*directing mind*" of the corporation then the criminal liability can be charged to the corporation.

As the head of the Region Level I, Region Level II/Municipality which is the "*directing mind*" of a public entity, in this case the Province/Municipality/District, the corruption done by the official can be burdened to the Province/Municipality/District. The action of the Governor/Mayor/Regent was considered as the behavior and attitude of the Province/Municipality/District. It imposes liability not only to the Governor/Mayor/Regent but also charged to the Province/Municipality/District in accordance

with the grammatical interpretation of Article 20 verse (1) Corruption Eradication Law in the third form, corporation as the doer but corporation and the officials must be responsible.

The writer believes that the imposition of criminal liability on the Province/Municipality/District as corporation/legal body for their action acts committed Governor/Mayor/Regent during working relationship based or based on other relationships is one of efforts as a deterrent to eradicate the culture of corruption in the government. Province/Municipality/District is charged with the administration of the criminal liability of principal and additional criminal punishment in accordance with the stipulation of Corruption Eradication Law.

Article 20 verse (2) of the Corruption Eradication Law also embrace the doctrine of aggregation, indicated from the formulation *when the criminal act was committed ... within the corporate environment either individually or jointly*. Applying aggregation doctrine there must be coherence of the elements in the various aggregates of people as a whole would mean the fulfillment of a crime and accountability. The combination of the elements are interrelated and can be combined into a whole that all these elements meet the pattern of actions described in the formulation of the relevant offense. All the elements, both concerning the behavior and faults, must be complete fulfilled as required in *offence* formulation and all these elements should be linked, not stand alone separately.

This aggregation doctrine complete the identification doctrine that Governor/Mayor/Regent action in corruption must satisfy the elements referred to in the formulation of corruption and there is an element of inter-related errors so that accountability can also be charged to the Provincial/Municipal/District as corporation/legal body.

Punishment for corporation who engage in corruption activities contained in Article 17, Article 18, and Article 20 of the Corruption Eradication Law. Penalty provision for corporation/legal body consists of the main criminal and additional criminal penalties beside the imprisonment for Governor/Mayor/Regent as the doer of corruption. The provision of punishment for the corporation/legal body, in this case the Provincial/Municipal/District, in the form of a fine as stipulated in Article 20, verse 7 of the Corruption Eradication Law which states that main criminal can be imposed to the corporation with a fine, the maximum punishment is added 1/3 (one third).

Under the provision of Article 17 of Corruption Eradication Law, defendant will not only get punishment referred to Article 2, Article 3, Article 5 to Article 14, but also can get an additional as referred to in Article 18. Defendant here is a corporation/legal body, in this case the Provincial/Municipal/District. Additional penal provision contained in Article 18 of the on Corruption Eradication Law, that:

(1) In addition to the additional punishment as referred to in the Book of the Criminal Law, some additional punishments are:
   a. deprivation of tangible chattels or intangible or immovable property used for or derived from acts of corruption, including company-owned convict where corruption is done , so is the price of goods that replace these items;
   b. replacement payment amount equal to as much as property derived from criminal acts of corruption;
   c. closure of all or part of the company for a period of 1 (one) year;
   d. repeal all or part of certain rights or removal of all or part of certain advantages, which have been or may be provided by the Government to the convict .
(2) If the convicted person does not pay the compensation referred to in verse (1) letter b, maximum in 1 (one) month after the court decision got settled power, then his property may be seized by prosecutor and auctioned to cover the replacement money.
(3) If the convicted person does not have enough wealth to pay the compensation as referred to in verse (1) letter b, then it shall be imprisoned for the duration does not exceed the maximum threat of criminal substantially in accordance with the provision of this law and the period has been determined in a court decision .

Additional criminal stipulation in the Corruption Eradication Law completes the criminal additional referred to the Article 10 of the Penal Code. Additional criminal punishment to the corporation under the Article 17 of Corruption Eradication Law is optional, it may be imposed or not by a judge following the main criminal like criminal penalty. The optional provision reflected the presence of the word "may" in the article to suggest that additional punishment is imposed to the corporation. Thus meaning of imperative as the command to impose additional criminal punishment under the main criminal to the corporation does not implied.

Imprisonment and criminal fines given to an individual who is the subject of law , in this case the governor/mayor/regent, is a different criminal system that is an alternative to the Criminal Code . Criminal system in Act Eradication is cumulative with the conjunctive " and " in describing the types of sanctions. Governor / mayor / regent found guilty of corruption and meet the elements contained in this Act in addition sentenced to prison also sentenced to a fine.

Sentencing the Governor/mayor/regent can not provide sufficient assurance that the corporation/institution will not keep doing corruptible criminal. Giving the main criminal fines for corporations with additional criminal/legal entity, in this case the Provincial/Municipal/District, as the prevention of corruption will realize the goal of punishment is deterrence (generally and specificly), and the protection for public financial loss and State's economy.

Conclusions and Suggestions

Based on the discussion above may results the conclusions as follows:

a. Systems of criminal accountability for the Province/City/Regency as a public legal entity in the formulation of the Law

Corruption Eradication embrace accountability identification teachings (doctrine of identification) and aggregation teachings (doctrine of aggregation). Directing mens rea element of mind, in this case the governor/mayor/regent, should be proven to have committed an act against the law according to the criminal acts of corruption formulations Law Corruption Eradication. Governor/mayor/regent as head of the district will be charged as criminal accountability of departmental responsibility (liability department).

b. The Province/City/Regency that has been sentenced as a public legal entity is a criminal offense with the maximum criminal fine plus 1/3 (one third) and accompanied by additional criminal. This is different to punished Governor/mayor/regent in the form of imprisonment and criminal fines, but also charged the return loss of financial or national economy.

Suggestions that given to the the problems and conclusion above are:

a. Sentenced Province/City/Regency should be included in the indictment by the General Attorney together with the criminal charges for governor/mayor/regent. The claims are unseparable and together with an indictment in accordance with the acts against the law which fulfill the formulations of Law Corruption and Eradication.
b. Sentencing Governor/mayor/regent by The Law of Eradication of Corruption should be a weighting the perpetrators which different from individual corruption acts, so that the changes of formulation in weight imprisonment and criminal fines in the Laws of Eradication of Corruption should be needed.

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RESTORATIVE JUSTICE AS AN ALTERNATIVE COMPLETION OF DOMESTIC VIOLENCE CASES

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ABSTRACT

The concept of retributive justice and fairness-based restitutive punishment, retaliation against the perpetrators, exile, and destruction must be replaced by a restorative justice-based reconciliation, victim recovery, integration in society, forgiveness, and forgiveness. So according to the purpose of the settlement of restorative justice is more emphasis on the repair or restoration of the suffering of the victims as a form of accountability of perpetrators without compromising the interests of offender rehabilitation and interests to maintain public order. From the perspective of justice women, the picture that can be observed from the law we are: women's experiences are often not taken into account in the formulation of law and policy, resulting in a law that is far from the sense of justice of the community (women/the marginal parties) and often unrealistic because it does not listen to the voice women. In addition to the implementation of laws in the field is often characterized by a lack of understanding of the practice of female perspective (often the victim) among law enforcement officials, increasingly distanced women from access to justice. Thus the necessary effort to reform the law from the perspective of justice for women. Restorative justice is often found in people's everyday lives. Although no formal, the effectiveness of this mechanism is based on local knowledge remains high and become priorities for the community before continuing to the formal dispute resolution in the courts. Restorative Justice is beneficial not only for the victim and the perpetrator, but also to the court and the public at large. It is only fitting if restorative justice used to resolve domestic violence cases. Restorative justice is very suitable to be applied for in accordance with Indonesian culture, especially to resolve family disputes which still maintains harmony and maintain privacy.

Key words: Restorative Justice, Domestic Violence Case.

Introduction

Regulations in Indonesian law relating to domestic violence (domestic violence) is still visible imbued with the spirit of retributive. Where the victim is not considered a good aspect in determining the sanction to be imposed or in the process of finalizing its case. While the resolution process domestic violence cases are based on the idea of restorative justice is a settlement of a case involving the victim. But the resolution of cases of domestic violence based on the idea of restorative justice should not be done for all cases, but only for cases of domestic violence causing physical or psychological suffering, which are lightweight, sexual violence between husband and wife, and the neglect of household.

Such thinking has the following reasons:

1. individual interests (family) to maintain the household is considered smaller than the state's interest in protecting or maintaining public interest and keep the feeling of community justice in sentencing for domestic violence are severe consequences or death of the victim.
2. individual interests (family) to resolve issues arising between them out of court, for domestic violence that causes bodily or mental, which are lightweight, sexual violence between husband and wife, and the neglect of household, is considered greater than the interests of the state or the public interest demanded that his case. This is implied by the formulation of domestic violence under Article 51, 52 and 53 of the Law on the Elimination of domestic violence as a crime on complaint.
3. The threat of imprisonment for domestic violence causing physical or psychological suffering that is included in the category of minor criminal short body (Article 44 paragraph (4) and Article 45 paragraph (2) of the Act is to formulate threat PKDRT imprisonment of 4 months).
4. Criminal penalties are imposed for directly also become a financial burden the victim or the victim's family. Because domestic violence generally occurs among people who are bound kinship, the criminal penalties imposed for offenders also will be a burden for victims. In accordance with the basic idea of restorative justice is to restore victims' suffering, it is not appropriate criminal penalties for domestic violence cases.

Benefits of Restorative Justice in Domestic Violence Case Settlement

In practice, restorative justice guided by several principles as follows:

1. Establish joint participation between the offender, victim, and community groups in resolving an incident or crime. They work together to find a solution that is perceived to be fair to all parties (win-win).
2. Encourage players to be responsible for the victim and establish responsibility not to repeat his actions.
3. Directing actors in accountability to the victim, not the responsibility of the state or legal liability.

4. Encourage completing his actions in a way that is more informal than formal court proceedings.[1]

Although the idea of restorative justice have not been able to guarantee the abolishment of domestic violence, but the idea is worth considering the following reasons:

1. The existence of correspondence between restorative justice with Pancasila. This is evident from the principle of the family who became the core of Pancasila which is also contained in restorative justice, as shown in restorative justice principles: (a) conflict resolution is done by involving all stakeholders, namely the perpetrators, victims, and society; (b) the purpose to be achieved is to perform reconciliation between the parties while repairing damages arising; (c) There is personal involvement between the parties; (d) the perpetrator invited to empathize with the victim and encouraged to learn to be a good member of society and useful; (e) to establish a trusting society.
2. The fact that domestic violence occurs among people who have a special relationship, which is generally either by marriage or blood relationship. So the criminal provision to the perpetrators who are also members of the victim's family will have negative impacts on victims and their families, especially if the inmate is a person who is the backbone of the family.
3. There is a tendency to consider aspects of international developments in the settlement of victims of crime. Consideration of aspects of the victim in the completion of the criminal act is not only relevant in the case resolution process, but also related to the recovery of the suffering of the victims, especially the compensation.[2]

In practice in Indonesia today, restorative justice can be applied in several forms as follows:

1. Deliberation family group.
   Deliberation in family groups need to be considered: (a) the presence of the relevant parties, including the victim, offender and other important people who need to come; (B) the other party that needs to be presented, among others, those who support the perpetrators and those who support victims; (C) other matters to consider, among other things: information regarding the meeting, specify the meeting place.
2. Service in the community.
   Service recovery can be carried out by independent organizations and institutions concerned with children and women by providing psychological assistance to victims and perpetrators.
3. At each stage of the justice system.
   At every stage of the justice system from investigation, prosecution, until the diversion proceedings shall be conducted through discussion forums / mediation with the goal of recovery for the offender, victim and community.

Diversion means diversion or avoidance. In the context of restorative justice, diversion is an alternative to the existing criminal justice. According to Mc. And Mc Carthy. Carthy, the concept of diversion is actually as old as the criminal justice system now. Although the lives of the people under the law, there should still be flexibility to adapt to the complexity of the legal issues faced today. Law enforcement officials have the discretion to not have to arrest and imprison people who committed the crime. Diversion provides the opportunity for criminals to avoid prosecution and detention, as well as counseling assistance, health, education and skills training. Diversion also pave the way for criminal justice to reduce the arrears case of a misdemeanor.[3]

Stephenson, Geller and Brown believes there are four (4) forms of restorative justice. All of these forms has the objective to improve the criminal act by balancing the interests of the offender, the victim and the community. The fourth form of restorative justice are:

1. Penal mediation (victim-Offender mediation).
   A process with the assistance of a neutral third party and impartial, helping the victim and offender to communicate with each other in hopes of reaching an agreement.
2. Restorative conferencing.
   Almost the same as penal mediation, which distinguishes only role as a mediator guides the discussion, the existence of the manuscript guides, and the presence of the family of each party.
3. Family group conferencing.
   Families of both parties (perpetrators and victims) to make a plan of action based on the information the perpetrator, the victim and the professionals who help. The action plan addresses the consequences of the perpetrator and preventing it does not happen again.
4. Community panel meetings.
   The meeting was attended by community leaders, perpetrators, victims and parents/families to reach an agreement fixes the error.[4]

Penal Mediation

[1] Hj. DS. Dewi dan Fatahillah A. Syukur, 2011, *Mediasi Penal: Penerapan Restorative Justice di Pengadilan Anak Indonesia*, Indie Publishing, Depok-Jakarta, hlm. 32.
[2] G. Widiartana, 2009, *KDRT (Perspektif Perbandingan Hukum)*, Penerbit Universitas Atma Jaya, Yogyakarta, hlm. 88-98.
[3] Mc. Carthy, B.R. dan Mc. Carthy Jr. Bernard J., 1997, *Community-Based Corrections 3 rd ed.*, Belmont: Wadsworth Publishing, hlm. 37.
[4] Hj. DS. Dewi dan Fatahillah A. Syukur, *Op.Cit.*, hlm. 41-42.

In fact everywhere, expensive litigation expenses, this is an obstacle to seeking justice. Not just for the poor. They are capable of increasing average also can not afford to pay court fees. PS Atiyah in Law and Modern Society states: "The cost of legal services is well known to be high, and the cost of litigation is so high as to be almost prohibitively for people of ordinary means".[5]

All you need do now is to revitalize the deliberation mechanism and give confidence to the people to resolve their own disputes. Mediation is very suitable to be applied for in accordance with Indonesian culture, especially to resolve family disputes that still maintain harmony and maintain privacy. Indonesian Justice System then also adopted a mediation with the Supreme Court issued Regulation No. 1 of 2008 on Mediation Procedure of the Court.[6]

The completion of the mediation cases besides cheaper than if litigants, there are also other advantages of mediation are:

a. There are two important principles in mediation. First, avoid the "win-lose", but "win-win solution". Win-win not only in terms of economic or financial, but including also moral victory, reputation (goodwill and trust). Second, the decision does not give priority consideration and legal reasons, but on the basis of equality and fairness compliance.
b. Settlement through mediation shorten the turn around time compared to the litigants. Extend the length of time the litigant not only add to the economic burden of finance, but also the psychological burden that will affect the attitudes and activities of the litigants.
c. For Indonesian people, litigants social effects which break the rope family relations (fraternal relations or social relations). Not only between parties litigant. Social effects can be extended to the wider kinship. This can happen due to a case not only be of interest and "self-esteem" litigants, but can propagate in relatives. A case not only hurt the parties but also relatives. By way of mediation, these things can be avoided. Family relation ships that can be glued back cracks.
d. Mediation is in accordance with the basic social interaction Indonesian society that prioritizes the basic of kinship, community, kinship and mutual cooperation . These principles have shaped the behavior of tolerance, forgiving, and promote attitudes the communal. Mediation is a good instrument for resolving disputes keep the basics of kinship, community, or family.
e. Mediation is a global phenomenon. Recognizing the severity of the litigants (cost, time, increasingly complex legal, reputation, etc.), then the mediation as an alternative means of dispute resolution has grown global. Well as the family of nations, as well as part of the procedures of international legal relations, mediation is the right way resolve disputes transnational commerce.
f. In light of the administration of justice, there are several advantages of mediation:
    1) The more disputes can be resolved through mediation, will reduce the amount of stress cases that go to trial. It can also affect the possibility of delinquency or "pending" in the settlement. The judge has the opportunity to explore deeply every case, which can improve the quality of decision, both for the benefit of the development of law and the interests of the litigants.
    2) At a low level of social trust to the reputation of judges, mediation is a deterrent, since the completion of mediation is determined by the parties, not by the judge .
    3) Gradually litigants in court can be directed to legal issues (not the value of the case) are complex and fundamental law that will affect the development of science even legal.[7]

Penal mediation is often referred to by various terms, such as: mediation in criminal cases or mediation in penal maters. Because the penal mediation primarily bring the perpetrator to the victim, then the penal mediation is often also known as victim Offender mediation (VOM). Penal mediation is a form of alternative dispute resolution outside the court commonly known as Alternative Dispute Resolution (ADR). Under the legislation in force in Indonesia is in principle a criminal case can not be settled out of court, although in certain cases, to permit the completion of a criminal case out of court, through a variety of law enforcement discretion or through consultation mechanisms/ peace or forgiveness institutions that exist in society (family meetings, village meetings, customary deliberation).[8]

Due to the nature of the criminal case is different from civil, penal mediation basically does have some differences with the general mediation. Umbreit explain these differences by making comparisons as listed in Table 1.

Table 1 . Comparison the General Mediation With Penal Mediation[9]

No. & Aspects	General Mediation	Penal Mediation
1 . General Focus	Issues & deal	Dialogue and relationship
2. Preparation of the parties to the conflict	mediator should not be contacting the parties before the mediation begins	At least once face to face meeting with the mediator each party prior to the

[5] Bagir Manan, *Mediasi Sebagai Alternatif Menyelesaikan Sengketa",* artikel dalam Varia Peradilan, No. 248 Juli 2006, hlm. 6.
[6] Hj. DS. Dewi dan Fatahillah A. Syukur, *Op.Cit.*, hlm. 70-72.
[7] *Ibid.*, hlm. 9-10.
[8] Barda Nawawi Arief, 2008, *Mediasi Penal: Penyelesaian Perkara Pidana Di Luar Pengadilan*, Penerbit Pustaka Magister, Semarang, hlm. 1-3.
[9] Mark Umbreit, 2001, *Humanistic Mediation: A Transformative Journey of Peacemaking*, dalam *The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research*, ed. Umbreit, M., Jossey-Bass, San Fransisko, hlm.17. Lihat Hj. DS. Dewi dan Fatahillah A. Syukur, *Op. Cit.*, hlm. 85. Perbandingan no.8 dan 9 adalah versi penulis.

		meeting together
3. The role of the mediator	Directing and guiding the parties to reach a satisfactory agreement .	Setting up the victim and the offender to have realistic expectations and feel safe enough to dialogue directly
4. Mediation style	Active and sometimes arrange, often spoke and asked the mediation session	Do not arrange for mediation . The party that controls everything.
5. Faced with a conflict of emotions	a low tolerance to the outpouring of feelings related to the background of the conflict	Pushing the outpouring of feeling from the parties and discuss the background of the conflict.
6. Pause of silence	A little pause of silence.	Many pause of silence. Mediator respect the silence as an integral part of healing.
7. Written agreement.	is the main goal to be achieved as a result of mediation.	is a secondary target . Which is the primary dialogue and mutual help.
8. Substance	To resolve disputes, especially civil disputes or business	For criminal cases, in principle, can not be settled out of court, although in certain cases it is possible
9. Aim	Settlement of disputes with the fixed purpose to establish a good relationship, and save face or someone's name.	The completion of the criminal case with the goal of recovery for victims, offenders and communities.

Research conducted by Umbreit found that penal mediation provide a high level of satisfaction and fair to the parties and produce more than 90 % achieved a successful agreement to compensate the victims. Another study conducted by Umbreit and Armour noted that the success rate is quite high, 40% - 60% which the parties followed the penal mediation.[10]

Liebmann explained in more detail the benefits of penal mediation, not only for the victim and the perpetrator, but also to the court and the public at large. Benefits of penal mediation can be seen in Table 2.

Table 2 . Penal Mediation Benefits for Victims , Perpetrators , Court & Community[11]

Victims	Perpetrators	Court	Community
- Recognize and learn the perpetrator . - Asking questions on the offender - Devoting feeling ; - Accepting an apology / repair / compensation . - Educate offenders about the consequences of his deeds . - Resolving conflicts . - Being part of the judicial process - Forgetting crimes	- Has responsibility for their crimes . - Knowing a result of his actions . - Apologize / offer repair / compensation . - Self-examination .	- Learning how to live the victims affected by crime . - Creating a more realistic decision	- Accepting an apology / repair / compensation from the offender. - Assist the victim and offender reintegration

Of all these explanations, in the opinion of the author of penal mediation is in accordance with the culture of Indonesia. It is only fitting if penal mediation used to resolve domestic violence cases which pose a particular physical or psychological suffering, which are lightweight, sexual violence between husband and wife, and neglect household. As for domestic violence that causes bodily or psychological weight needs to be resolved through the courts.

In the explanatory memorandum of the Council of Europe Recommendation concerning Mediation in Penal Matters, presented several models of penal mediation as follows: (a) Informal mediation; (b) Traditional village or tribal moots; (c) Victim -

[10] Mark Umbreit, 1994, *Victim Meets Offender: The Impact of Restorative Justice and Mediation*, Willow Tree Press, New York, 1994, hlm. 15. Lihat Hj. DS. Dewi dan Fatahillah A. Syukur, *Op. Cit.*, hlm. 87.
[11] Marian Liebman, 2007, *Restorative Justice: How It Works*, Jessica Kingsley Publishers, London, hlm. 28-29. Lihat Hj. DS. Dewi dan Fatahillah A. Syukur, *Op. Cit.*, hlm. 88.

Offender mediation; (d) negotiation Reparation Programmes; (e) Community panels or court; (f) Family and community group conferences.[12]

Ad. (a) Informal mediation .

This model is implemented by criminal justice personnel in their normal duties, which can be done by the public prosecutor to invite the parties to reach an informal settlement with the intention not to continue the prosecution if an agreement is reached; may be done by a social worker or a supervisory official, police officer, or by judges. This informal type of intervention was used in all legal systems.

Ad. (b) Traditional village or tribal moots .

According to this model, the whole community met to resolve conflicts between citizens crime. This model is in some less developed countries and in rural areas. This model is preferred for the public benefit. This model predates western law and has inspired modern mediation programs.

Ad. (c) Victim - Offender mediation.

Mediation between victim and perpetrator is a model that is most often done. The model involves various parties met in the presence of mediators appointed. Mediator can be derived from the formal official, independent mediator, or a combination. Mediation can be held at any stage of the process, both at the policy stage the police, the prosecution stage, sentencing stage or after sentencing .

Ad. (d) Reparation Programmes negotiation.

This model solely to estimate/assess compensation or repairs to be paid by the perpetrator to the victim, usually at the examination in court. This program is not related to the reconciliation between the parties, but only with regard to material improvement planning. In this model, a person may be a work program in order to save money to pay damages/compensation.

Ad. (e). Community panels or court.

This model is a program to divert cases from the criminal prosecution or judicial procedures more flexible society and the informal and often involve an element of mediation or negotiation .

Ad. (f). Family and community group conferences.

This model was developed in Australia and New Zealand, which involves community participation in the criminal justice system. Not only involve victims and perpetrators, but also the perpetrator's family and other community members, such as police officers, judges and victim advocates. Performers and their families are expected to produce a comprehensive and satisfactory agreement victims and can help to keep the perpetrator out of trouble/next issue.

Family and Community Group Conference.

Completion of domestic violence through out of court dispute resolution (penal mediation) model of family and community group conference, has been developed in Australia and New Zealand. In Indonesia, this model can be found in the institutional form of the extended family who had been held in Surakarta and in the form of community -based crisis center, as has been held in Yogyakarta and Bengkulu.

The institutional form of the extended family.

Institutional model of the extended family is not offered to replace or negate the positive efforts by law enforcement, but an attempt to find a breakthrough in handling domestic violence cases based restorative justice. The model offered by the role of the judiciary is a large family or extended family. Just as the nuclear family, extended family institution is a universal phenomenon. The extended family was very important to the survival of the nuclear family as well as for the survival of a society, because the extended family have functions that include, among others, education, social, economic, judicial, religious.[13]

In connection with the settlement of domestic violence in accordance with the Law on Domestic Violence, Institute for Extended Family Courts, a model is offered as an alternative punishment for reasons as described below :

a. Extended family relationships with nuclear family based on blood ties , the nature of that relationship is existential and personal. Therefore, at the same nuclear family members are members of the extended family. Specialized in domestic violence cases, men and women equally in conflict is an integral part of the extended family.
b. Extended family relationships with women victims of domestic violence interpreted by the following: In the case of domestic violence is essentially an extended family issues; dignity of women victims of domestic violence dignity parallel with the extended family; Domestic violence is a problem that the extended family of the extended family responsibilities finish first .
c. Extended family into a model of an alternative solution, because in addition to the women who dwell in the cities, the largest number of women victims remain in the extended family in the rural areas in the humiliation of domestic violence victims the dignity of women is a reflection of humiliation dignity of the extended family. In the settlement of domestic violence cases, there is no other institution that knows factually-objective root of the problem except the extended family, in terms of completion time domestic violence by extended family are relatively short, as did the cost relatively less expensive, and the benefits of women are victims protection both psychologically and physically from the extended family.

[12] Barda Nawawi Arief, 2008, *Op. Cit.*, hlm. 7-8.
[13] T.O. Ihromi, 1980, *Pokok-pokok Antropologi Budaya*, Diterbitkan untuk Yayasan Obor Indonesia dan Fakultas Ilmu-ilmu Sosial Universitas Indonesia, Penerbit PT. Gramedia, Jakarta.

d. Indeed there is a strong awareness that efforts to recreate the extended family to carry out the court which gender functions as difficult as moving a mountain. Because of the extended family not only experience but also an instrument of oppression of patriarchy. It was apparent in the trend: lack of awareness of the humiliation of dignity in domestic violence cases. The extended family was not aware of the alienation of women victims of domestic violence as one member of the alliance itself. In addition, the extended family is powerless to criticize and oppose the customary court in the case of gender are not their own members.
e. The functioning of the extended family as an institution of justice in cases of domestic violence must be through strategic measures freed from the clutches of a patriarchal institution. That requires a fundamental effort through enlightenment and awareness are able to dismantle and remove the patriarchal value system as the role of the old paradigm and replace it with a new paradigm that is gender equity.
f. Extended family as an institution can be potentially effective, although it still serves the interests of the institution of patriarchy. Women have always been victims in this trial, but if the court is willing to be used as an alternative, these institutions must be freed from patriarchal values. Exemption covers the values, laws and extended family structures that are involved in it. For example, by involving women and youth in changing the program through empowerment.
g. To empower the extended family is not easy, because it is not easy to unite the two families are culturally, each extended family has a system of values that nurture and protect their identity. In addition, this social institution has long been contaminated in customary law as a tool of patriarchy that promotes male superiority. The presence of young people in alternative structures to offer a new force that is able to drive the process of deconstruction and institutional reconstruction more functional for the extended family. In addition, to preserve the values of gender law from generation to generation.

The institutional model of the extended family will be able to function optimally if it also involves a third party that can serve as a mediator. The third party could be community leaders, elder leaders or religious figures who are well known by a large family of the couple. Because without involving a third party will have difficulty in bridging the desire of both parties.

Community Based Crisis Center

In 2004 a house of worship stands Mai'sya (Huma) as a medium to deal with domestic violence cases. The organization at the beginning of the use of the name of the Society Cokrodiningratan that deal with the problem of violence against women and children sort of partner or family. Although in today's process management Huma is the responsibility of society, but at the beginning of the formation of this institution is a community organization that was established in the framework of the implementation of the program which took Bappeda Yogyakarta Rifka Annisa Women Crisis Centre (WCC) in it. The government acts as the support of funding activities, while Rifka Annisa role to provide assistance, both in terms of strengthening the knowledge of gender issues in society and the technical ability to manage a crisis center. The government put Huma as a pilot project for 6 (six) months after the first stand, after that, the next 6 months Rifka Annisa turn that play a role in providing assistance to improve the capacity of institutions.[14]

Involve NGOs in a government program, as was done with the City Government of Yogyakarta Rifka Annisa is not without reason. Government programs has been criticized for not providing independence in the community. Activities that do tend to caricature by providing various kinds of assistance to the community, both goods and capital assistance. Economically, it contributes to the improvement of people's income directly and provide a significant impact on economic growth. But it is to condition the public to always be in a position beneficiaries ultimately be dependent on the government's helping hand . In relation to the State, the community will occupy an inferior position , and often becomes a tool ligitimasi for state policies. Non-governmental organizations (NGOs) in the rate of development brought the idea of empowerment as an alternative support for the community. Empowerment was developed from the concept of participation as a basic approach. From this side, NGOs, among others, serve to manage the initiatives under the expectation of growing self-sufficiency.[15]

In the process there are two tendencies approach taken by the NGOs. First, NGOs engaged and united in the community assisted. Measures and activities carried out within the framework of building a social movement (new) with a vision of social justice, for example by doing community organizing. Second, NGO advocacy in influencing policy. In an effort to foster self-reliance, which is defined as the ability to manage the welfare of his community, raising awareness of people's rights, human rights and democratization becomes a necessity. With such a method, involving NGOs in government programs, as did the government of Yogyakarta with Rifka Annisa involved indirectly as a facility to build public trust in government aid, as well as providing a different view that society should not be a party without a receiver effort and hard work to get it.[16]

Departing from a program initiated by the government, Huma standing after a series of communications through organizations or community groups which are directly under the line of government coordination, such as RT, RW, PKK, posyandu, and others. Because intersect with women's issues, the PKK is designated groups as a means for the entry of Huma (or Cokrodiningratan

[14] Danang Arif Darmawan, 2008, *Mengikat Tali Komunitas Memutus Rantai Kekerasan Terhadap Perempuan*, Media Wacana, Yogyakarta, hlm. 51.
[15] E. Shobirin Nadj, 2004, *Kegamangan LSM*, dalam Dharmawan, ed., *Lembaga Swadaya Masyarakat: Menyuarakan Nurani, Menggapai Kesetaraan*, Penerbit Buku Kompas, Jakarta, hlm. 20.
[16] Danang Arif Darmawan, *Op. Cit.*, hlm. 52-53.

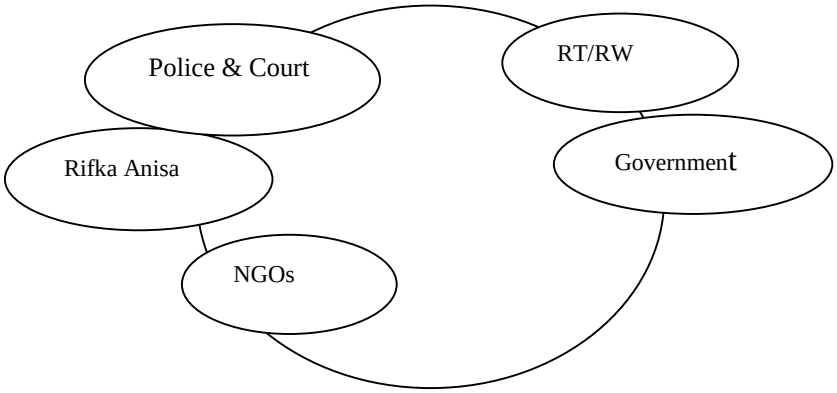
Society at its inception) into society. PKK members, all of whom are women, are expected to become change agents in incorporating the ideas of gender equality are built through a series of discussions and training.[17]

Huma existence as a community -based crisis center, can not be separated from Rifka Annisa gait as the originator of Huma. Rifka Annisa also play a role in providing knowledge through a series of training activities and mentoring. In a further development Huma requires the involvement and active participation of women, because although Huma does not stand alone in the interests of women, in practice many problems encountered by women, because of domestic violence, subordination and marginalization in everyday life. For that Huma even involve mothers who have experienced domestic violence, so that the mother and the victim's neighbor approach can more easily communicate and openness. Although there are also fathers who are involved in the organization of Huma, but more involving mothers in terms of assistance to the victims, while the father was engaged to speak with the domestic violence perpetrator.

For example, the model handling domestic violence cases involving fathers as a counselor, is what has been done by the Institute for Women and Women's Voices Studio in East Nusa Tenggara Kupang. For mild cases of domestic violence, counseling for men that most perpetrators were quite effective. With male counselors also facilitate openness actor who is also a man. From the results of digging in counseling, the counselor can then direct the actors on techniques to manage anger, so that even in anger perpetrator can control myself not to use violence. Isaac Pattiwaellapia continuously grateful, if first he needs a counselor to escape uncontrolled anger that leads to violence, now he became counselor to others who have similar cases . Isaac is one of 30 men who received counseling training in order to prevent acts of domestic violence in Kupang.[18]

Models of community-based crisis center or community-based crisis center in Yogyakarta of Huma involving multiple parties, ranging from the RT/RW up to the level of municipalities and other government agencies such as the police, the courts or with various NGO's in Yogyakarta. Huma strategy undertaken in order to maintain its existence is to develop a range of activities and networks. Although the initial establishment was motivated by acts of violence against women, Huma also touched on his way productive activities , both conceptually and economically. Training activities, seminars and mentoring compiled in the hopes of transfers between participants, while composting, recycling, and several other activities carried out in order to improve the economic capacity of the community. Models of community-based crisis center Huma involving the government of the RT/RW to involve municipalities and other government agencies such as the police, courts, and various NGOs including the Rifka Annisa can be seen in chart 1 below.

Chart 1. Model -Based Community Crisis Center of Huma Yogyakarta

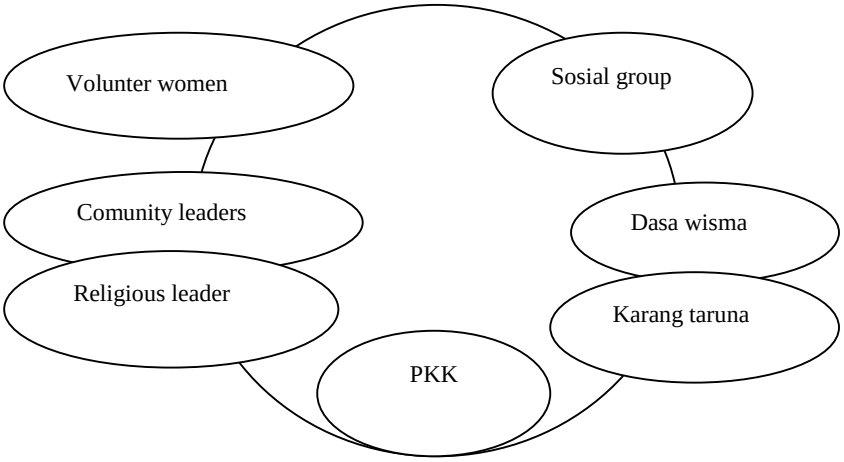


Huma as a social movement can be said to have a positive impact if: (1) Activity Huma accepted by most people, which can be shown with the active participation of the people, both men and women, (2) There is a change in the mindset of the people looking at domestic violence indicated by changes in the response of the community in case of domestic violence, (3) Although not totally change the culture of patriarchy society, at least Huma able to direct it in a positive social relationships. (4) The training activities should be done to improve the economy and managed professionally and seriously.

For comparison below will be displayed models of integrated crisis center village Bukit Paninjauan 2 (Chart 2), village Kembang Seri (Chart 3) and village Malabero (Chart 4) Bengkulu, as follows: [19]

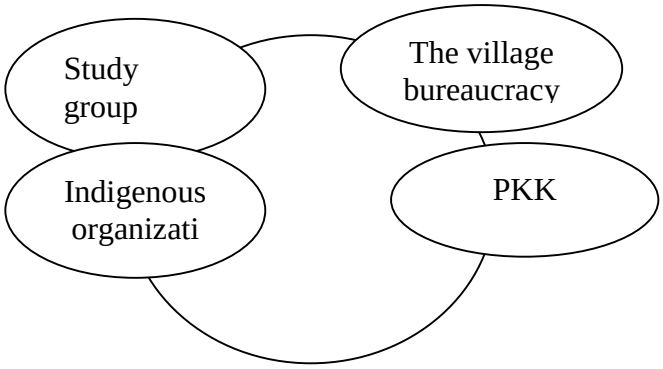
[17] *Ibid.,* hlm. 53.
[18] Harian Kompas, Rabu 28 September 2011, hlm. 24.
[19] Hasil Penelitian yang dilakukan oleh Tim Peneliti : Noeke Sri Wardhani, SH, M. Hum, Dra. Titiek Kartika Hendrastiti. MA, Dra Sri Hartati, M. Hum dan Drs. Raharjo Nuryono, MPM.,pada tahun 2006 dan 2007.

Chart 2. Model Integrated Crisis Center in the village of Bukit Paninjauan 2



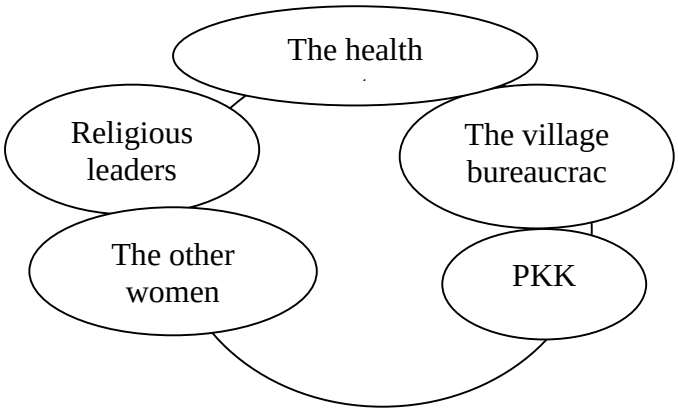
From this diagram , it can be explained Integrated Crisis Center (CPC) in the village of Bukit Paninjauan 2 personnel of the various components, comprised of community leaders, religious leaders, the PKK, village representatives, Youth, Dasa Wisma, Volunteer women and social groups in the village. Those that will handle the event of violence, if necessary CCP can coordinate or refer to a health center if the injured or ill and to the police, if need be completed by the Police.

Chart 3 . Model Integrated Crisis Center in the Village of Kembang Seri



The design model of the ICC in the village of Kembang Seri, more simple, not a lot of components, consisting only of the PKK, the village bureaucracy, Indigenous organizations and study groups. According to them if there is violence, completed by the ICC, with more priority to the completion of customary, involving mothers PKK, religious leaders who are members of the study group with the knowledge of the bureaucracy Village Kembang Seri .

Chart 4. Model Integrated Crisis Center Village Malabero

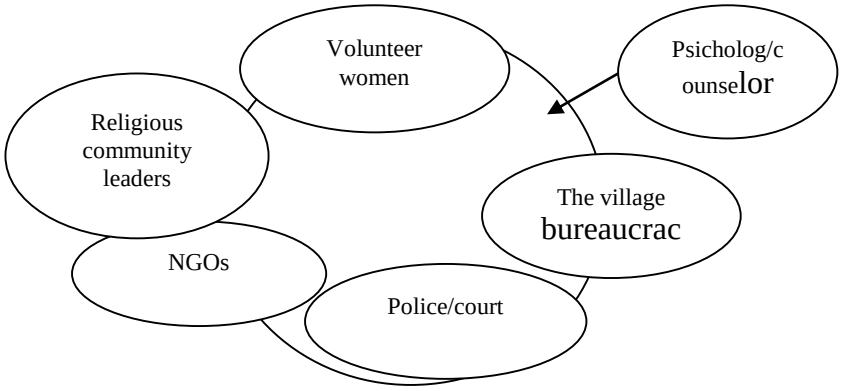


What's interesting in the village Malabero ICC model is the inclusion of the health center to be part of the ICC. This could happen due to the Bengkulu City Government, in addition to establish hospitals and M. Yunus Bhayangkara Police Hospital to be a referral center for the treatment of victims, also appointed two health centers, the health centers and health centers Fish

Market Road Gedang as a referral center for victims. Incidentally Health Center Fish Market in the territory of the village Malabero .

After studying various models of community -based crisis center above, the writer tries to make the design model of community -based crisis center, as follows :

Chart 5. Model -based Crisis Center Community of Writers



The new thing is involvement of the authors offer a psikholog/counselor, because according to the authors psikholog / counselor is a person who can help clients / people who are troubled to discover the identity and strength in solving the problem . Although they could not be present at every meeting held, at least they can give instructions or counseling when faced with cases that require handling psikholog. In addition to the involvement of a former victim of domestic violence as a volunteer companion also very helpful openness of the above cases the victims suffered.

Conclusion

Construction of new institutional forms of protection-oriented victim is "institutional -based restorative justice", performed at the level of institutional reconstruction of the social fabric. By the way: make a settlement procedures involving all parties, namely the offender, victim and community/state; change law enforcement perspective, in order to have a greater understanding of women's perspective and increase sensitivity to domestic violence, and to make clear the mechanism of action to enable the coordination of inter- networking agencies that deal with domestic violence; moral transformation of individuals, in order to eliminate gender -based discrimination; empowerment of men and women, as well as build "equality in diversity". Finally, the completion of domestic violence can be done through penal mediation model "institutional extended family" and in the form of "community based crisis center".

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PROPOSED ISLAMIC ETHICS FOR FOOD PROCESSING

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ABSTRACT

Processed food is widespread phenomenon all over the world. Some of these foods are ready to be eaten immediately after purchasing, while others need to be cooked before eating them. In order to make higher profits, companies and suppliers of these foods sometimes do not follow the proper production methods, or use unhealthy ingredients, or do not label products correctly. This negligence causes various types of health problems in consumers. To some extent, this negligence can cause human casualties. Islam offers a number of ethics to be followed in food processing. By analyzing the related verses of the Qur'an and ahadith of the Prophet (p. b. u. h.), this paper intends to discuss these ethics. The paper may conclude that Islam has a comprehensive code of ethics for food processing. Implementation of these ethics may help reducing health problems and drawbacks that are caused by neglecting them during food processing.

Key words: Islamic ethics, food, processing, animal welfare.

Introduction

Among others foods and drinks are primary components for keeping a person healthy. Prior to eating or drinking, our foods and drinks should be prepared correctly. This preparation can be made completely by the consumer himself or herself. This paper does not discuss this personal preparation. It also does not talk about normal preservation of agricultural products that require harvesting, cleaning, keeping in a suitable place, etc. Rather, it touches upon processing and preparing foods and drinks for instant consumption, which are presently done by many commercial companies all over the world. These companies are also involved in supplying these processed foods and drinks for the public. Nowadays almost every human being consumes these processed foods. What are the processed foods then? If they are commercially boxed, bagged, canned or jarred or prepared in a way that they can be sold as hot, or ready-to-eat dishes, or refrigerated or frozen products that require minimal preparation (typically just heating), and have a list of ingredients on the label, they are called processed foods. Benefits of food processing include easing marketing and distribution tasks. Additionally, it increases availability of many foods at any time of a year. However, food processing also has drawbacks, such as it can affect its nutritional density; any food additive can cause health risk; there is also a risk of contamination.[1] Likewise, there is possibility of cheating by committing inconsistency between the ingredients written on the packet and what are given inside. For the interest of all consumers, there is a necessity to take some steps to stop or at least reduce these and other drawbacks that are caused by food processing activities. One of these steps could be to prepare a code of ethics for food processing, which should be followed by these companies. Nowadays many professional organizations, such as medical association, engineering association, etc. try to follow code of ethics, in order to provide good and appropriate services to their clients. Food professing is also considered to be a profession, for which many companies and organizations are created. They have also many clients and consumers. In order to avoid the drawbacks mentioned above and to provide good and suitable services to these consumers, these companies also should try to follow certain rules and regulations, which are considered to be ethics for food processing. Food and Agriculture Organization (FAO) of the United Nations long ago invited experts to develop this type of ethics.[2] This paper could be considered as an attempt to response to this invitation.

Allah (SWT) provides Muslims with a complete *Shari`ah* to accomplish some higher objectives, such as protection of religion (*hifz al-din*), protection of life (*hifz al-nafs*), protection of wealth (*hifz al-mal*), protection of intellect (*hifz al-`aql*), and protection of progeny (*hifz al-nasl*).[3] In order for human beings to achieve these objectives, Allah introduces many rulings comprising certain deeds that should be done and some actions that must be abandoned. Among them rulings related to human health have close relationships with all these objectives. In other words, human health plays a central role for them. Without having sound and strong health these objectives cannot be achieved. Therefore, the prophet (p. b. u. h.) says: "A strong believer is better than a weak one" (Muslim and Ibn Majah). In order to maintain human health, beside other things, foods and drinks are required. Processed foods and drinks contribute partially to fulfill this requirement. But since there are

[1]Wikipedia, Retrieved on 23-03-2015.

[2]FAO Ethics Series 1: *Ethical issues in food and agriculture*, Food and Agriculture Organization of the United Nations (Rome, 2001), p. 29.

[3]See Ahmad al-Raysuni, *Nazariyyat al-Maqasis `inda al-Imam al-Shatibi* (Rabat: Dar al-Aman, 1991), p. 252.

some drawbacks caused by processing foods, Islam provides some guidance that may help to stop or at least reduce them. This guidance may be considered as Islamic ethics for food processing.

Islamic Ethics for Food Processing

Some Islamic guidelines or ethics discussed in this section are directly related to food processing procedures, while some others are related to them indirectly. These Islamic ethics may be divided into six sets of rules and regulations under subheadings of animal welfare, ethics related to plants, production methods, quality control and safety of food, pricing and advertising, and several other Islamic principles.

A. Animal Welfare

1. Slaughtering Animals Properly

In order to have lawful processed meat, the lawful animals should be slaughtered properly prior to process their meats. They should be slaughtered by Muslims and Allah's name should be recited at the time of slaughtering. Allah says: "Eat not of (meats) on which Allah's name has not been pronounced."[4] If people of the Book slaughter these animals properly, their meats are lawful for Muslims. Throat (*hulqum*), gullet (*mari'*) and two jugular veins (*wadajan*)[5] of the animals should be cut properly so that blood can flow easily and completely because flowing blood is forbidden in Islam. Additionally, meat of any animal killed or slaughtered in the name of other than Allah is not lawful for Muslims. Allah says: "Forbidden to you (for food) are: dead meat, blood, pork and that on which has been invoked the name other than Allah; that which has been killed by strangling, or by a violent blow, or by a headlong fall, or by being gored to death; that which has been (partly) eaten by a wild animal; unless you are able to slaughter it (in due form)."[6]

2. Slaughtering for the Sake of Getting Meat

No lawful animal should be killed for the sake of killing it. The purpose of slaughtering it should be collecting lawful meat for eating. `Abd Allah bin `Umar says: "I heard the Messenger of Allah forbidding to hold an animal, et al. and shoot it for the purpose of killing it."[7] Ibn `Umar also narrates that the Prophet cursed the one who took anything that has soul as target [to kill it].[8] The Prophet also says: "Whoever kills a sparrow or any bird or any bigger animal without fulfilling its right, Allah will ask him about his killing. Someone asked: 'O Messenger of Allah, what is its right? The Prophet replied: 'Its right is that he should slaughter it and eat it, and should not cut its head and throw it.'"[9] Anas says: "The messenger of Allah forbids holding animals for the purpose of killing them."[10]

3. Slaughtering Animals Nicely

Muslims should try to inflict as less as possible of pain to lawful animals at the time of slaughtering them. Therefore, they should sharp their knives before slaughtering so that pain of losing life will be less. The Prophet says: "Surely Allah prescribes kindness for everything. So when you perform [lawful] killing, do it nicely. And when you slaughter [animals] do it also nicely. [In order to be nice and kind], one of you should sharp his knife and relieve his slaughtered animal."[11]

4. Cutting Limbs of Live Animals

Cutting limbs of live animals is severely painful for them. Therefore, Muslims are not allowed to cut limbs of animals before slaughtering them. This type of bad deed is inspired by Satan. Allah says on the tongue of Satan: "Surely I will order them to slit the ears of cattle."[12] If any organ is cut off through this way, it is forbidden for Muslims to eat. The Prophet says: "…Whatever cut off from an animal while it is alive is considered to be dead. It should not be eaten."[13]

[4] Al-An`am, 6: 121.

[5] Wahbah al-Zuhayli, *Al-Fiqh al-Islami wa Adillatuh*,4th ed. (Damascus: Dar al-Fikr, 1997), vol. 4, p. 2758.

[6] Al-Ma'idah, 5: 3.

[7] *Bukhari, Muslim*. See Al-Shaykh Wali al-Din Muhammad bin `Abd Allah al-Khatib al-Tabrizi, *Mishkat al-Masbih* (Lahore: Maktaba'i Mustafa'i, n. d.), p. 357.

[8] Bukhari, Muslim. See al-Tabrizi, *Mishkat al-Masabih*, p. 357.

[9] *Ahmad, al-Nasa'i, al-Darami*. See al-Tabrizi, *Mishkat al-Masabih*, pp. 358-359.

[10] *Bukhari, Muslim*. See Abu Zakariyya Yahya bin Sharaf al-Nawawi al-Dimashqi, *Riyad al-Salihin*, 19th ed. Shu`ayib al-Arnabut (Beirut: Mu'assasat al-Risalah, 1991), p. 607.

[11] *Muslim*. See al-Tabrizi, *Mishkat al-Masabih*, p. 357.

[12] Al-Nisa', 4: 119.

[13] *Al-Tirmidhi, Abu Dawud*. See al-Tabrizi, *Mishkat al-Masabih*, p. 359.

5. Killing Animals by Burning

Whether their meats are lawful or not, killing animals by burning is painful and inhumane. Muslims are not allowed to kill any animal by burning. Abdullah bin Mas`ud says: "…The prophet saw a village of ants we burned. He asked: 'Who burned it?' We replied: 'We.' Then the Prophet said: 'Nobody should punish anyone with fire except its Lord.'"[14] In another *hadith* the Prophet says: "Surely none should punish with fire except Allah."[15]

B. Ethics Related to Plants:

Ethics of plants are closely related to their rights. Western scholars dispute over whether the plants have any right or not. This dispute goes back to another dispute, i.e., whether plants can understand and feel. Some scholars maintain that they can understand and feel; therefore they should have rights. Hence, some ethics should be maintained with the plants. While some other scholars think that the plants do not have understanding and feeling capacity; therefore, they should not have any rights. Hence, no ethics should be maintained with them. Although some Western governments have introduced the law saying that the plants have rights, there is no unanimous view in this regard among the Western Scholars.[16]

As for Islam, a number of Qur'anic verses and *ahadith* of the Prophet (p. b. u. .h.) indicate some principles to be followed towards the plants. These principles are as follows:

1. Believing that all creatures including plants prostrate Allah (S. W. T.): Allah says: "See you not that to Allah prostrates whoever is in the heavens and whoever is on the earth, and the sun, and the moon, and the stars, and the mountains, and the trees, and *Ad-Dawab* (moving living creatures, beasts, animals etc.), and many of mankind?"[17]

2. Believing that the plants praise and exalt Allah: Allah says: "There is nothing in this Earth except that it exalts Allah with His Grace, but we do not comprehend their praise (of Him)."[18]

3. Avoidance of Wastage: Muslims are not allowed to use any plant more than what they need. Allah forbid wasting anything including plants. Allah says: "Eat and drink but do not waste."[19]

4. Keeping a Path Free from Harmful Things: If any path or walking area is full with any harmful thing or any plant that prevents free movement, then we are supposed to cut it and clean the path. In a *hadith*, the Prophet says: "Removing harmful things from the road is an act of charity (*sadaqah*)."

5. Planting Increasing Number of Trees and Plants: Planting trees in Islam is considered to be charity. If a Muslim plants a tree or sows seeds, and then a bird, or a person or an animal eats from it, it is regarded as a charitable gift (*sadaqah*) for him" (Al-Bukhari).

6. Muslims should not destroy or cut trees and plants without any necessity. The Prophet says: "Harm should neither be inflicted, nor should be reciprocated."

7. They are not allowed to consume harmful and intoxicating plants. Alcohol is forbidden because it is intoxicating. Therefore, any plant which is intoxicating also should be forbidden.

C. Production Methods

1. Cleaning and Washing

Prior to their cooking, meat and fish should be cleaned from darts and should be washed with clean water. Likewise, other foods, such as several types of vegetables also should be cleaned and washed properly before cooking them. If vegetables are supposed to be served as salad, extra care should be taken to clean and wash them because they will enter the human stomach without cooking. Likewise, workers who do the works of cleaning and washing should keep their hands and pots used for cleaning and cooking clean. Following

[14] *Abu Dawud*. See al-Dimashqi, *Riyad al-Salihin*, p. 609.
[15] *Bukhari.* See al-Dimashqi, *Riyad al-Salihin*, p. 609.
[16] Linton Weeks, *The Future of Nonhuman Rights: Recognizing The Right of Plants to Evolve*, Retrieved on 23/03/2015 from http://www.npr.org/2012/10/26/160940869/recognizing-the-right-of-plants-to-evolve.
[17] Al-Hajj, 18.
[18] Al-Isa', 44.
[19] Al-A`raf, 31.

completion of cooking, foods should be served on clean plates or packed with clean packets. Cleanliness is so important in Islam that it is considered to be a branch of faith. The Prophet says: "Cleanliness is a branch of faith." In another *hadith* he says: "Surely Allah is clean. He loves cleanliness" (Al-Tirmidhi).

2. Refraining from Cheating

Fixed amount of each ingredient for a particular food declared on its label or advertised in media should be maintained accurately during its processing. All ingredients mentioned on the label also should be mixed together without any exception. Likewise, the total weight of a particular processed food written on its packet should be maintained accurately. Any kind of cheating in this regard is forbidden in Islam. The Prophet says: "The one who cheats is not one of us."[20] Since the Prophet does not consider a cheater as one of his community, his action, i.e., cheating must be forbidden in Islam. Any kind of hiding the true nature of the food is cursed by Allah and His angels. Wathilah bin al-Asqa` says: "I heard the Messenger of Allah saying: 'The one who sells a defective thing without disclosing its defect will continue to be hated by Allah. Likewise, [His] angels will continue to curse him.'"[21]

3. Avoidance of Forbidden Ingredients

Forbidden ingredients such as alcohol, pork or its bi-products should not be mixed with processed foods. Islam forbade consuming pork and all intoxicating materials including alcohol. Allah says: "O you who believe, surely intoxicants, gambling…are abominations of Satan's handiwork; avoid such (abominations)."[22] Allah also says: "Surely He has forbidden you dead meat, blood, and flesh of swine."[23] Jabir narrates that he heard the Messenger of Allah saying in the year of [Makkan] conquest when he was at Makkah: "Surely Allah and His Messenger forbid selling and buying of alcohol, dead meat, pork and idols."[24] In another *hadith* the Messenger of Allah also says: "May Allah curse alcohol, its drinker, cupbearer, seller, buyer…."[25]

4. Cooking Properly

Foods that require cooking should be properly cooked because foods cooked improperly may cause indigestion which is harmful for the health. Several materials, such as salt, red pepper, etc. used for cooking, should be used proportionately. Excessive amount of salt or red pepper should not be used because it is harmful for health. Oil with high cholesterol should not be used for cooking because it is also harmful for health. The Prophet says: "Harm neither should be inflicted nor should be reciprocated."

5. Packets

Packets should be clean. Packets prepared of harmful materials that can cause diseases should not be used for processed foods. The Prophet says: "Harm neither should be inflicted nor should be reciprocated," as mentioned earlier. Likewise, cleaning is a branch of faith as quoted earlier.

D. Quality Control and Safety of Food

1. Throwing Rotten Foods

Rotten foods or foods whose written dates before which they should be consumed are expired should be thrown away; or they could be given to animals, if they are not harmful for them. No rotten food should be supplied or mixed with good foods and delivered to the consumers because they are harmful for their health. The Prophet says: "Harm neither should be inflicted, nor should be reciprocated."

2. Genetic Modification of Any Food

In doing genetic modification of any food, Islamic ethics should be followed. Substance taken from forbidden animals or plants should not be used for this modification. Animals whose whole body is forbidden by the Quran and *Sunnah*, any substance taken from their bodies also should be forbidden.

[20] *Muslim*. See al-Dimashqi, *Riyad al-Salihin*, p. 599.
[21] *Ibn Mazah*. See al-Tabrizi, *Mishkat al-Masabih*, p. 249).
[22] Al-Ma'idah, 5: 90.
[23] Al-Baqarah, 2: 173.
[24] *Bukhari* and *Muslim*. See al-Tabrizi, *Mishkat al-Masabih*, p. 241.
[25] *Abu dawud* and *Ibn Majah*. See al-Tabrizi, *Mishkat al-Masabih*, p. 242.

3. Making Healthy Foods Should be Preferred to Making Testy Foods

Although making processed foods as testy as possible is desired by the customers, making them testy should not be on the expense of making them healthy. In other words, making these foods healthy should be first priority. This is because some ingredients for making foods testy are harmful for health, such as monosodium glutamate (MSG). According to a *hadith* mentioned earlier, any kind of harming others is unlawful in Islam.

4. Internal Monitoring System

Any company that works for processing foods should have an internal monitoring and evaluating system on those employees and workers who are involved in this processing. Monitoring should include examining cleanliness of their hands and pots of cooking, and also cleanliness of raw foods before cooking them. Monitoring also should be on whether declared ingredients on the labels of packets of processed foods are being mixed together accurately or not. The Prophet says: "Take account of yourself before you are accounted for." The companies and suppliers of processed foods, therefore, should evaluate the performance of their employees and take account of their works before they will be evaluated by other authorities, such as an institution or government.

5. External Monitoring System

Two types of external monitoring systems should be implemented. First, institutions, such as universities or hospitals, etc. should monitor those food outlets and restaurants that supply processed foods within their jurisdictions. Second, the government or its representatives should monitor and investigate the companies, business partners and suppliers of this type of foods through checking their food processing time to time without prior notice, or applying any other type of intervention method. Investigation or monitoring is so important that once at a market place the Prophet himself checked a pile of foods and advised the owner not to hide any damage that might have occurred in his food. Abu Hurayrah narrates: "Once the Messenger of Allah passed by a pile of food. He made his hand to enter into it. Then once his fingers felt wetness, he said: 'O owner of the food, what is this? The owner replied: 'O Messenger of Allah, it is affected by rain. The Prophet said: 'Why didn't you put that wet part on top [of the pile] of the food, so that people could see it? The one who cheats is not one of us."[26]

6. Guidelines and Conditions

A government should have guidelines for food processing. A government is allowed to impose tough conditions for getting licenses for this type of business. It has the authority to increase tax for unhealthy ingredients. All these fall under man-made conditions (*shurut ja`liyyah*), which are allowed in Islam, if they do not make a forbidden food lawful or a lawful food forbidden. The Prophet says: "Muslims should abide themselves by the conditions [made by them], except a condition that makes a lawful thing forbidden or a forbidden thing lawful."[27]

7. *Halal* Sign

An important mechanism of monitoring food processing is that the companies involved in this business should receive *halal* sign for each of their products from the government office that is in charge of issuing this sign. This practice is especially important for non-Muslim companies and suppliers who normally do not bother about *halal* and *haram*. This type of regulation is in line with the instructions given by Allah and His Messenger for consuming lawful foods. Allah says: "O you who believe, eat of what is on earth, lawful and good."[28]

E. Pricing and Advertising

1. Labeling Accurately

A producer of processed foods should be sincere to write all the ingredients without exception on their labels so that consumers will be able to know what are in them. Because of two reasons labeling is important: first, if any ingredient of a processed food is not suitable for a consumer, he will be able to read it and avoid this food; second, it is a sign of telling the truth and being sincere in processing foods. The Prophet (p. b. u. h.) says: "Seller and buyer have option [of completion or cancellation of a deal] as long as they do not depart [their meeting place]. If they tell the truth and explain [all the attributes of the sold thing] they will be blessed in their transaction [of selling and buying]. But if they tell a lie and hide [these attributes] blessing will be

[26]*Muslim.* See al-Tabrizi, *Mishkat al-Masabih*, p. 248; and al-Dimashqi, *Riyad al-Salihin*, pp. 599-600.
[27]*Al-Tirmidhi*, *Ibn Mazah*, *Abu Dawud*. See al-Tabrizi, *Mishkat al-Masabih*, p. 252.
[28]Al-Baqarah, 2: 168.

erased from their deal of selling and buying."[29] This *hadith* fit perfectly the mentioning of all the ingredients on the labels of processed foods because these ingredients are considered attributes of them which according to this *hadith* should be disclosed. If any producer or supplier of processed foods hides the ingredients, he will be deprived from the blessings of Allah. In another *hadith* the prophet says: "A truthful and trustworthy businessman will stay with the prophets, truthful people and martyrs [on the Day of Judgment]."[30] Likewise, telling a lie in mentioning the ingredients is considered to be a sign of hypocrisy. The Prophet says: "Signs of a hypocrite are three: if he talks, tells a lie; if he promises, he violates; and if he is entrusted, he betrays."[31]

2. Reasonable Price Tag

Compared to their processing costs, price of processed foods is sometimes too high. Price of these foods should be reasonable. However, price should not be reduced for the sake of contest with other businessmen and on the expense of quality and ethical values. Rather, it should be reduced by lessening the percentage of profit. Fixing reasonable price is considered to be a kind of justice to the consumers. Allah says: "Surely Allah orders you to do justice."[32] It is also considered to be public interest, while asking for high price is deemed to be personal interest. Public interest should be preferred to the personal interest.

3. Advertisement

In advertising the processed foods in newspapers, radio, television, internet, etc. accurate attributes and qualities of these foods should be told. Praising foods more or less than that they deserve is not allowed in Islam. Inaccurate explanation of the attributes of foods causes deprivation of their producers from the blessings of Allah as it has been discussed earlier. Likewise, companies and suppliers should not use naked or semi-naked women pictures for advertising their processed foods. This type of advertisement is considered to be direct participation in spreading obscene things among the society, which is forbidden in Islam. Allah says: "And He [Allah] forbids obscene deeds."[33] Allah also says: "Those who love (to see) that obscene deeds are spread among the believers, will have a painful punishment in this life and in the Hereafter."[34]

F. Several Other Islamic Principles

1. Wasting Foods

In processing foods, one should be careful not to waste the left over ingredients because wasting is forbidden in Islam. Those who waste are brothers of Satan. Allah says: "Surely those who waste are brothers of the Evil One."[35]

2. Preferring Public Interest Over Personal Interest

Islam orders its followers to prefer public interest over personal interest. This is applicable in observing almost all the ethical values mentioned above.

3. Following Islamic Ethics of Visiting the House of Another Person

An employee who delivers processed foods, such as pizza, MacDonald chickens, etc. should have minimum knowledge and practice of Islamic ethics of visiting the house of another person. He should not violate those ethics when he goes there to deliver these foods. One of these ethics is to seek permission to enter the house, if entering is required for the delivery of processed foods. Likewise, the employee in charge of delivery should greet the owner of the house. Allah says: "O you who believe, enter not houses other than your own, until you have asked permission and greeted those in them."[36] This employee also should control his eyes if he meets a female person for receiving his delivery. Allah says: "Say to the believing men that they should lower their gaze and guard their private parts. That will make greater purity for them."[37] Allah also says: "And say to the believing women that they should lower their gaze and guard their private parts."[38]

[29] *Bukhari* and *Muslim*. See al-Dimashqi, *Riyad al-Salihin*, p. 68.
[30] *Bukhari* and *Muslim*. See al-Dimashqi, *Riyad al-Salihin*, p. 321.
[31] *Al-Tirmidhi, Al-Darami, al-Darqutni*. See al-Tabrizi, *Mishkat al-Masabih*, p. 243.
[32] Al-Nahl, 16: 90.
[33] Ibid., 16: 90.
[34] Al-Nur, 24: 19.
[35] Al-Isra', 17: 27.
[36] Al-Nur, 24: 27.
[37] Al-Nur, 24: 30.
[38] Al-Nur, 24: 31.

4. Keeping Promise

   After declaring the ingredients on the labels and after announcing the attributes and qualities of a processed food in the media, it becomes a kind of promise with the customers. There should not be any breach of this promise. Likewise, if a company or supplier receives an order for processing some foods and supplying them for an individual occasion or a collective occasion, this supplier must fulfill his promise in terms of what is requested for and the deadline to supply them. Fulfillment of a promise is required in Islam. Allah says: "And fulfill [every] promise because [every] promise will be enquired into [on the Day of Judgment].[39] Violation of promise is considered to be a sign of hypocrisy. The Prophet says: "Signs of a hypocrite are three: if he talks, tells a lie; if he promises, violates; and if he is entrusted, he betrays."[40] Giving compensation for being late to supply foods is lawful, but delay should not be intentional for any hidden purpose, such as if a free coupon is given to the customer as compensation for being late, he will make a new order. Thus the business will continue for a long period of time through the chain of giving coupons.

5. Fair Trading

   Trade of processed foods should be fair. Competition among the companies and suppliers of this type of foods should not be based entirely on personal interests. Public interest and ethics of food processing should be maintained.

6. Good Working Conditions

   Good working conditions for the workers and employees of the sector of food processing should be provided.

Conclusion

Most important findings on this research related to Islamic ethics for food processing are as follows:

1. Sources of lawful meat for processed foods that require meat are animals. In order to get meat from lawful animals, Muslims are obliged to observe animals' welfare by slaughtering them nicely with sharp knives in the name of Allah. They are not allowed to kill any animal for the sake of killing. They are also not allowed to kill them by burning. Moreover, they should not cut the limbs of live animals before slaughtering them.

2. Principles related to plants, such as avoidance of wasting them, removing harmful thing or a branch of a tree from a path, etc. should be followed.

3. Foods should be washed and cleaned properly prior to correctly cooking and/or processing them. Pots of cooking should be clean. No forbidden food or ingredient should be mixed or/and supplied to the customers. Harmful ingredients also should be avoided. Conformity between ingredients and weight declared on the labels and actual processing should be maintained. These foods should be packed properly by healthy materials.

4. In order to maintain and control the quality and safety of the processed foods, internal and external monitoring and evaluation systems should be implemented. Governments should have prescribed guidelines for food processing to be followed by the workers, companies and suppliers involved in this business. Proper *halal* sign must be obtained for this type of foods. Rotten food should be thrown away. Making healthy foods should be preferred to making testy foods.

5. Price of processed foods should be reasonable. Reduction of price should not be on the expense of quality and ethical values. Rather, it should be based on the policy of getting reasonable profit.

6. All the ingredients used should be truthfully mentioned on the labels of processed foods without hiding anything. Accurate attributes should be mentioned for advertising processed foods in the media. No naked or semi-naked pictures of women should be used on the packets of these foods.

[39]Al-Isra, 17: 34.

[40]*Bukhari* and *Muslim*. See al-Dimashqi, *Riyad al-Salihin*, p. 321. According to this *hadith*, violation of a promise is considered to be hypocrisy and sin. According to another *hadith*, it is not considered to be a sin, if intention is there to fulfill the promise but [because of any valid reason] it is not fulfilled. The Prophet said: "Intending to fulfill it, if a man promises his brother [for doing something for him], but [because of any valid reason] he neither fulfills it nor comes to the place or at the time of appointment, he will not commit a sin." *Abu dawud*, *Tirmidhi*. See al-Tabrizi, *Mishkat al-Masabih*, p. 416. Combining these two *hadiths*, some scholars said that violation of promise is considered hypocrisy, if this promise is done with the intention of violating it. See footnote of al-Tabrizi, *Mishkat al-Masabih*, p. 416.

7. Several other Islamic ethics, such as keeping promise of delivery on time, Islamic ethics of visiting hoses of other Muslims, refraining from wasting foods, fair trading, and good working conditions for the workers of food processing should be maintained.

8. Thus it may be concluded that Islam has a high quality and comprehensive code of ethics for food processing. Implementation of these ethics may help reducing health problems and drawbacks that are caused by neglecting them during food processing.

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COMPETITION LAW AND EXEMPTION POLICY IN MALAYSIA: WHEN, WHY AND WHY NOT?

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ABSTRACT

The local newspaper "The Star" reported "Exempt and explain, please" as the headline on the (Saturday, 11 January 2014), posed a question among others, "When an industry is excluded from competition law, shouldn't we know why?" The question raised some legitimate legal issues concerning the exercise of the discretionary power to grant exemption or exclusion for anti-competition practices with reference to the open competition policy specifically under the Competition Act 2010(CA 2010) in Malaysia. The report illuminated best practice requires the relevant authority in power when exercising their legal authority to exclude or exempt an industry from liability should properly give some explanation, as to why the exemption was granted in one case and not another case. The CA 2010 have provisions for relief or exclusions of liability, by way of an application to the competition commission for an individual exemption or a block exemption respectively under Section 5, section 6 and Section 8 for specific categories of agreements or conduct subject as stated in the Second Schedule of the CA2010. Alternatively some industry or sectors can also be completely excluded from the competition regulation specifically under the First Schedule of the CA 2010. This exemption or exclusion would relief the parties from infringing the competition law. In this respect the Malaysian Competition Commission (or known as MyCC) decisions for granting of a conditional block exemption order for the liner shipping industry's vessel sharing agreement (VSA) and voluntary discussion agreement (VDA) was challenged by the Malaysian Trade associations and Housing Developers as unconstitutional and failed to satisfy the Competition Act. The parties in this matter challenged the decision making process and not the decision. CA2010.Althoughdriven by various economic reasons and principles but the process of implementation to grant or not grant the relief must be grounded on some accepted legal principles and procedures to be justifiable in the eyes of law. Although, the exemption applications are not automatically granted the public outcry on the media appears to signify there are some serious substantive and procedural fairness issues, which needs to be recognized and addressed in such competition cases. The competition exemption process and the competition commission must be clear of the underlying legal and economic principle for granting or not granting an exemption. This process should as a matter of due process of law include, giving the reason for such action. The basic rights as to transparency in law which includes the right to know the factual and legal basis of enforcement and decisions is important aspects to gain public confidence in the competition agency in nationally and regionally in line with the spirit ASEAN Economic Community (AEC) as a member of ASEAN. The paper explores the rationale, policy and legal instruments being used as key regulatory measures for granting individual and block exemption in Malaysia. The paper critically analyses the exemption regulation as well as the due process in granting exemptions under the Malaysian competition regime. The paper explores critically when, why and why not exemption granted in some cases and not in another to reflect upon the generally applied concept and principles in competition exemption law regimes. An exemption serves as an important element for furthering the objectives of the competition law to meet certain social, economic and political needs in the nation. However it also equally important to have clear guiding legal instruments of reasoning in safeguarding the true interest of the competition policy, agencies as well as the business community. The paper also highlights the shortcomings and proposes relevant recommendations from other competition regimes to improve the due process of law in the context of competition exemption cases. On the road towards the ASEAN Economic Community (AEC)competition laws development at the national level, is important to implicate the trend setting in ASEAN open market business road map.

Key words: open competition, exemption, and exclusion and competition regulation.

Introduction

The Malaysia's Competition Act 2010 (CA 2010) (implemented with effect 1 January 2012) came in pursuance to introducing open market or free trade concept under the ASEAN Economic Community (AEC).An 'open market' policy means an economic system with no barriers to free market activity. An open market aims to provide free-way from tariffs, taxes, licensing requirements, subsidies, unionization and such other regulations or practices that interferes with the natural functioning of the free market.It facilitates the market in which prices are determined by supply and demand, in the absence of barriers to entry and trading without restriction to a specific area.

Generally, there are two generic laws to regulate anti-competition conducts in the Malaysia namely, the CA 2010 and the Competition Commission Act 2010. These enactments envisioned to meet with the ever-increasing demands for competition in the current era of globalization and trade market liberalization in particular to ASEAN Economic Community (AEC) roadmap. The law mainly, framed to ensure enterprises operate in the free market economy without restriction or market distortion to allow the market function optimally for the benefit of the consumer. The competition Act regulates and controls specifically under

Section 4 CA2010, whereby it prohibits enterprises from engaging in anti-competitive agreements, which have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services ("Chapter 1 Prohibition").Whereas under section 10 of the Act it prohibits any abuse of an enterprise's dominant position in any market ("Chapter 2 Prohibition"). However mergers and acquisition are not regulated yet.

The Competition Commission Act 2010 establishes the Malaysia Competition Commission (also known as MyCC), which is made up of the Chairman and nine other Commissioners. The Competition Commission Act 2010 empowers MyCC to administer all functions in the implementation and enforcement of the CA 2010. The MyCC is under the purview of the Ministry of Domestic Trade, Cooperatives & Consumerism but functions as an independent body in its decision-making process. The MyCC, similar to other competition authority is empowered to carry out various roles that includes: advocacy, investigation and enforcement, market review, exemption &compliance and leniency process.The MyCC is comprised of representatives from both the public and private sectors who have experience in business, law, economics, public administration, and competition law and consumer protection to have a balanced approach in their undertakings.

Open Competition And Concept Of Exemption

According to United Nations Conference on Trade and Development (UNCTAD) the principle of "best practice" recommends that competition (antitrust or antimonopoly) law should be of a general law for general application to all sectors and economic agents in an economy engaged in the commercial production and supply of goods and services irrespective of whether private and public (i.e. State) owned. The fundamental legal and economic reasons theory strongly calls for its application to all sector /enterprise public or private. Whereby, it is believed entities engaged in the same or similar lines of activity with single legal principles and standards legally would ensure fairness, equality and non-discriminatory treatment under the law. This approach fosters "due process" of law, in bringing about greater predictability and consistency in the interpretation and application of the law besides promoting more transparency, accountability and confidence in the legal and other institutions responsible for the implementation of the law (R.Shyam, 2002).

The fundamental economic reason for general application of competition law, relates to the interdependent nature of economic activities conducted in different markets and the promotion of allocative efficiency. The 'economic interdependence' describes a concept based on the characteristic of a society or macroeconomics that in the high degree of division of labour, individuals depend on others to produce all or most of the goods and services required to sustain life and living. An 'allocative efficiency' which also referred as social efficiency means that scarce resources are used in a way that meets the needs of people ina Pareto-optimal way. Whereby, economically suggests conditions prevailing in one market can affect prices and outputs in other markets either because one good or service is an input in the production of other goods and/or services, or because the goods and services are substitutes or complements to each other.

As such concept of providing exemptions in competition law to one sector may perpetuate or induce distortions that can affect the efficiency of economic activity conducted in other sectors. As evidenced, in reality various industries and markets for goods and services today tend to be "seamlessly" interconnected even when the linkages are not directly obvious because of the role that price and profit signals play in the redeployment of resources across different lines of economic activity.

Although "best practice" proposes competition law should apply to all, in practice various exclusions, exemptions and exceptions are granted to cater for various social, economic, and political reasons. The most influential European competition law provides exemptions generally for three categories. The European Union (EU) competition law (Article 101(3)) firstly, creates an exemption for practices beneficial to consumers such as by facilitating technological advances, but without restricting all competition in the area. However, in practice only very few official exemptions have been actually granted to maintain their fair trade policy. Secondly, the Commission agreed to exempt 'Agreements of minor importance' (except those fixing sale prices) from Article 101. This exemption applies to small companies, together holding no more than 10% of the relevant market. In this situation (Article 102 EC), market definition is crucial and highly difficult matter to resolve. Thirdly, the Commission has provision for a collection of block exemptions for different contract types. These include a list of contract permitted terms and a list of banned terms in these exemptions.

Exemptions or exclusions for anti-competition activities usually granted based on either specific sectors, types of economic activity, and/or some situations under some specific/special provisions. However countries with newly enacted competition law, specifically developing and countries with transition market economies such as in Asia which includes Malaysia have been found with much more less exemptions in comparison with more industrialized nations. This could be probably because these less developed countries have yet to fully implement their competition law regime. In fact various businesses, sectors such as Small and Medium Enterprises (SME) and trade associations are still unaware of the potential impact of the competition law on their economic activities and also the potential lobbying for exemption from competition law. Indeed, casual observation suggests that in advanced industrial countries, exemptions granted from competition law have evolved and expanded over time because of specific issues and cases confronted in the application of the law, and the resulting lobbying by business. In addition other reasons, importantly various historical, cultural and political factors have also played some role in their competition regulations evolution to promote certain unique exemptions.

Exemption could be potentially utilized to create a balanced competition regulation localized to the country's economic aspiration. One such interesting and unique exemption, worth noting is in the South African competition regime. The exemption process (Sec. 10) permits consideration under their Competition law for other social or economic policies, notably the promotion of small business competitiveness. An example of such exemption was granted to an association of individually owned

pharmacies, to jointly advertise and market in order to compete with larger chains. Joint marketing supported the group's growth from 10 members to 33, and its success persuaded the Commission to extend the exemptions for another 5 years. Their Competition policy was aimed to incorporate the interests of consumers, workers, emerging entrepreneurs, and other corporate competitors, and on the same note protect the ability of large corporations to penetrate international markets, just as must allow foreign investors to do business in South Africa in the interests of enhancing overall efficiency and growth. Whereby, the exemption policy uniquely provides an equitable opportunity for the local small businesses to participate in the economy and to increase the ownership stakes of historically disadvantaged persons. The competition law reflects the acceptance of free competition in their market and through the exemption policy realized the importance of property rights, the need for greater economic efficiency, the objective of ensuring optimal allocation of resources, the principle of transparency, the need for greater international competitiveness, and the facilitation of entry into markets to all within a developmental context by consciously attempt to correct structural imbalances and past economic injustices.

Rule Of Law For Competition Exemption

The pioneer competition regime, the United States of America's anti-trust (similar to anti-competition law) model, gave initial authority for judges to paint with a broad brush approach their competition law portrait. Competition law was developed on the case by case basis with little need to refer back to the archaically worded statute. Alternatively, the newer models in Australia, New Zealand and Asia the words of the statute have primacy and concepts of reasonableness, efficiency and public benefit into their analysis of deciding an anti-competitive conduct to the extent that the words of the statute permit. So the term of rules in the competition statute determines the rule of law of its application.

The rule of law fundamentally upholds the principle that firstly that the government cannot order one to pay civil damages or criminal punishments except strictly according to some well-established and clearly defines laws and procedures. Secondly, the context of the term rule under law emphasis no branch of the government is above the law and so no public official my act arbitrarily or unilaterally outside the law. And thirdly it also means rule according to higher law whereby means no written law be enforced by the government or its agent unless it conforms to certain unwritten, universal principles of fairness, morality and justice that transcend human legal system.

So legality and equality before the law are the underlying fundamental facets of the rule of law but the principle of law demands something more; otherwise it would be satisfied by giving the government unrestricted discretionary powers. Following that, the courts have developed guidelines aimed at ensuring that statutory powers are not used in ways which the legislature did not intend. These guidelines relate to both the substance and the procedures relating to the exercise of executive power. Thus, it is important in the application of the competition law to exercise the respective authority or powers, in particular the discretionary powers for exemption (on the players in the market) according to the due process of law. Due process of law means the statute referred must be precise and if the government is going to restrict an activity, it must be clear as to what activity is being restricted so to say according to the rule of law which also promotes due process of law in that system of law.

Concept Of Exemption And Due Process In Malaysia

The CA2010 provides space for exemption or relief against anti-competitive agreements mainly through Guidelines on Chapter 1 Prohibition ("Chapter 1 Guidelines") whereby relief can be granted independently through an individual exemption under Section 6 of the Act; or block exemption under Section 8 CA2010. Likewise relief of liability can be invoked through Section 5 CA2010, where parties who are being investigated for breach or in litigation proceedings brought by private parties under for a breach of Section 4 CA2010.MyCC is generally the body empowered to implement and enforce the exemption process and approval. Under CA 2010, any party claiming such relief has to prove that the benefits gained are passed onto consumers. An enterprise, which is a party to an anti –competition agreement may seek relief from liability (Sec 5 CA2010) if can prove all the following four reasons, namely that:

(a) The are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
(b) The benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;
(c) The detrimental effect of the agreement on competition is proportionate to the benefits provided; and
(d) The agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

In furtherance, the parties applying should conduct a self-assessment to determine its ability to justify its conduct under section 5 CA2010.The individual exemptions are granted to specific applicants and alternatively, block exemptions granted to a class of enterprises. As filing for an exemption is not a pre-condition to raising a section 5 defence, some enterprises may choose not to apply for an exemption but instead raise it as defence arguments when MyCC investigates their conduct or issues a notice of a proposed finding of infringement.

The procedure for application empowers the MyCC to grant individual exemption under Section 6CA2010 an individual agreement and under Section 8 CA2010to grant a block exemption to a particular category of agreements which, in the opinion of the MyCC, satisfy the criteria set out in Section 5 of the Act. Both exemptions are granted by way of an order published in the *Gazette*. Under Section 6(4) CA2010 the individual exemption granted by the Commission may be— (a) subject to any condition or obligation as the Commission considers it appropriate to impose; and (b) for a limited duration as specified in the order. Section 5(5) provides an individual exemption may provide for it to have effect from a date earlier than that on which the order is made.

The commission may also, by order published in the Gazette, cancel, vary or impose additional condition or obligation on the granted individual exemption where there had been material change of circumstances since it granted the individual exemption or breach of an obligation. Such cancellation, variation or removal or imposition of new conditions or obligations will take effect on the date the order is made and under Sec 7(2), if satisfied that— (1) (a) the information on which the Commission based its decision to grant an individual exemption is false or misleading in a material particular; or (1) (b) breach any condition to the exemption. Where the individual exemption is cancelled by reason of false or misleading information, the individual exemption shall be void *ab initio*. Where it is cancelled because of a breach of condition, the cancellation takes effect from the date on which the condition is breached.

Likewise, in block exemption cases, under Sec 8(5) provides that if an enterprise granted the exemption breaches a condition or fails to comply with an obligation imposed by the block exemption, MyCC may cancel the exemption in respect of the agreement from the date of the breach. In the same manner, MyCChas discretion to cancel the block exemption in respect of a particular agreement where it considers that the criterion set out in Section 5 of the Act no longer fulfilled. The CA2010 states that a cancellation for a breach of condition takes effect from the date of the breach but however silent as to when a cancellation for a breach of obligation will take effect. With regards to the cancellation by reason of notable within the Section 5 criteria, the cancellation will take effect on a date specified by the MyCC.

In addition, an applicant for an individual exemption or a block exemption also required to submit a written application together with a fee of RM50, 000 to the MyCC for each application. The enterprises granted block exemptions must also pay an annual fee of RM20, 000 for every year that the block exemption is in effect while an enterprise granted an individual exemption must pay an annual fee of RM10, 000 for each year that the individual exemption remains in effect. According to MyCC, these fees required to cover manpower costs "to study and review the applications, while also acting as an incentive for companies and industries to conduct their own assessments instead of leaving the task to MyCC (*The Star*, 26 April 2012). As a part of the application process MyCC can request for documents and information that it deems necessary (Sec 9CA2010) and required to publish details of a proposed block exemption. This gives members of the public at least 30 days from the date of publication to make submissions in relation to the proposed exemption. The MyCC is required to give due consideration to any such submission made in deciding whether or not to grant the block exemption.

MyCC could also impose on an applicant any condition or obligation as it deems fit and the exemption are granted subject to a limited period only. Both exemptions may be given retroactively and MyCC also has the inherent power to grant an interim exemption pending its final decision on the application for exemption. The Act does not limit applicants to single enterprises but allows trade bodies or associations representing such enterprises to apply for a block exemption for categories of agreements entered into by the members of the association. MyCC had so far received one application for individual exemption and three applications for block exemptions filed by trade associations on behalf of their members (*The Star*, 26 April 2012).

Scope Ofprohibition And Exemption In Malaysia: Critical Evalution

Under the Chapter 1, Sec 4(1) CA 2010prohibits horizontal or vertical anti-competition agreement between enterprises in so far as the agreement has the 'object' or 'effect' of significantly preventing, restricting or distorting competition in any market for goods or services. In addition, Sec 4(2) provides explicitly that without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to— (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions; (b) share market or sources of supply; (c) limit or control— (i) production; (ii) market outlets or market access; (iii) technical or technological development; or (iv) investment; or (d) perform an act of bid rigging, deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services. Following that under Sec 4(3) any enterprise, irrespective of their size if had been a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition. It is worth noting, any agreement entered between enterprises, includes agreement entered by or through the related trade associations.

The CA 2010 does not define the term "object" but the guideline to Sec 4 CA2010 reflects the spirit of words in the preamble of the Act "to promote economic development by promoting and protecting the process of competition". As such the MyCC takes the following approach in examining the certain kinds of agreement for anti-competitive "object." These are: (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions; (b) share market or sources of supply; (c) limit or control :- (i) production; (ii) market outlets or market access; (iii) technical or technological development; or (iv) investment; or (d) perform an act of bid rigging. Thus, MyCC will not just examine the actual common intentions of the parties to an agreement but would also assess the aims pursued by the agreement in light of the agreement's economic context. If the "object" of an agreement is highly likely to have a significant anti-competitive effect, then the MyCC may find the agreement to have an anti-competitive "object." On the same note, on when once an anti-competitive "object" is shown, the MyCC may not examine the anti-competitive effect of the agreement. If an anti-competitive "object" is not found, the agreement may still breach the Act if there is an anti-competitive effect.
The Act applies to all commercial activities within Malaysia, as well as commercial activities undertaken outside Malaysia to the extent that it effects competition in any local market in the country. Commercial activity refers to any activity of commercial nature but does not include certain categories of activities. The activities excluded, covers: any activity, directly or indirectly carried out in the exercise of governmental authority; such as provision of medical services in hospitals; any activity conducted based on the principle of solidarity, such as EPF and SOCSO; or any purchase of goods or services done not for the purposes of offering goods and services as part of an economic activity such as government procurement activities.

There are also three sectors or industries that were clearly carved out from the scope of the Act. That includes the competition matters relating to communications and energy are enforced by sector regulators, namely the Malaysian Communications and Multimedia Commission in relation to communications and multimedia industries (Communications and Multimedia Act 1998) and the Energy Commission in relation to the energy sector (Energy Commission Act 2001). Commercial activities regulated under the Petroleum Development Act 1974 and the Petroleum Regulations 1974 (directly in connection with upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia) are also excluded from the purview of the CA2010.

In addition, CA2010 also excludes:(1) Agreement or conduct that comply with any legislative requirement;(2) Collective bargaining for employment; and (3) Services of general economic interest or having the character of a revenue-producing monopoly.

These exclusions discussed above, could dilute the range of CA 2010 application. Multiple sector based regulations, creates different requirement for different application test to regulate restrictive business practices applicable in different sector. This scene can also cause some business to be caught by more than one sector competition regime. Whereby, it is exempted in one category but not the other. Such duplicity requirement may cause more confusion and may be stumbling block to effectively establish a standard anti- competition and exemption policy. So the issues related to whether an enterprise should be regulated by a single legislation applying to all sector need to be studied further as we dwell deeper into implementing our competition regime. This may particularly be a serious concern for MyCC too, as an exclusive competition authority to gain public confidence and apply their wings in fully flourishing the rule of law on fair competition sphere in Malaysia.

Individual exemption applied to MyCC and may be granted subject to conditions, obligations and for a limited duration. As such it is left to the parties concerned to demonstrate the claimed benefits according to the criteria set out in Section 5 CA2010. An individual exemption can be cancelled or varied if there is a material change of circumstances or there is a breach or non-compliance of an imposed condition. An individual exemption can be obtained by applying MyCC in the prescribed form and upon payment of the prescribed fee. So far we have only one application for this exemption.

Block Exemption Order (BEO) is granted to a particular category of agreements. For example, this could be a distribution agreement in a particular industry. The advantage of a block exemption is that similar agreements can be examined at the same time to allow MyCC to provide a better overall assessment of the anti-competitive impact and assessment of the claimed benefits. It will also relieve enterprises of having to submit separate applications. Likewise, BEO can be cancelled or varied if there is a material change of circumstances or there is a breach or non-compliance of an imposed condition. For a block exemption, the MyCC will publish details of the application to allow submissions to be made by members of the public. Pursuant to an investigation for breach under Section 4 of the Act, parties being investigated may also rely on relief of liability under Section 5 of the Act. Similarly, these benefits can also be claimed in litigation by private parties for a breach of under Section 4 CA2010.In Malaysia, similar to other competition regimes, relief through individual and block exemptions are provided to cater for the specific requirements and factors of a particular market or industry. Some agreements between parties in the market, either horizontal or vertical, may on the face of it be anti-competitive in order to achieve the necessary social benefits and efficiencies. Such social benefits or efficiencies arising from an agreement or category of agreements, entitles the parties to the agreement for either an individual or block exemption if they can show that the anti-competitive effect of the agreement is proportionate to the benefits provided by the agreement (or agreements) and that competition is not eliminated completely in respect of a substantial part of the goods or services in the relevant market.

In April 2012, Nestlé Products Sdn. Bhd. (“Nestlé”) applied for an individual exemption application to exclude its pricing policy called the “Brand Equity Protection Policy (BEPP)” from complying with the Act. Following which, in May 2012, the Federation of Malaysian Consumers Associations (FOMCA) filed a complaint to the MyCC against the Nestlé for price fixing policy. FOMCA claimed Nestlé had determined retail prices of its products, and thus, eliminating competition. Nestlé was claimed to have dictated the price that retailers must charge for its products like Milo, Nescafe and Maggi products. Retailers therefore, do not have the option to sell these products at lower prices or action can be taken against them. In response to the complaint, Nestlé Malaysia denied charges of price-fixing per se and claimed that it’s BEPP, have elements of price-fixing relating to the three of its products to prevent loss leader selling activities by retailers. In other words, its BEPP allows only loss leaders to have its price set by the company.

MyCC in Nestlé’s case although acknowledged and recognized its right to promote and enhance its brand equity under the BEPP, but in principle concluded it has elements of Resale Price Maintenance (RPM), which is considered as per se an anti-competitive conduct that prevents resellers from setting their prices independently, potentially leading to increased prices for consumers. So MyCC requested Nestlé to dismantle its pricing policy contained in the BEPP and Nestlé had complied by issuing notices to the trade on the same. However, Nestlé was of the opinion that may be such issues relating to loss leader selling policy should have been addressed to other government organization or more appropriately to the attention of the Ministry of Domestic Trade, Cooperatives and Consumerism. This point of reasoning calls for further analysis on the scope of MyCC to decide on the application of the competition law issues with respect to trade activities or conducts which are legitimately also arises in other areas of commerce which overlaps with CA2010.

With reference to block exemption application, liner industry is the first and thus far only industry to be formally exempted from provisions of CA2010. MyCC granted conditional Block Exemption Order (BOE) on December 2013, which was published in the Gazette on 4 July 2014 to Malaysia Ship owners' Association. Malaysia Ship Owners' Association had applied for the block exemption with respect to their Liner Shipping Agreements on 14 February 2013 to grant a Block Exemption Order (BEO) from

the scope of Section 4(2) and under Section 8 CA 2010.This block exemption was granted to liner shipping agreements in respect of Voluntary Discussion Agreements(VDA) and Vessel Sharing Agreements(VSA) made within Malaysia or which have an effect on the liner shipping services in Malaysia, effectively from 7 July 2014. It broadly exempts liner Vessel Sharing Agreements (VSAs) and (to a more limited extent) Voluntary Discussion Agreements (VDAs) from certain prohibitions set forth in the Malaysia Competition Act of 2010.

It was granted for three years and to be reviewed after two years. While this is positive news for the shipping industry, there is still certain compliance issues associated with the publication of the BEO which requires further attention. The BEO is although valid for three years, it could possibly cancelled earlier by the MyCC.

Generally, co-operative agreements among liner shipping companies have existed in most trades for more than 100 years and a common practice for competition authorities to grant BEOs to liner shipping agreements. The Competition Commission of Singapore has given similar exemption which they renewed recently. The European Commission although initially withdrew its exemption but also had it renewed later. Most major trading nations in Asia and the Pacific Rim have also recognized the importance of these agreements to shipping industry which ultimately contributes to the national economies.

The introduction of the BEO was subject to a public consultation process, which was held over a 30-day period from 19 February to 18 March 2013. The final BEO was issued in June,after the consultation confirmed that the agreements create "significant identifiable efficiency benefits" and the reduction in competition is "proportionate to the benefits", and there is no opportunity for liner operators to eliminate competition completely in respect of a substantial part of the liner shipping services.

However, despite MyCC following all the procedure and consulting the relevant government agencies which include the Ministry of Finance, Ministry of Transport, as well as the Ministry of International Trade and Industry was still subjected to a judicial review procedure. Judicial Review allows and grants the court's an authority to review the the executive or legislative administrative decision /act and to invalidate them if found to be contrary to Law. The Malaysian Trade Associations and Housing Developers claimed that the BEO given to Malaysian Ship owners' Association was unconstitutional and that not in satisfaction to Section 5 of Malaysia's CA 2010, to grant a relief. It was claimed amongst, others that, the CA 2010 was enacted to promote economic development by protecting the process of competition which encourages efficiency, innovation, entrepreneurship, competitive prices, improvement in the quality of products and services, by providing wider choices for consumers and thereby protecting the interests of consumers. So claimed that the Vessel Sharing Agreements (VSA) contradicts the restriction in the BEO 2014 that states that "shall not contain any element of price fixing, price recommendation or tariff imposition by any person". By reason thereof, the conditional BEO to restrict on price fixing of liners shipping services was claimed self-contradictory and impossible to enforce since the pricing information is shared.

Judicial review is the procedure by which a public body's decisions can be challenged in civil courts. The process of judicial review, generally does not contest the decision itself but the process of making the decision. Thus it questions the due process of the decision making process in approving and granting the block exemption. In Malaysia we do have limited exceptions, where judicial review extends to the substance or merits of the decision where there is illegality, irrationality and or proportionality as highlighted in R. Rama Chandran v The Industrial Court of Malaysia [1997]1 CLJ 147 and Jye Tai Precision Industrial (M) Sdn Bhd v Victoria Arulsamy [2008] 1 CLJ 760 for further reference as to the scope of the review.
Judicial review, in this sphere was not an appeal on the MyCC's decision but concerns with the decision-making process applied by the MyCC. Therefore BEO decision was not within the jurisdiction of the Competition Appeals Tribunal (CAT) which otherwise has an exclusive jurisdiction to review any findings of infringement or non-infringement made by the MyCC. However the competition authority was very concerned of the civil court stand in Malaysia's in handling the case on the basis that judges are not well verse in competition law principles. The author is of the opinion, that perhaps what may be really lacking here is in reality is a clear guideline as to what measurement, legal and an economic tools applicable to assess the grounds for granting exemption in one case and not in the other which should be provided either by way of a guideline or the legislature itself.

Substantive And Procedural Weaknesses On Competititon Exemption Cases

The CA 2010 was indeed drafted on a "broad-brush" approach broadly based on the European model and does not cater or inculcate the specific nature and requirements of the various local markets o industries that form the Malaysian economy. For example, the economic, social and technical factors relating to the financial services industry are found so different from that of the wholesale flower market or for that matter the criterion in the food market which often overlooked.

Furthermore, the exemption application is subject to substantial amount of application fee and annual fee which is set by MyCC aimed to deter potential applicants. However, how much this fee requirement is going to defeat the true purpose competition exemptions privilege under CA 2010 is yet to be seen. As we have not experienced many application or any challenge on this fee requirement. However it could possibly discourage some deserving local industry who may have a genuine case but too small such as the small and medium enterprises or their related associations who cannot afford to pay.

Justification for exemption as a matter of due process of law also requires as to when certain industry excluded from liability regime, a justifiable reasons for which ground it is excluded must be disclosed. The principle of transparency in law requires reasons as well explanation to be given as to why the exemption was granted in one case and not another case to avoid element of biasness and discrimination in the decision making process. Explanation to justify or defend such decision is a duty of the

controlling authority in line with rules, policy or other principles governing the exercise of discretionary powers under fundamental administrative law principles.

Conclusion

In conclusion, the development of substantive anti- competition law prohibiting practices restricting competition and its context of regulation could be said in Asia as well as other jurisdictions are becoming more universal. However, by contrast there has been significantly less universal legal character in the application of the procedural standards that govern the enforcement of the substantive rules of the competition law. Therefore due process and competition must be seen in the same breadth to bring about procedural fairness in the competition related cases. Due process is generally a marginal subject in procedural rules matters, related to the Competition Commissions access to file, documents and role of the Hearing Officer. Lack of clear procedural rules validly could raise some serious questions for the effective protection of the rights of defence and fair procedure. Within the concept of procedural law, there are also identifiable categories of rights which includes: right to be heard, right to participate, right to defence, right to protect business secrets and other confidential information and as well as the right to judicial review and some other rights such as giving justifiable reasons, publication of reasons and transparency.Competition prohibition and as well as the exemption must observe and respect the due process of law in its exercise of power otherwise it will be a story of the competition between the hare and tortoise which reflects a competition between unequal partners which does not serve the term fair competition in the spirit of the law. However the good news is the Malaysian Competition authority, evidently have far more better development progress record in their advocacy exercise as well as in the implementation related functions compared to other ASEAN nations in line with the ASEAN Economic Community (AEC) road map.

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THE IMPOSITION OF FINES BY THE LAW ENFORCEMENT AGENCIES IN MALAYSIA: A VIOLATION OF THE RULE OF LAW

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ABSTRACT

The right to a fair hearing and the presumption of innocence are essential elements of the rule of law and shields for the proper adjudication of criminal cases. They are ultimate and collectively recognized human rights, cherished under various international, regional and domestic laws. Malaysia has not expressly incorporated the right to fair hearing and the right to presumption of innocence under the Federal Constitution, but courts in their judicial activism express that "law" as contained in Articles 5 and 8(1) of the Federal Constitution do not only include substantive law but also procedures established by law. Therefore, the combined effect of Articles 5 and 8(1) of the Malaysian Federal Constitution construed to incorporate and ensure procedural fairness wherever a person's rights or livelihood are adversely affected by a decision maker. However, the law enforcement agencies in Malaysia impose fines on law offenders as part of their roles toward maintaining law and order, preventing crime and protecting the lives and properties. The methodology employed in this study is evaluative and exploratory doctrinal legal research. Using an evaluative and exploratory legal research as the methodology, this article discusses the laws regulating the imposition of fines in Malaysia and instances where law enforcement agencies impose fines on the offenders. Secondly, it examines the scope and the application of right to fair hearing and the presumption of innocence under international law as compared to the Malaysian laws. Lastly, this article identifies how far does the imposition of a fine by the law enforcement agencies in Malaysia tantamount to a potential threat to human rights.

Key words**:** Fines, Law Enforcement Agencies, Violation, Human Rights, Malaysia.

Introduction

The right to a fair hearing and the presumption of innocence are essential elements of the rule of law and shields for the proper adjudication of criminal cases. They are ultimate and collectively recognized human rights, cherished under various international law instruments such as the United Nations Universal Declaration on Human Rights (UDHR), the United Nations International Covenant on Civil and Political Rights (ICCPR) and other regionals instruments.

Malaysia as a sovereign country, and a party to a number of vital international humanitarian law treaties, including the 1949 Geneva Conventions and the Additional Protocols of 1977. It has ratified only three of the key international human rights law instruments, and they are; Convention on the Elimination of All Forms of Discrimination against Women of 1979, the Convention on the Rights of the Child 1989 and few years back ratified the Convention on the Rights of Persons with Disabilities of 2006.[1] Malaysia is party to the most important conventions on terrorism, but it has assented neither to the main treaties dealing with refugees nor to the Rome Statute of the International Criminal Court.[2]

Malaysia has not expressly incorporated the right to fair hearing and the right to presumption of innocence under the Federal Constitution, but courts in their judicial activism express that "law" as contained in Articles 5 and 8(1) of the Federal Constitution do not only include substantive law but also procedures established by law.[3] Therefore, the combined effect of Articles 5 and 8(1) of the Malaysian Federal Constitution construed to incorporate and ensure procedural fairness wherever a person's rights or livelihood are adversely affected by the decision maker law.[4]

The law enforcement agencies in Malaysia play a vital role toward maintaining law and order, apprehending offenders of the law to face justice, preventing crime and protecting the lives and properties. It has been the practice that the law enforcement agencies in Malaysia like Police, Immigration and custom officers use to fine traffic offenders, non-citizens for overstaying or delay in submitting their visa application, travellers for not declaring to the custom what was in his/her possession. These people

[1] www.geneva-academy accessed on 10th November, 2015.
[2] Ibid.
[3] *Raja Abdul Malek Muzzaffar v. Setiausaha Suruhanjaya Pasukan Polis & Ors* (1995) 1 MLJ 308
[4] *R Rama Chandran v. The Industrial Court of Malaysia & Anor*. [1997] 1 MLJ 145

that are being fined by the law enforcement agencies were not given a fair hearing so as to express or to state their reason(s) for committing such an act or to raise any defence that will exonerate or mitigate the punishment. More so, their right of presumption of innocence until proved guilty before a court of law or tribunal has been curtailed.

For instance, a situation may arise whereby a motorist may be sick or forced by nature to park in order to seek medical attention in a place where parking is not allowed, or a car may be stolen by thieves and along the line, something may happen or they may decide to leave the car in a place where it is not allow to park. Also, motorists are obliged to on double signal in a place where it is not allowed to park, but perhaps the traffic indicator after it has been on may developed a mechanical problem. Likewise, a motorist while driving in a place where he is not supposed to drive beyond a certain limit, still the speed meter may co-incident developed a mechanical problem or chased by armed robbers. All these situations required explanation and may serve as a defence to the offender under the law.

Meanwhile, on the part of the immigration, international student may submit his passport to visa unit in his/her university, but unfortunately for one reason or the other and the reason best known to the visa unit, they may not submit the passport on time. At times, until after the expiration of the visa pass or when the visa is about to expire, the immigration may fine the student for late submission or overstay while the fault was not from the student.

In another case, a custom officer may fine a traveller for not disclosing to them what was in his possession at the arrival point into Malaysia, especially where the item is contraband to import or bring it into the country without paying custom tax.

This study firstly, discusses concisely about the laws regulating the imposition of fines in Malaysia. Secondly, examines the instances where law enforcement agencies enforce fines on the offenders, and thirdly, the scope and the application of right to a fair hearing and the presumption of innocence under international law as compared to Malaysia. Lastly, to identify how far does the imposition of a fine by the law enforcement agencies could be a potential for a human rights violation?

Laws And The Agencies Involved In Imposing Fines In Malaysia

Section 57 of the Immigration Act of Malaysia provides that any person guilty of an offence under the Act which there is no specific penalty to that effect, on conviction, be liable to a fine not beyond ten thousand ringgit or imprisonment to a term not above five years or to both.[5] The Act further provides in section 58 that session courts and first class magistrate court should have the jurisdiction to try the offences and no charge should be filed in court without the consent of the public prosecutor. Additionally, under section 54 of the Act, the Minister is empowered to make regulations on many issues which among others include; prescribing a procedure to be followed by the authorities in performing their functions, prescribing fees and other charges, offences, offences to be compounded, amount to collect, the person to compound the offences and others. An Immigration officer or any person prescribed by the regulations with the consent of the public prosecutor under section 58A of the Act may compound any compoundable offence prescribed in the regulations by accepting certain amount of money as directed from any person who reasonably suspected of having committed an offence under the Act.

The Customs Act of Malaysia of 1967 regards any incorrect or untrue declarations, refusal to make a declaration and falsifying any documents as an offence, which shall on conviction be liable to a fine not exceeding five hundred thousand ringgit or to imprisonment not exceeding 5 years or both.[6] It is also an offence where a person omitted or neglected to comply with, and every act done or attempted to be done contrary to the provisions of Customs Act, or any breach of the conditions and boundaries subject to, shall be an offence and in respect of any such offence for which no penalty is expressly provided, the offender shall be liable to a fine of not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding five years or to both.[7] The first class Magistrate Courts shall have jurisdiction to try any offence under the Act and to award the full punishment for any such offences.[8] Similarly to the Immigration Act, Customs Act also empowered Customs officers to compound offences by accepting certain amount of money from a person who is alleged to have violated any provisions of the Act.[9]

It is an offence under the Land Public Transport Act of Malaysia to unlawfully bring dangerous or offensive goods or luggage into a vehicle or a railway train.[10] More so, it is an offence to enter or leave a railway coach or public service vehicle or tourism vehicle while in motion, travelling irregularly or get into any part of the coach or vehicle not intended to, for the use of the passengers, commit an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit for each offence.[11] The Police Officer and Road Transport Officer are empowered by the Land Public Transport Act to investigate and shall have the power to acquire information from a person acquainted with the facts.[12] The Minister has the power to prescribe any offence under the Act to

[5] Immigration Act of Malaysia 1956/63, Act no. 155
[6] Section 133(1) a-g of the Customs Act of Malaysia of 1967, Act no.235. See also Sections 135, 136 and 137 of the said Customs Act no. 235 prescribing penalties related to smuggling, assaulting or obstructing Custom officer from exercising his duties and offering of bribe to custom officer.
[7] Section 138 of the Customs Act of Malaysia of 1967, Act no.235.
[8] Section 118 of the Customs Act of Malaysia of 1967, Act no.235
[9] Section 131 of the Customs Act of Malaysia of 1967, Act no.235
[10] Section 198 of the Land Public Transport Act of Malaysia 2010, Act no 715
[11] Section 199 of the Land Public Transport Act of Malaysia 2010, Act no 715
[12] Sections 231 & 232 of the Land Public Transport Act of Malaysia 2010, Act no 715

be compounded, make regulations on issuance of license and other issues and the public prosecutor has to be informed before commencing any proceedings under the Act.[13]

A Police officer and Traffic Warden are allowed by the law to arrest without warrant any person who committed an offence against the Road Transport Act and they are also empowered together with Road Transport Officer to conduct an investigation and to request for an information from the person who is acquainted with the facts and circumstances of the case under investigation.[14] The first class Magistrate Courts shall have jurisdiction to try any offence under this Act and to award the full punishment for any such offence.[15] Any person who without lawful excuse or proof which shall on him, refuses or neglects to do anything he is by the Act required him to do, fails to comply with the notice served on him or fails to comply with the any provisions of the Act shall be guilty of an offence.[16] Police officer, Director General of Road Transport Officer and others may in their discretions compound any offence against the Act by collecting from the offender certain amount of money as fine.[17]

From the laws highlighted above, it is evidently clear that Ministers are empowered to make regulations guiding or regulating a procedure to obtain something and to compound some certain offences by collecting a certain amount of money as a fine from the offender(s). Based on powers of the Ministers to compound offences, it is now the practice of Police Officers, Immigration Officers, Customs Officers and Road Transport Officers to collect fines from the offenders in respect of compoundable offences instead of filing a criminal charge against the offenders before the court of law.

Right To Fair Hearing And Presumption Of Innocence Under International Law

The right to a fair hearing and presumption of innocence lies at the heart of every democratic society which prides itself on fairness, justice and rule of law.[18] Based on the above premise, there is an expectation that the principle of natural justice will be applied to issues involving the liberty, goods or welfare of a person, especially when they are at stake and the fairness and legality of the judicial process will be measured against those principles.[19]

The Magna Carta of 1215 is assumed to be the origin or basis of a variety of rights and privileges enjoyed by everyone, and clause 29 of the Magna Carta brought about the foundation of crucial elements of a fair trial.[20] Clause 29 provides:

> "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or Liberties, or free customs, or be outlawed, or exile, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right."

Subsequently, the English Bills of Rights of 1689 contained some provisions that had a direct bearing on how the law affected individuals.[21] The said Bills of Rights echoed that Crown should not arbitrarily suspend or dispense any law or impose unreasonable penalties or impositions unless due process of law making had been observed.[22] The Bills provide:

> "That the pretended power of suspending the laws or the execution of laws by legal authority [and as it hath been assumed and exercised of late] without the consent of Parliament is illegal…that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted…that jurors which pass upon men in trials for high treason ought to be freeholders [and] that all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void."

In criminal trials, common law has developed a principle on the presumption of innocence upon which any person who is alleged to have committed an offence is innocent until properly proved guilty and the burden is on the prosecution to prove his guilty beyond reasonable doubt.[23]

The principles of *Audi Alteram Partem* and *Nemo Judex in Causa Sua* were developed in the nineteen century[24] as a guide to trials. The concern of this study is on the first principle that is *Audi Alteram Partem*, meaning "to hear the other side". The principle is saying further that no one should be convicted or found liable without giving an opportunity of being heard.[25] Today, these are

[13] See Sections 252 & 241 of the Land Public Transport Act of Malaysia 2010, Act no 715
[14] See Sections 112-114 of the Road Transport Act of Malaysia of 1987, Act no. 333.
[15] Section 116A of the Road Transport Act of Malaysia of 1987, Act no. 333.
[16] Section 119 (a-c) of the Road Transport Act of Malaysia of 1987, Act no. 333
[17] Section 120 of the Road Transport Act of Malaysia of 1987, Act no. 333
[18] S. Foster, *"Human Rights and Civil Liberties",* Second Edition, published by Pearson Education Limited, 2008, pg 245.
[19] Ibid at 246
[20] Peter Halstead, "*Unlocking Human Rights"* Edited by J. Martin & C. Turner, Published in 2009 by Hodder Education, London, pg.194
[21] Ibid at 195
[22] Ibid.
[23] Ibid at 196
[24] Ibid 200.
[25] Ibid.

regarded as rules of procedural fairness which comprises an important component of judicial review and which is another aspect of the individual's right to obtain justice by means of a court hearing when he wishes to challenge a decision of a public body.[26]

One of the arguments to be considered on the issue of natural justice, is whether the fundamental rights of a person will be affected by a decision of the executive or administrative bodies. It was held in the case of *R. v. Army Board of the Defence Council*,[27] where such rights are affected or involved, the common law will be demanding in terms of procedural protection.

The principle underpinning the basis of trial is the right to a fair and public trial, which can be found in a number of international and regional human rights instruments, including Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Article 35 of the Statute of the International Court of Justice.[28] The rule of a fair hearing is not a technical doctrine, but it is one of substance and the question is not whether an injustice has been done because of lack of hearing, but, whether a party is entitled to be heard and given an opportunity of hearing.[29] Once an appellate court comes to the conclusion that the party was entitled to be heard before a decision was reached but was not given the opportunity for a hearing, the judgment entered is bound to be set aside.[30]

Article 6 of the European Convention on Human Rights provides as follows:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law.

In general, the scope of the application of Article 6 of the ECHR applies to all proceedings where it involves civil rights and obligations that are subject to determination or where the applicant is facing criminal charges.[31] The phrase "civil rights" as contained in Article 6 of ECHR has a conventional meaning and it is related to cover the rights under private law as used in civil law systems.[32] The courts now have taken a knee position on the scope of matters that are within the context of civil rights to include; monetary claim against public authorities,[33] land matters,[34] and disciplinary proceedings[35]

It has been decided that public law rights are involved only when they are personal and economic in nature and not on issues that are solely discretionary in nature.[36] It is equally important to note that, Article 6 provides a need for any decision making body to be overseen by an impartial and independent body or tribunal established by law.[37] When it appears before the court that even if there is little evidence that individual's right or interest has been damaged, the court may rule in favour of the applicant and declared that Article 6 of the EHCR has been infringed.[38]

In the case of *the Lord Advocate, Petitioner 2007 SLT 849* in Scotland, the court held that the fatal accident inquiries were statutory proceedings *sui generis* and it shall not be treated as civil proceedings, administrative or ordinary actions in relation to awards of expenses. This means that such a case does not have a protection under Article 6 ECHR, being neither a process for determination of civil rights and obligations nor of punishment in respect of a criminal charge. The decision demonstrates the necessity of having a hearing which has a bearing on the way that penalties or punishments may be imposed on individuals if the shield of Art.6 is to be safeguarded.

In determining whether the charge was criminal in nature and falls within the ambit of Article 6 of the ECHR, it was held in the case of *Engel v. Netherlands*[39] that three (3) thing must be satisfied. The first one is, the offence alleged to have committed must be regarded as an offence under the domestic law. Secondly, the nature of the offence and thirdly the severity of the punishment. In

[26] Ibid.
[27] *R. v. Army Board of the Defence Council, ex p Anderson* [1991] 3 ALL ER 375
[28] An International Bar Association Human Rights Institute Report on Malaysia (2010): the delicate balance between security and due process, A report on the observation of the habeas corpus application of Raja Petra Kamarudin.
[29] E.E Sunday (2011), the rule of fair hearing is not a technical doctrine. *Sacha Journal of Human Rights Volume 1* Number 1 (2011); pp. 68- 89.
[30] Ibid.
[31] S. Foster, *"Human Rights and Civil Liberties"* at pg. 247.
[32] P. Leyland & G. Anthony, *Text Book on Administrative Law*, 6th Edition, published by Oxford University Press, 2009, pg. 353.
[33] *Editions Periscope v. France (1992)* 14 EHRR 597
[34] *Skarby v. Sweden* (1990) 13 EHRR 90
[35] *Le Compte, Van Leuvan and De Meyere v. Belgium* (1982) 4 EHRR
[36] *Runer Begum v. Tower Hamlets London Borough Council* [2003] 2 AC 430, at 465.
[37] P. Leyland & G.Anthony, Administrative law at 378.
[38] See *Kingsley v. United Kingdom* (2001) 31 EHRR 13.
[39] (1976) 1 EHRR 647.

most cases, the courts are more concerned on the charges and the penalty whether has the elements of a criminal offence.[40] It was held in the case of *Ozturk v. Turkey*[41] that classifying motor offences as regulatory did not preclude the applicant's right to rely on Article 6 and to be protected from arbitrary fines.

The presumption of innocence is universal, irrespective of the offence charged and the country in which it was allegedly committed. The accused is innocent until proven guilty. Not only does the accused have a right to be treated as being innocent until found guilty, they also have a right to be dealt with fairly and expeditiously throughout the process.[42] Therefore, it is duty upon the prosecution to notify the accused of the case against him, so that he will get prepare to his available defences and to present his witnesses.[43]

An Overview Of The Right To Fair Hearing And Presumption Of Innocence Under Malaysian Federal Constitution

As rightly observed in the introductory part of this paper, there are no specific provisions on the right to a fair hearing and the presumption of innocence under the Malaysian Federal Constitution. Despite the above hitches, that does not stop the courts from accommodating the right to fair hearing, presumption of innocence and procedural fairness to be the products of the combined effect of Articles 5 and 8 of the Malaysian Federal Constitution.[44] It is apparently clear that, decided cases in Malaysia show that the courts are brave, innovative and energetic in interpreting the law liberally and broadly where it involves the fundamental rights of the applicant.[45]

Justice Raja Azlan Shah held in the case of *Lob Kooi Choon*[46] that the Malaysian Constitution contained three basic concepts and they are rule of law, separation of powers and federalism. The concept of rule of law is the sources of many rights to the accused person standing trial and it has been embodied in part II of the Malaysian Federal Constitution, which not only set out the fundamental liberties but also to protect individual rights by ensuring that the power of the State and its enforcement agencies is not exercise unsteadily and indiscriminately.[47]

Adherence to the principle of rule of law necessitate compliance with the principle of natural justice, including but not limited to right to be heard, the rule against biasness and also right to presumption of innocence. [48] These rights are guaranteed and protected under Article 5(1) of Malaysian Federal Constitution which provides that no person shall be deprived of his right to life or personal liberty except in accordance with the law and Article 8(1) of the Federal Constitution of Malaysia equally provides that all persons are equal before the law and entitled to equal protection of the law.[49]

At this juncture, it is of great important to share the recent decision of the case of *Fauzilah Saleh*,[50] on fair hearing in Malaysia. The brief fact of the case was that, the Plaintiff was awarded Master's degree by the Defendant, later she was invited by a committee of inquiry as a witness to give evidence and not to answer accusations against her and based on recommendation of the committee, the Defendant revoked her degree. It was held that the Plaintiff was never afforded with the right to be heard and it has been well established and rooted in the Malaysian public law that before depriving a person rights, he is entitled to be heard, which must be fair or otherwise the decision will be set aside.[51]

To What Extent Does The Fine Imposed By The Law Enforcement Agencies In Malaysia Amounts To Violation Of The Rule Of Law?

It is a universal standard in every democratic state that, where a person is alleged to have committed a criminal offence, before his conviction or found liable, he has to be given an opportunity to be heard. The essence of this is to provide an avenue to the alleged offender to express whether he has a defence in the eyes of the law that will exonerate him from the punishment completely or to mitigate the punishment. There is presumption that the alleged offender is innocent until proven guilty by the prosecution.

It is a non-contested fact that in Malaysia, the combined effect of Articles 5 and 8(1) of the Malaysian Federal Constitution construed to incorporate the right to fair hearing and presumption of innocence and ensure procedural fairness wherever a person's rights or livelihood is undesirably affected by a decision maker.

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[40] S. Foster, Human Rights, pg. 248.
[41] (1984) 6 EHRR 409
[42] A Global Campaigns by Open Society Foundation, Improving Pre-trial Justice (2012): The Roles of Lawyers and Paralegals.
[43] Shajeda Akther and Rohaida Nordin (2015), An Analysis of Fair Trial Guarantees at Trial Stage under the ECHR, *[2015] LR 211-234*.
[44] S. Thambapillay (2007), "Recent Developments in Judicial Review of Administrative Action in Malaysia: A shift from Grounds based on Common Law Principles to the Federal Constitution", Persidangan Udang-Udang Tuanku Ja'afar 2007, at pg 276
[45] Ibid at 275.
[46] *Lob Kooi Choon v. Government of Malaysia* (1977) 2 MLJ 187
[47] Amer Hamzah Arshad, Rights of Accused Persons; Are Safeguards Being Reduced? The Malaysian Bar, Published in Infoline January/Febuary, 2004, pg 1. Can be access online via http://www.malaysianbar.org.my
[48] Ibid.
[49] Ibid
[50] *Fauzilah Saleh v. University Malaysia Terrenggan* [2012] 4 CLJ 601
[51] Ibid.

As realised in this article,[52] law enforcement agencies in Malaysia are allowed by law to impose fines on the offenders for violating the law. The question to be addressed in the following paragraphs is whether the imposition of such fines by the law enforcement agencies amounted to a violation of the rule of law?

It is a settled law that, where a person alleged that his right to fair hearing and presumption of innocence has been violated, it is duty bound on the adjudicating body to determine whether what transpired between the applicant and the respondent involves civil rights and obligations that are subject to determination or where the applicant is facing criminal charges.[53] This article is concerned on the second part of the issues to be determined by the court that is whether the person is facing criminal charges. This is because fines were imposed in Malaysia on those that were alleged to have violated the law.

In determining whether the charge or offence was criminal in nature and entitles the applicant right to a fair hearing, then three (3) must be satisfied. The first one is whether the offence alleged to have been committed is regarded as an offence under the domestic law. Secondly, the nature of the offence and thirdly the severity of the punishment.[54] In most cases, the courts are more concerned on the charges and the penalty whether has the elements of a criminal offence.[55] It was held in the case of *Ozturk v. Turkey*[56] that classifying motor offences as regulatory did not preclude the applicant's right to rely on Article 6 and to be protected from arbitrary fines.

In Malaysia context, fines were imposed on the law offenders by the law enforcement agencies as permitted by the laws and regulations. From the available facts above, it can be argued that the fines impose by the law enforcement agencies on offenders in Malaysia are in respect of criminal offences. This is because it is the law that categorises such an act to be an offence and provide punishment that should be inflicted on the offenders. More so, certain offences attracts fine of twenty thousand ringgit or 5 years imprisonment or both.[57]

Therefore, it can be laudably stated that those that are being fine by the law enforcement agencies in Malaysia for violating a law are entitled to a fair hearing, because the offence alleged to have committed is criminal in nature. And it is the position of the law that any person who is alleged to have committed an offence is entitled to a fair hearing and presume to be innocent until proven guilty.

Another issue to consider is that, the essence of a fair hearing is to allow the offender to ventilate any available defence that is acceptable in the eye of the law that will either exonerate him or mitigate the punishment. In line with that, Malaysian criminal law provides a number of defences to the accused person that will either exonerate him or mitigate the punishment. The available defences for an accused person standing trial include; Defence of Mistake of fact as provided under Section 79 of the Malaysian Penal Code that "nothing is an offence which is done by any person who is justified by law, or who by a reason of mistake of fact and not by a reason of mistake of law in good faith believes himself to be justified by law, in doing it". The motive behind recognising a mistake of fact as a defence is that, if a person as a result of mistake of fact in good faith, believe himself to be bound or justified in doing an act, is not criminally responsible.[58]

Also, it is a defence to an accused person if he can shows that the alleged offence occurred as a result of accident or misfortune, without any criminal knowledge or intention, in doing a lawful act in a lawful manner, by lawful means and by proper caution and care.[59] This defence was applied in the case of *Ratnam*[60] where the Court of Criminal Appeal set aside the judgment of the lower court on the ground it convicted the Appellant on the evidence that is solely a defence of accident to the Appellant which the lower court supposed to have acquit him.[61]

Under the defence of accident or misfortune stated above, a situation may arise whereby a car may be stolen by thieves and along the line, something may happen or they may decide to leave the car in a place where it is not allowed to park. Then, the law enforcement agencies may fine the owner of the car for illegal parking. While he was not the person that actually committed the offence of illegal parking, even if there is a remedy, he has already been fined. Also, motorists are obliged to on double signal in a place where it is not allowed to park as a sign that they will not stay long. But the traffic indicator after it has been on by the car owner or driver and left to a shop or nearby, it may developed a mechanical problem, which the police or other law enforcement agencies may not realise that and they may clip the fine paper to his car without knowing that he complied with the law. After they might have left, the motorist may get to know that he was fined by law enforcement agencies and there will be no room to explain to them. But if the law enforcement agency draw his attention by calling him that you illegally parked at a place where you are not supposed and you did not comply by switching a double signal. Definitely he will explain to them and to even show them that the traffic light was already on.

Another scenario which may serve as a defence of accident to a motorist is that, while driving in a place where a motorist is not supposed to drive beyond a certain limit, still the speed meter may co-incident developed a mechanical problem to display to him

[52] Under the heading of Laws and Enforcement Agencies involved in imposing fines in Malaysia.
[53] S. Foster,*" Human Rights and Civil Liberties"* at pg. 247.
[54] See *Engel v. Netherlands* (19760 1 EHRR 647.
[55] S. Foster, Human Rights, pg. 248.
[56] (1984) 6 EHRR 409
[57] See the discussion under the heading of Laws and Agencies involved in imposing Fines in Malaysia in this Article.
[58] Stanley Yeo, "*Criminal Defences in Malaysian and Singapore"* Published Lexis Nexis Malaysia, 2005, pg. 16.
[59] Section 80 of Malaysian Penal Code of 2006, Act 574.
[60] *Ratnam v. R* [1937] MLJ 222.
[61] This decision was also applied in the case of *Kong Poh Ing v. PP* [1977] 2 MLJ 199.

certain speed as if he is driving within the average speed permitted or allowed by law without knowing that he has exceeded the speed limit, which he may release letter after he was snapped by a camera for violating speed limit while no room for explanation.

Moreover, with the exception of murder and other offences punishable with death penalty, nothing is an offence which is done by a person who is compelled to do it by threat or duress.[62] This defence of duress which exonerate an accused person from criminal liability is available to an accused person or offender that was chased by the armed robbers or other criminals that forced him to drive his car beyond speed limit as permitted by law in a place where he is not supposed to do so.

The defence of necessity may avail a motorist offender where he is sick or forced by nature to park in order to seek medical attention in places where parking is not allowed. This is because the Penal Code of Malaysia makes categorically clear that "nothing is an offence merely by reason of its being done with knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property".[63] There is tendency that if he did not park immediately, it may result in causing accident which may consume lives and properties.

The above are some of the defences open to an accused person in a criminal trial which will avail him if he is being heard by the court or tribunal. Therefore, right to fair hearing enables the accused or offender to state his own part of the story in order to determine whether the act he committed has any justification or reason to protect him from being punished.

It is observed that the fine is just like a verdict of the court and not a charge that may warrant admission or denial on the part of the offender. This is because if it is really a charge, there will be a judgment after admission of guilt. But once the offender accepted to pay the fine or paid it, there is no judgment or court's verdict. Where the offender for instance after being chased by criminals and he exceeded the speed limit or he parked at place that where he is not supposed to answer the call of nature or by necessity, at the trial he cannot provide these evidences so easily as his defences. It is of paramount importance to give him fair hearing at the place where the offence was alleged to have been committed before founding him liable or fine him, in order to justify his act or to provide a defence to the alleged act.

One may argue that the current system of imposing fines on the offenders by the law enforcement agencies forced the offenders with no option rather than to pay the fine. This is because, considering the time to spend at the trial, money to spend in engaging the services of a lawyer and going to court and other issues that may inconvenience the offender. The offender is left with no option than to pay the fine. Thus, something need to be done in order to bring the court closer to the offenders and to determine the case within short possible time.

Conclusion

From the discussion above, it is clearly understood that the law enforcement agencies are empowered by law in Malaysia to impose or collect fines from law offenders. While imposing the fines, the offenders in most cases were not given the right or an opportunity to state their own story as to whether they have justification for committing that act or offence. And to also determine whether they have defence recognised by law that will avail them in mitigating or exonerating them from being punished. Therefore, this act of condemnation or founding liable and imposing fines on the law offenders by the law enforcement agencies in Malaysia is a serious attack on the principle of rule of law that entitles an offender the right to heard and to presume innocent until proved otherwise.

Having determined that, it is recommended that there is need for a mobile court or tribunal that will go along with the law enforcement agencies in order to comply with the rule of law and procedural fairness guaranteed by the law to all the offenders. One of the importance of this mobile court as rightly pointed out by the Chief Justice of India, Mr. Justice Balakrishnan (as then was) during inauguration of mobile court in India in 2007 said, "A judicial system for the masses is a must for the maintenance of rule of law and for safeguarding the democracy, and people generally go to courts to get justice but today with mobile courts, the courts will come to the people".[64] The mobile court will serve as an avenue for the offender to bring to its notice of any available defence and to be tried within short possible time.

Before the trial of the offender at the mobile court or tribunal, the law enforcement agencies can ask the offender whether he will bargain with them in order to compound the offence by collecting certain amount as fine or he will prefer his trial before the mobile court or tribunal. If the offender chooses to bargain, then he has waived his right to a fair hearing and presumption of innocent. But where he insisted that he has a justification or defence regarding the alleged offence, then the matter shall proceed to hearing before the mobile court or any tribunal established by law to try such offender.

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CRIMINAL LAW ENFORCEMENT OF CYBERPORN/CYBERSEX IN ORDER TO FIGHTING CRIME IN INDONESIA

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ABSTRACT

Internet has created a new world called cyberspace, which is a computer-based communications domain that offers a new form of virtual reality. The development of the Internet has increased both technology and its use, has a lot of both positive and negative impacts. The negative impact of internet makes formerly conventional crime now be done using online computer media with very little risk of being caught. One conventional crime that uses online computer media is pornographic images. The problem discussed in this paper is: "How do criminal law enforcement policy against criminal acts of cyberporn/cybersex in the context of crime prevention in Indonesia during this time and the constraints of effort to anticipate the future? Based on the description in the discussion above it can be concluded that: Law enforcement policy against cyberporn/cybersex in Indonesia still use laws that are conventional, such as the Criminal Code, Broadcasting Act, Press Act, Film Act, Information and Electronic Transactions Act and Pornography Act, which still has weaknesses. Therefore, reforms are needed in the field of the substantive law to meet the challenges ahead. In addition to the renewal of the substance of the law also required the improvement of human resources of law enforcement, infrastructure and legal a wareness of the society. Given that cybercrime cannot be equated with ordinary/conventional crime, so it cannot be faced by law enforcement and thought/construction of conventional law either.

Key words**:** Criminal law enforcement, cyberporn/cybersex, to fighting crime

Introduction

Internet has created a new world called cyberspace, which is a computer-based communications domain that offers a new form of virtual reality. The development of the Internet has increased both technology and its use, has a lot of both positive and negative impacts. The negative impact of internet makes formerly conventional crime now be done using online computer media with very little risk of being caught.

Head of Public Relations of Jakarta Police Commissioner Rikwanto said that cases of crime through the virtual world are different from criminal cases that occur in the world of reality, and its handling also different in terms of disclosure. Police should not be hasty in determining the perpetrators of the crime. Even if there are indications of a crime, the perpetrators cannot be immediately arrested. Rikwanto explained disclosure of criminal cases in cyberspace need valid proof. Not every person conducts criminal offense even though there is an element that is closer, and to prove it need some times. The police are obliged to bring criminal cases to the world of reality first, and then search for victims and losses of material and non-material acquired. Then, police can arrest the operator of the site in cyberspace. [1]

Based on some of the literature and practice, cybercrime has distinctive characters than conventional crimes, among others, namely:

1. The illegal act, without any rights or unethical are happening in cyberspace, so the jurisdiction cannot be ascertained.
2. The act is done using any equipment that can be connected to the Internet.
3. This act resulted in loss of material and immaterial (time, value, service, money, goods, self-respect, dignity, confidentiality of information) which tend to be larger than a conventional crime.
4. The perpetrator is the person who controls the use of the Internet and its applications.
5. This act is often carried out transnationally/cross borders.[2]

Cybercrime can include crimes in all aspects of human life, including all the traditional forms of crime such as contained in the Criminal Code. Congress Report of the United Nations X/ 2000 stated, covers all new forms of crime directed at computers, computer networks and users, and other forms of traditional crime that is now done with the use or with the aid of computer equipment.[3]
One conventional crime that uses online computer media is pornographic images. The pictures circulating on the Internet and can be seen by anyone for free, regardless of age. The spread of pornographic images can resulted in moral decline of society.

[1] http://www.republika.co.id/berita/nasional/jabodetabek-nasional/14/... Pengungkapan Kasus Cybercrime butuh waktu lama, download 23 Mei 2014.

[2] Dwi haryadi, 2013, *Kebijakan Integral Penanggulangan Cyberporn Di Indonesia*, Penerbit, Lima, Yogyakarta, p. 44 - 45.

[3] Barda Nawawi Arief, 2005, *Tindak Pidana Mayantara, Perkembangan Kajian Cybercrime Di Indonesia*, RajaGrafindo Persada, Jakarta, p.43.

Cyberporn/cybersex is one type of serious cybercrime and cause huge damage, because the attack is directed at younger generation of a nation that can result in the existence of free sex and result in further reduction in human resources because oriented pornography. Therefore, law enforcement against cyberporn/cybersex needs serious attention from the government.

In the opinion of Dr. Robert Weiss of the Sexual Recovery Institute in Los Angeles, that pornography has a reputation of similar effects to cocaine, which cause sexual addiction. The way it works is very fast and powerful, just like the use of narcotics, sexual pleasure experience gained by viewing pornographic images can cause repetitive behavior patterns and intensified, as a result creates addiction to pornography.[4]

If it is upon the children of Indonesia, one can imagine how suffering the nation, because future generations addicted to pornography. Such impacts are very dangerous for the nation, therefore the criminal law enforcement against cyberporn needs to be improved by the Government.

The Problem

Based on the above mentioned fact the problem discussed in this paper is: "How do criminal law enforcement policy against criminal acts of cyberporn/cybersex in the context of crime prevention in Indonesia during this time and the constraints of effort to anticipate the future?

Research Purposes:

To identify and analyze criminal law enforcement policy against criminal acts of cyberporn/cybersex in the context of crime prevention in Indonesia during this time and the constraints of effort to anticipate the future.

Discussion
Formulation Policy of Cyberporn/Cybersex Crime in Indonesia

Criminal law enforcement policy is part of a criminal policy. Law enforcement policy is a set of processes consists of three stages of the policy. First, formulative policy stage or legislative policy stage is the stage of preparation/formulation of criminal law. Second, the judicial/implementation stage, namely the implementation phase of the criminal law. Third, the stage of executive/administration policy, namely the stage of implementation/execution of criminal law. The first phase (legislative policy) is the stage of law enforcement "in abstracto" while the second and third phase (phase of the judiciary and the executive policy) are the stage of law enforcement "in concreto".[5]

The stages of criminal law enforcement aforementioned contains three power or authority, namely legislative authority which formulates or establishes acts as acts that can be imprisoned (criminal offenses) and its criminal sanction, law application authority by law enforcement officials, and the power/authority which execute or carry out a concrete law by authorities/agencies authorized.

The legislative process is a strategic early stage of the law enforcement, so that mistake at this stage is a strategic error that can become an obstacle to law enforcement efforts. With the formulation stage, the prevention and control of crime is not only the task of law enforcement/implementation officers, but also the task of apparatus that make the law (legislative authorities), even legislative policy is the most strategic stage of "penal policy". Its Strategic position is because the penal system and punishment policies formulated by the legislative apparatus are the foundation of legality for criminal practitioners apparatus (judicial officers) and officers of criminal executive (executive/administrative officer).

Related with this cyberporn, the Government has issued several laws that containing criminal acts of decency, among other:[6]

1. Articles 281, 282, 283, 284-292, 532, and 533 of the Criminal Code.
   The disadvantage is that the articles of the Criminal Code are not able to reach the corporation as moral perpetrator and also cannot reach the crime of morality that transcends territorial boundaries of Indonesia, the more so if the criminal act of decency is done by means of a computer.

2. Article 5 (1), Article 13, Article 18 paragraph (2) of Law No. 40 of 1999 on the Press.
   Article 5 (1) concerning the obligation of the national press to spread events and opinions that respecting religious norms and a sense of public morality as well as the presumption of innocence.
   Article 13, set the Press Company shall not contain ads, which among other things resulted in degrading a religion or interfere religious harmony, and contrary to the sense of public decency.
   Article 18 paragraph (2), set up for the Press Company violating the provisions of Article 5, paragraph (1) and Article 13, shall be punished by a fine of Rp.500.000.000 (Five Hundred Million).

[4] http://www.voa-islam.com/read/smart-teen/2011/06/23/15386/hati-hati terhadap Pornografi, download 9 Mei 2014.

[5] Barda Nawawi Arief, 2012, *Kebijakan Formulasi Ketentuan Pidana, Dalam Peraturan Perundang-undangan*, Pustaka Magister, Semarang, p.10.

[6] Barda Nawawi Arief, 2011, Pornografi, Pornoaksi, dan Cybersex-cyberporn, Pustaka Magister, Semarang, p.44-59.

The weakness of the Press Law is no qualifying offense and there are no rules of liability for corporation, there are no rules about when or in terms of how the corporate/company press with a criminal offense and how if the fine is not paid, because there are no rules regarding criminal lieu of fines.

3. Article 57 Jo 36 paragraph (5), Article 57 Jo 36 paragraph (6), Article 58 Jo 46 paragraph (3) of Law No. 32 Year 2002 on Broadcasting.

   Article 57 Jo Article 36 paragraph (5) threatening, among others, broadcast that accentuating the obscene. For radio, the threat of criminal imprisonment of 5 (five) years and/or a maximum fine of Rp. 1.000.000.000 (one billion Rupiah), while for television broadcasting, criminal threats imprisonment of 5 (five) years and/or a fine of Rp.10.000.000.000 (ten billion rupiah).
   Article 57 Jo 36 paragraph (6), threatens punishment against broadcast that bullying, degrading, insulting and/or ignore religious values, dignity of Indonesian. Criminal threats for radio broadcasting, imprisonment of 5 (five) years and/or a maximum fine of Rp. 1.000.000.000 (one billion Rupiah), while for television broadcasting, criminal threats imprisonment of 5 (five) years and/or a fine of Rp.10.000.000.000 (ten billion rupiah).
   Article 56 Jo 46 paragraph (3) threatens punishment against commercial advertisement in which includes among other things that are contrary to public morality and religious values, and/or exploitation of a child under the age of 18 years. Criminal threats 2 (years) and/or a fine of Rp. 500.000.000 (five hundred million rupiah) for radio broadcasting, and the imprisonment of 2 (two) years and/or a fine of Rp.5.000.000.000 (five billion rupiah) for television broadcasting.
   The above provisions may be directed to cybercrime in the field of ethics, because according to this law the broadcastings are: activities that spreading broadcast by means of transmission and/or means of transmission on land, at sea, or in space by using the radio frequency spectrum through radio, through the air, cable and/or other media to be received simultaneously and concurrently by the community with the broadcast receiving device.
   Weakness in the law Broadcasting is that the offenses aforementioned are limited to broadcast via radio or television, do not include broadcasting in digital technology, satellite, internet and other specific forms, whereas there are many broadcasts and advertisements in cybersex and cyberporn sites.

4. Article 40 and Article 41 of Law No. 8 of 1992 on Film.

   Artikel 40, threatened with imprisonment of a maximum of 5 years and/or a maximum fine Rp.50.000.000 (fifty million) to acts:

   a. Intentionally distribute, export, display and/or broadcast movies and/or advertisement films that rejected by the film censorship institution as referred to in Article 33 paragraph (6); or
   b. Intentionally distribute, export, display and/or show pieces of film and/or a certain sound that was rejected by the film censorship institution as referred to in Article 33 paragraph (6); or
   c. Intentionally distribute, export, display and/or show a film that was censored as referred to in Article 33 paragraph (1).

Article 41, threatened with imprisonment 1 (one) year and/or a maximum fine of Rp. 40.000.000 (forty million) to acts:

a. Doing movie business without license (Jo Article 14 paragraph (1), Article 17, Article 19, Article 20, Article 24 and Article 27).
b. Distribute, export, display or showing uncensored films (jo Article 33 paragraph (1)).

The weakness of this law is that there is no provision of corporate criminal liability, in addition to the maximum criminal fine of only Rp 50 million, it does not mean anything for the film company, compared to the Broadcasting Act maximum fines up to Rp 10 billion.

5. Article 45 Jo 27 paragraph (1) and Article 52 of Law No.11 of 2008 on Information and Electronic Transactions.

   Article 45 Jo 27 paragraph (1), threatening 6 years inprisonment and/or a fine of 1 billion rupiah, if intentionally and without right to distribute and/or transmit and/or make accessible electronic information and/or electronic documents that violate decency.
   According to Article 52, if the violation of Article 27 paragraph (1) concerning morality or sexual exploitation of children, criminal liability substantially aggravated third.

6. Article 29 - Article 41 of Law Number 44 Year 2008 on Pornography.

   Article 29, threatened imprisonment minimum of 6 (six) months and a maximum of twelve (12) years and/or fined at least Rp.250.000.000 (two hundred and fifty million rupiah) and maximum Rp. 6,000,000,000 (six billion), for every person who produces, makes, reproduce, copy, distribute, broadcast, importing, exporting, offering, reselling, leasing, or providing pornography as referred to in Article 4 paragraph (1).
   As for Article 4 paragraph (1) provides: Every person is prohibited to produce, make, reproduce, copy, distribute, broadcast, importing, exporting, offering, reselling, leasing, or providing explicit pornography that includes:

   a. Sexual intercourse, including distorted sexual intercourse;
   b. Sexual violence;
   c. Masturbation;
   d. Nudity or an impressive display of nudity;
   e. Genitals; or
   f. Child pornography.

In the explanation of Article 4 paragraph (1) stated: what is meant by "making" is not included for himself and his own interests.
Article 30, threatened imprisonment of 6 (six) months and no later than 6 (six) years and/or fined at least Rp.250.000.000 (two hundred and fifty million rupiah) and maximum Rp. 3,000,000,000 (three billion rupiah), any person who provides pornography services as referred to in Article 4 paragraph (2).

Article 4 paragraph (2) stipulates: everyone prohibited from providing pornography services that:

a. Presenting explicitly nudity or display of nudity;
b. Presenting genitals explicitly;
c. Exploiting or displaying sexual activity; or
d. Offer or advertise, either directly or indirectly, of sexual services.

Article 31, threatened imprisonment of 4 (four) years and/or a maximum fine of Rp. 2.000.000.000 (two billions rupiah), for every person who lent or downloading pornography as referred to in Article 5.

Article 5 set every person is prohibited to lend or download pornography as referred to in Article 4 paragraph (1).

Article 32, threatened imprisonment of 4 (four) years and/or a maximum fine of Rp.2.000.000.000 (two billions rupiah), for every person who play, show, utilize, possessing or storing pornographic products referred to in Article 6.

Article 6 set that anyone banned from show, utilize, possessing or storing pornographic products referred to in Article 4 paragraph (1), except as authorized by legislation.

Article 33, threatened imprisonment of 2 (two) years and a maximum of 15 (fifteen) years and/or fined at least Rp.1.000.000.000 (one billion rupiah), and most Rp.7.500.000.000 (seven billions, five hundreds million rupiah), for every person who financed or facilitated acts as referred to in Article 7.

Article 7 set any person prohibited from funding or facilitating acts as referred to in Article 4.

Article 34, threatening criminal imprisonment of ten (10) years and/or a maximum fine of Rp.5,000,000,000 (five billions rupiah), any person who intentionally or with the approval her/himself into a object or model that contains pornographic content, as referred to in Article 8.

Article 8 regulates: Each person is prohibited from intentionally or as permitted himself to be an object or a model containing pornography.

Article 35, threatened imprisonment of 1 (one) year and a maximum of twelve (12) years and/or fined at least Rp.500.000.000 (five hundred millions rupiah) and at most Rp.6.000.000.000 (six billions rupiah), any person who makes other people as objects or models that contain pornographic content as referred to in Article 9.

Article 9 set each person is forbidden to make another person as an object or a model that contain pornographic content.

Article 36, threatened imprisonment of ten (10) years and/or a maximum fine of Rp. 5,000,000,000 (five billions rupiah), every person who showed themselves or others in the show or in public that depicts nudity, sexual exploitation, mating, or other pornographic contents referred to in Article 10.

Article 10 set that every person is prohibited from exposing themselves or others in the show or in public that depicts nudity, sexual exploitation, mating, or other pornographic contents.

Article 37, threatening everyone who involve children in activities and/or as an object as referred to in Article 11, shall be punished with the same punishment as referred to in Article 29, Article 30, Article 31, Article 32, Article 34, Article 35, and Article 36, plus 1/3 (one third) of the maximum threats.

Article 11, set each person is prohibited involve children in activities and/or as an object as referred to in Article 4, Article 5, Article 6, Article 8, Article 9, or Article 10.

Article 38, threatened imprisonment of 6 (six) months and no later than 6 (six) years and/or fined at least Rp. 250.000.000 (two hundred and fifty millions rupiah), and most Rp.3.000.000.000 (three billions rupiah), every person who invite, persuade, exploit, let, abuse of power, or force the child to use the pornographic products or services referred to in Article 12.

Article 12, set each person is forbidden to invite, persuade, exploit, let, abuse of power, or force the child to use the pornography products or services.

According to Article 40, in the case of pornography offenses committed by or on behalf of a corporation, the imposition of criminal charges can be made against the corporation and/or its management. The charge to administrators is in the form of imprisonment and fines, while the corporation was sentenced to the maximum penalty multiplied by 3 (three) of the criminal penalties in every chapter. Corporations can also be sentenced to an additional form of: freezing a business license, business license revocation, seizure of the proceeds of a criminal offense and revocation of legal status.

Of the various laws mentioned above, not all articles contained in the law can be used to handle cyberporn/cybersex in Indonesia, only a few chapters just as has been mentioned above, and even then there are still some weaknesses.

Criminal Law Enforcement against Cyberporn/Cybersex in the Context of Crime Prevention, and Constraints Faced In Indonesia

In addition to the weakness from material criminal law standpoint (its substance), there are also a formal weaknesses in the evidence domain. Juridical recognition of the electronic record, as an evidence only exist on Corruption Act and Money Laundering Act, so that it becomes a problem for other crimes, especially those related to cybercrime.[7]

The weaknesses from this material criminal law standpoint will cause weak enforcement of the criminal law against cybercrime. This is in accordance with the opinion of Soerjono Soekanto which states that: "The functioning of law depends heavily on a harmonious relationship between the law itself, law enforcement, facilities and the people it governs. Lameness in one of the elements, it will probably result that the entire system will be exposed to negative influences".[8]

The legislation factors that often interfere with law enforcement are:
1. Not following the principles of the act enacted.
2. The absence of regulations that is necessary to implement the Act.
3. Unclear meaning of the words in the Act which led to confusion in the interpretation and implementation.[9]

Conceivably, if the law itself contains confusion in the interpretation then there are many court's decisions with striking disparity, so there is no legal certainty.

Following the opinion of Gustaf Radburch that any application of the Act into society rests on three (3) legal basis namely the value of the rule of law, justice and expediency, then this will add to the long row of weaknesses of criminal law enforcement.

In addition to the effect of substance on the rule of law, law enforcement evidently also influenced by the structure, and culture. This is in accordance with the opinion of Laurence M. Friedman of the Legal System Theory which says that: the legal system includes three components:
a. *Legal substance*, actual results issued by the legal system, in the form of legal norms, both regulations, decisions used by law enforcement officials as well as by those who are governed;
b. *Legal structure*, the parts that move in a mechanism, which is an institution created by the legal system and has the function to support the operation of the legal system (includes a domain of legal system as legal institutions, and the relationship or the distribution of powers between the legal institution);
c. *Legal culture* in the form of ideas, attitudes, expectations and opinions on the law as a factors that determine how the legal system obtain its place or otherwise.[10]

This is because law enforcement is a process to realize the desires of law becomes a reality. The desire of Law are thoughts of law-making body formulated in legal regulations. Law enforcement process also reach law making. Formulation of lawmakers thought set forth in the rule of law will also determine how the law enforcement will be held. In fact, the law enforcement process culminated in the implementation by law enforcement officials.[11]

Satjipto Rahardjo states that: Law enforcement is not a stand-alone activity, but have a close reciprocal relationship with the community, therefore, in speaking of law enforcement should not be ignored discussion of the structure of society behind it.[12]

Law never operates in a vacuum state of the environment, always will be a mutual process between the law and the environment. Law works through human being, it is increasingly clear role of the environment on the legal life of a nation.

Discussing enforcement without offending people who run the enforcement aspect, a sterile discussion of nature, when discussing law enforcement just holding on imperatives as contained in the provisions of the law, it will only get an empty picture. Discussing enforcement be unbiased when linked to concrete implementation by humans.[13]

According to Van Doorn, "People always tend to give their own interpretation of the functions within the organization, based on personality, social origin and level of education, economic interests and political beliefs and view of his own life". Therefore, the human factor becomes important, because it is only through human factors such enforcement is executed.

Functional coordination relationship from each law enforcement agencies (police, prosecutors, judges, Correction Department) that currently shows the central ego and neglect in their duties that they are actually one of the criminal justice system needs to be fixed. According Muladi: "As a system, the criminal justice have structures device or sub-system supposed to work in a

[7] *Ibid*, p. 62.
[8] Soerjono Soekanto dan Mustafa Abdullah, 1987, *Sosiologi Hukum Dalam Masyarakat*, CV Rajawali, Jakarta, p. 20.
[9] Soerjono Soekanto, 1983, *Faktor-fsktor yang Mempengaruhi Penegakan Hukum*, CV Rajawali, Jakarta, p.10.
[10] Lawrence M.Friedman, 1975, *The Legal System: A Sicial Science Perspective*, Russell Sage Foundation, New York, p 10.
[11] Satjipto Rahardjo, 2011, *Penegakan Hukum Suatu Tinjauan Sosiologis*, Genta Yogyakarta, p.24.
[12] *Ibid*, p 31.
[13] *Ibid*, p.26.

coherent, coordinated and integrated way in order to achieve maximum efficiency and effectiveness. The combination of efficiency and effectiveness in the system is essential, because it is not necessarily the efficiency of each sub-system, by itself produce effectiveness. Functional fragmentation of sub-system will reduce the effectiveness of the system, it can even make the whole system dysfunctional".[14]

Weak law enforcement is also caused by the legal culture of society that lack of respect for the law. Legal culture is defined as people's attitudes, values, ideas, and expectations of society against the law. Indonesia legal culture is not yet conducive for law enforcement, as tends to be elitist and corrupt. Culture of feudalism and paternalism that live in the community led to the law being elitist, derived and defined from above, even the officer remarks are considered something that must be obeyed.

According to Barda Nawawi Arief, in current crisis situation the most important thing is precisely the immaterial aspects of the legal reform, namely reform of legal culture, legal ethics/moral and law science/education. This immaterial aspects of this legal reform should be an advantage if the main goal is justice. The core of law reform/development is not on the formal aspects and external (such as the formation of new legislation, new institutional structures and mechanisms/procedures, more buildings and facilities/infrastructure), but rather lies in the aspect of immaterial, namely build culture and values of law.[15]

Barda Nawawi Arief asserts that legal reform means not only renewal of legal substance reform, but also legal structure reform, and legal culture reform which also includes legal ethics and legal science/education reform).[16]

Efforts to tackle cybercrime requires seriousness from all parties, in view of information technology, especially the Internet has been used as a means to build a civilized society of information. The existence of laws governing cybercrime is necessary, but law enforcement is influenced by factors other than legislation, is also influenced by law enforcement personnel, facilities and also legal awareness.

According to the author, Cybercrime is a crime with high-tech dimension, however, Indonesian law enforcement agencies do not fully understand what is cybercrime. In other words, human resources, especially law enforcement officers still do not fully understand about cybercrime. The availability of funding or budget for training of human resources is minimal, so that law enforcement agencies difficult to transmit their training both at home and abroad, although now the police as law enforcement officers have set up special units to deal with crimes of cybercrime namely VIT/Cybercrime Unit, that has Cybercrime laboratory which is the largest in Asia that can easily keep track of credit card fraud, porn video website, or bomb threats by short message system, [17] but not on local police station level. Indonesia can not only be measured by Jakarta, but outside Jakarta should also receive attention.

In addition to the legislation, law enforcement, and infrastructure factors, other important factors that affect the law enforcement according to the author, is legal awareness of community. The question of ethics to interacts on the internet still not well understood, low legal awareness to report the case to the police, the victim does not want his case known to the public because it looked a disgrace to the family.

Prevention and control of cyberporn/cybersex is not enough just to criminalize that states in the article, but rather required the cooperation of the Government, law enforcement agencies, NGOs, and communities in order to reduce the crime rate. Actually, the Internet Service Provider in Indonesia, had done to block pornographic sites, but the number of sites blocked has not been much so that the users are still free to enter into these sites, especially sites that come from abroad. For that ISPs need to collaborate with relevant agencies to update the list of porn sites that need to be blocked.

In addition, according to Barda Nawawi Arief, for effecting positive criminal law, it would need to be taken several steps/effort as follows:[18]

1. Increase the commitment of national strategy/priorities in crime prevention in the field of ethics, which should be aligned with efforts to reduce corruption, drugs, terrorism, and so on.
2. Increase the socialization movement/campaign about danger or negative impact of moral offense in the field of cyber (cybersex, cyberporn, cyber phone, cyber prostitution, cyber/virtual cohabitation, and so on) on national development goals, like campaign of anti-drug, anti-corruption, or anti-terrorism;
3. Increase the dissemination of basic values and spirit contained in the preamble of the Constitution of 1945, as well as goals (Vision and Mission) contained in the national development plan, which is the base value/passion to eradicate colonialism in all its forms (including colonization moral and cultural) as well as the spirit to build a life that is free national paradigm based on moral/national culture.
4. Improve dissemination and strengthening of law enforcement officers on the purpose (general guidelines) and the National Decency value in various laws (among others in the Film Act and the Broadcasting Act).
5. Construction Juridical reform, among others:

[14] Muladi, 1995, *Kapita Selekta Sistem Peradilan Pidana*, UNDIP, Semarang, p.21.

[15] Barda Nawawi Arief, 2010, *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana Dalam Penanggulangan Kejahatan*, Kencana Prenada Media Group, Jakarta, p. 6.

[16] *Loc Cit*, p. 6.

[17] http://www.islatimes.org/vdcjahe88uqei8z.bnfu.html, download 23 Mei 2014.

[18] Barda Nawawi Arief, *Op Cit, Pornografi…,* p.65.

- Reconstruction of law enforcement (legal thought) in the context of policy reform of the legal system and national development;
- Conducting substantial legal construction in the face of the juridical constraints;
- Enhance scientific culture/scientific approach in the making process and the enforcement of criminal law.

Policy Formulation in The Future

Based on the opinion of Barda Nawawi Arief, mentioned above, then it is time for Indonesia to reform criminal law, especially in the face of cybercrime, not simply by ITE Act, but it takes a law that comprehensively regulates the issue of cybercrime. Cybercrime cannot be equated with conventional criminal offense. Conventional principles in the positive criminal law and legal doctrine that had been applicable are: the principle of legality, culpabilities principle, the principle of jurisdiction, evidence and so on. Therefore, need renewal in the field of criminal law to combat cybercrime.

Criminal law reform in effect must be taken by policy-oriented approach as well as value-oriented approach. The views and the concept of the value of the public/citizens regarding the values of decency need to be considered in the determination of the offense.[19] View of society that is familial, collectivist, and mono-dualism consideration would need to formulate a criminal offense of cyberporn and cybersex is in the legislation, no longer as a complaint-based offense but as an ordinary offense.

Author opined that the arguments of Barda Nawawi Arief still needs to be coupled with morality and ethics Improvement from law enforcement officers.

According to Aristotle's moral function is to guide man to choose a middle way between two opposite extreme, including in determining fairness.[20]

Morality covers a broad field of human behavior that are both personal and social nature. Sensitizing law enforcement officers against social situations people need to be improved. Moral and ethical hold the key to arbitrate progressively.

According Soerjono Soekanto, indicators of good moral are, among others, rationality, honesty, responsible, fair, and productive. The basis of the deviant behavior is among others is bad intention. This is because with a clean conscience, then humans will be able to distinguish which one is the bad behavior and which is a good behavior.[21]

According to the author: "Pancasila-based Morality will be different from non Pancasila moral. Ethics that aligned with the values of Pancasila will not distort the progressive laws for personal and institutional gains.

Conclusion

Based on the description in the discussion above it can be concluded that: Law enforcement policy against cyberporn/cybersex in Indonesia still use laws that are conventional, such as the Criminal Code, Broadcasting Act, Press Act, Film Act, Information and Electronic Transactions Act and Pornography Act, which still has weaknesses. Therefore, reforms are needed in the field of the substantive law to meet the challenges ahead. In addition to the renewal of the substance of the law also required the improvement of human resources of law enforcement, infrastructure and legal awareness of the society. Given that cybercrime cannot be equated with ordinary/conventional crime, so it cannot be faced by law enforcement and thought / construction of conventional law either..

Suggestion

To face the challenges of the future need to be made law on cyberporn/cybersex specifically with regard to the principle of enactment of criminal law according to the place (jurisdiction), the type of crime, criminal liability for corporations as perpetrators, evidence and proofing and the rules of sentencing, which is specifically applicable to the crime in cyberspace.

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THE PHILSOPHY OF ARBITRATION

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ABSTRACT

Arbitration provides a method of alternative dispute resolution accepted by most public and private entities internationally and locally. Parties in an agreement can choose to resolve any dispute by forming a private tribunal before an arbitrator of their choice. They may also choose the follow or discard any particular rule or law of their own country or choose that of another country or may even choose to follow international laws and rules. These choices are not withour short comings due to the lack of uniformity as parties' intentions and choices vary from contract to contract. Judiciary on the other hand takes a passive approach and will be cautious when setting aside an award. The arbitral tribunal remains the sole determiners of questions of fact. Therefore, unless an error of law substantially affects the rights of parties, this particular jurisdiction is not lightly exercised by the courts.. In general terms, therefore, the law of arbitration is the contract between the parties. However, the rules of natural justice bind all arbitration. This article will examine the law, if any, applicable to arbitration as most arbitral agreements conforms to wishes of the parties. This paper seeks to expound the need for uniformity in arbitration regardless of the wishes of the parties to ensure checks and balances in an arbitral process. It cannot be denied that there exist no precedents binding an arbitral tribunal. Precedent on the other hand, forms the basis of jurisprudence and it cannot also be denied that there is a lack of jurisprudence in the arbitral arena. Jurisprudence has its importance in the development of arbitration. This article assumes that philosophy can shed light on the jurisprudence of arbitration and therefore fills the void and the lacking rules. It will be shown that by looking at arbitration with philosophical glasses can create a jurisprudence and uniformity much needed in arbitration.

Key words: Arbitration, jurisprudence, philosophy.

Introduction

Consider a hypothetical situation wherein C Ltd, a company, contracts with F, a foreign country, to build a highway system according to certain specification within a specified time. C Ltd. however prefers to add a clause to have any dispute to be heard in another third country, T, for obvious reasons. C Ltd and F therefore signs a joint venture agreement with an arbitration clause fixing T as the arbitral tribunal and venue, in the event of a dispute.

This agreement gives T, a tribunal, the function, power and a reason to exist without which there can be no tribunal. In this instance, an arbitrator is frequently given additional powers which would not otherwise be open to him and are not open to a judge to exercise.

One principle is that parties should normally be held to their contractual agreements. Where the parties agree that any dispute or difference between them should be referred to arbitration the court should be willing to say by its decision what the parties have already said by their contract and prefer arbitration. The other principle is that a multiplicity of proceedings between C Ltd and F was highly undesirable.

The criteria for an arbitral system is therefore a contract between parties. The contracting parties in the contract, are entitled to dispute any such instruction and to refer to arbitration. Were it not for a contract such as this, clearly the contractor C Ltd, would have no right to dispute or litigate about any such instruction and, they cannot dispute such an instruction before a court. In this respect, it is right to say that as arbitral tribunal like T, has additional powers to a court.

Thomas Hobbes' theory of the law of nature in particular his sixteenth law of nature is that people who are unable to resolve a dispute between themselves should submit their arguments to the judgment of an arbitrator. The seventeenth law of nature is that in order for arbitration to be fair, the arbitrator of a dispute should not be a participant in the dispute. The eighteenth law of nature is that in order for arbitration to be fair, the arbitrator of a dispute should be able to be fair and impartial, and should not have any reason to favor one participant over another. The nineteenth law of nature is that in order for arbitration to be fair, the arbitrator of a dispute must also be fair and impartial in trying to resolve controversies about facts (Gaskin, J.C.A, 1996).

Following these laws of nature therefore C Ltd and F agrees to submit their arguments to the judgment of an arbitrator, T. In order for arbitration to be fair, C Ltd and F chose a third country T who is not a participant in their potential dispute. In this way T should be able to act in a fair and impartial manner, and should not have any reason to favor either C Ltd or F. Finally for arbitration between C Ltd and F to be fair, T must also be fair and impartial in trying to resolve their controversies.

A philosophical jurist is generally a pragmatist. He is interested in the nature of law but only with reference to its use as a tool to serve society, and his examination into the law is always in connection with some specific problem of the everyday work of the legal order. The sociological jurists on the other hand, propose to study law in action on the basis of the hypothesis that the law in action bears some significant relationship to law in the books, and to proceed then to ascertain in what respects the hypothesis is or is not substantiated and requires qualification (Gardner, J. A, 1961). The philosophical jurist therefore looks at the arbitration clause and the law thereof. Whence the sociological jurists seek the hypothesis and links the clause to arbitral power.

2. History

"Cut the living child in two and give half to one and half to the other" (New King James Version, The Bible). These may just be the first decision if not the first recorded words of an arbitrator. Some legal historians have traced arbitration's beginnings all the way back to King Solomon. What led to such a peculiar decision maybe the peculiar facts that came before King Solomon.

The peculiar facts involve two prostitutes who came to King Solomon with each one claiming "The living one is my son; the dead one is yours." According to the king, "This one says, 'My son alive and your son is dead,' while that one says, 'No! Your son is dead and mine is alive.' Then the king in all his wisdom said, "Bring me a sword." So they brought a sword for the king. He then gave an order to cut the child in two and give half to one and half to the other (New King James Version, The Bible).

Why did the women choose to arbitrate and not litigate this matter? Maybe it made no difference or maybe King Solomon was a wise judge or maybe that was the only way to have the matter resolved at that time. Whatever maybe the reason the women needed an independent, trusted and wise, to say the least, third party to resolve their dispute. So why not before a wise king who may have been a judge and an arbitrator. In this case it made no difference to them. But the fact that they appeared before a judge of their choice, made it an arbitration.

Therefore there is now a myth about arbitration and, the myth persists, usually in the following form: Arbitration? That's when you don't go to court, but pick somebody to decide the case informally, and you go and discuss it with the arbitrator and the arbitrator will usually "split the baby". However it may be suggested that the story of King Solomon's first arbitration does not support the arbitration myth. The obvious reaction of the woman whose son was alive was to plead and say, "Please, my lord, give her the living baby! Don't kill him!" But the first said, "Neither I nor you shall have him. Cut him in two!" Faced with this additional testimony, King Solomon modified his award. It is important to note what King Solomon did not do. He did not split the baby! (Goodman, A. H, 2004). What then is the reality of arbitration?

In coming to his decision, King Solomon may have considered the following possibilities:

(1) follow the first woman's request and cut the baby to half and neither will have him;
(2) follow the second woman's request and give the baby to the first woman;
(3) follow neither of the request and give the baby to the second woman; or
(4) follow neither of the request and give the baby to some other person.

In the philosophical stance the questions above show that, in arbitration, the players cannot eliminate possible outcomes. The players may say that they prefer some outcomes, but an arbitrator is not bound to follow what they say. In the baby custody dispute example, King Solomon, the arbitrator, can see that the mother is only playing a strategy when she says that the baby is not hers. From the responses of the two women, King Solomon can guess and then identify that the best solution is to give the baby back to its mother. In arbitration therefore, the arbitrator can eliminate some possible outcomes (Revesz, Peter Z, 2014). In deed King Solomon eliminated the rest and chose the third option and it is said that he had wisdom from God to administer justice (New King James Version, The Bible).

This case may be evident, that the world is ruled by such a wisdom or a Divine Providence. The whole community of the universe, on the other hand, is governed by Divine Reason. Wherefore the very idea or concept of the government of things in God the Ruler of the universe, has the nature of a law. It is of the type proper to be made laws or the norms. And since Divine Reason's conception of things is not subject to time but is eternal therefore it must be called eternal (Dawson, J. G. (Ed.), 1948).

For God to a dminister justice, legal philosophy requires the application of natural law. Therefore it is suggested that natural law forms the jurisprudence of arbitration. Though there be no application of precedents arbitrators are bound by the principles of natural law or rules of natural justice. In the legal philosophical sense these principles are basic and self-evident.

For the same reason no man in any cause ought to be received for arbitrator to whom greater profit, or honor, or pleasure, apparently ariseth out of the victory of one party than of the other; for he hath taken, though an unavoidable bribe, yet a bribe, and no man can be obliged to trust him. And thus also the controversy and the condition of war remain, contrary to the law of nature (Gaskin, J.C.A. (Ed.), 1996).

3. General Prinscples

Generally, the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. This safeguard of public policy is required to closely watch over public interest. Hence the general rule is, any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy. Public policy is a breach of the rules of natural justice which occurred during the arbitral proceedings.

'Public policy' is itself undefined and applies differently to different 'public' or society. What is against public policy in C Ltd's country may not be so in F. A contract which has a tendency to injure public interests or public welfare is obviously one against public policy in both countries. What constitutes an injury to public interests or welfare depends on the times and climes. The legislature often fails to keep pace with the changing needs and values nor as it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society.

Tribunals like that of T, are not held to observe any particular rules of procedure. Their decision shall be final and they shall act as friendly mediators. T as arbitrators are entirely unfettered by any legal considerations and must act only according to what they consider to be general principles of justice – having regard to that, the court should hesitate long, even if it had a discretion, to revoke the arbitration clause.

Further, arbitral tribunals are neither bound by previous tribunals nor are their powers curtailed by any law. This leaves the arbitral tribunal with no proper checks and balances to ensure justice is done. The obvious next question is 'does an arbitrator act arbitrarily when arbitrating?' A related question is 'Are arbitral tribunals bound by precedent'. A prelude to this question would be Do arbitrators create precedent?'. These form the centre of discussion in this article and seek to ponder the following :

i. if there are no precedents, can C Ltd or F know the strength of their respective cases?
ii. can jurisprudence as a legal philosophy be replaced with the philosophy of arbitration?

3.1 What is arbitration?

C Ltd and F, for instance, do not want their disputes to be the subject of over-elaborate procedures, which are time-consuming and expensive and divert resources away from the conduct of the parties' businesses. In general terms the law should not load men with burdens hard to bear, and in the particular circumstances of adjudication it is especially important that the control exercised by the courts should not place such requirements on adjudicators that it becomes difficult for them to resolve disputes rapidly by means of informal procedures, in favor of speedy resolution to enable continuation of a contract.

Whilst it is undesirable to introduce too much technicality, there should be clear rules as to when an arbitration is deemed to have commenced. There must, of course, be an arbitration agreement, that is a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

The dispute or difference must be one which is "real" and *bona fide* and a mere refusal to pay upon a claim for which the liability is admitted may not be a dispute or a difference within the meaning of an arbitration act of any one nation. In any event the word 'dispute' in an arbitration clause should be given its ordinary meaning, and was not confined to cases where it could not then and there be determined whether one party or the other was in the right, so that the fact that a person has no arguable grounds for disputing something does not mean in ordinary language that he is not disputing it.

The proposition must therefore be that if a claim between parties is indisputable then it cannot form the subject of a "dispute" or "difference" within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration.

Consider again the hypothetical two parties referring a dispute to T to arbitrate. The arbitrator has the authority to settle the dispute, for C Ltd and F had agreed to abide by his decision. Two features stand out. First, the arbitrator's decision is for the disputants a reason for action. C Ltd and F ought to do as T says because he says so. But this reason is related to the other reasons which apply to the case. It is not just another reason to be added to the others, a reason to stand alongside the others when one reckons which way is better supported by reason. The arbitrator's decision is meant to be based on the other reasons, to sum them up and to reflect their outcome (Raz, Joseph, 1986).

3.2 Why arbitration?

The philosophy of the reason to act in effect sums up the answer to 'why arbitration?'. Meeting a dead end in a contractual obligation with no possible solution in sight would see the arbitrator's role as a guiding light. However such a light is only beneficial if both parties, C Ltd and F, abide by the direction given. The light itself has no direction of its own and is considered fair to both parties. Therefore the arbitrator as adjudicator is seen as impartial with no possible gain from the outcome of either direction taken.

The adjudicator, T, is appointed by C Ltd and F to decide one or more disputes arising under their contract. His decision is binding on C Ltd and F by virtue of their agreement to that effect. Those are the essential features that characterise an arbiter. Generally speaking, therefore, the decisions of the adjudicator provide in practice the last word on the parties' rights and obligations. This clearly reflects the success of adjudicators in providing fair and rational solutions to a dispute.

On the other hand since there is a general arbitration clause, any dispute or difference between C Ltd and F is to go to T for arbitration. However if the dispute comes before a court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the court is able, to give summary judgment for such sum as appears to be indisputably due, and to refer the balance to arbitration. The parties cannot insist on the whole going to arbitration by simply saying that there is a difference or a dispute about it. If the court sees that there is a sum which is indisputably due, then the court can give judgment for that sum and let the rest go to arbitration. In other words the court takes a pragmatic approach.

Having regard to the essentially private nature of arbitration, C Ltd and F are, as a matter of law and a necessary incident of the arbitration contract, subject to an implied obligation of confidence not to make use of material generated in the course of the arbitration outside its four walls, even when required for use in other proceedings. That rule is subject to exceptions, for example where it was reasonably necessary for the protection of the legitimate interests of both C Ltd and F, ie for the establishment or protection of the party's legal rights.

3.3 How to arbitrate?

The rule that no man shall judge his own cause or *nemo judex in sua causa* for instance has grounded natural justice and natural rules principles based on natural law. However, T, the arbitral tribunal appointed by C Ltd and F, may rule on its own jurisdiction. This would seem an exception to the general rule of natural justice and principles of *nemo judex in sua causa* as the tribunal itself judges on its own jurisdiction.

The philosophy of this general rula is based on the sociological understanding that every man is presumed to do all things in order to his own benefit. Therefore neither C Ltd nor F is a fit arbitrator in his own cause, and if he were never so fit, yet, equity allowing to each party equal benefit, if one be admitted to be judge, the other is to be admitted also; and so the controversy, that is, the cause of war, remains against the law of nature (Gaskin, J.C.A. (Ed.), 1996).

The *audi alteram partem* rule, which is another component of the principles of natural justice and of procedural fairness, requires that a person who is a party to proceedings before a tribunal be informed of the proceedings and provided with an opportunity to be heard by the tribunal. Natural justice requires the respondents to have an opportunity to be heard before the court of arbitration whose award could affect their rights. In the circumstances the infringement of the *audi alteram partem* rule constituted an excess of jurisdiction giving rise to evocation.

Following these two laws of nature, arbitration as a private tribunal, T, is appointed by two parties, C Ltd and F, according to their needs and requirements. Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by that tribunal. The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, by itself, indicate that a dispute about that matter is not capable of determination by arbitration. The only restriction is that the dispute shall not be contrary to public policy. The courts on the other hand shall not intervene in any of the matters governed by the arbitration act.

In any event, T, as an arbitrator has no jurisdiction over disputes which were not in existence when he was appointed to act. The appointment defines his jurisdiction at the same time as creating it and cannot be taken to give him jurisdiction over something which does not at that time exist (Sutton, St. John & Gill, J, 1997). In other words T is bound by the agreement of C Ltd and F. Problems arise when a dispute is not within that envisaged by that agreement.

However, T may consider the generally accepted practice in industry in both countries of C Ltd and F and the whole agreement between them in reaching his decision. This phenomena of dispute within an industry or within a society has a co-relation with the socio economy and sociology of both these countries. An attempt is therefore to understand the philosophy of this sociology in a hope to expedite what is good in arbitration.

4. Judiciary And Arbitration

In this instance C Ltd and F chose arbitration as it is founded on the following principles-

(a) the object of arbitration is to obtain the fair resolution of disputes by T, an impartial tribunal without unnecessary delay or expense;
(b) C Ltd and F will be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and
(c) the court should not intervene except as provided by legislation.

The court however would not be deprived, by the power which the parties had given to their arbitrator to open up, review and revise certificates, opinions and decisions of the architect, of its ordinary power to determine the rights and obligations of the parties and to provide them with the usual remedies.

It follows therefore, the fact that arbitration proceedings are pending between C Ltd and F is clearly not in itself any ground for preventing the courts from becoming seized of the same dispute in an action. On the other hand the current practice was for claims which are covered by an arbitration clause, but which are said to be indisputable, are frequently put forward in an arbitration, and then also pursued concurrently by an attempt to obtain summary judgment in the courts. The claimant however can, obtain an order for payment in such cases by either means. The co-existence of both avenues towards a speedy payment of an amount which is indisputably due being well recognised.

Courts are also not bound by the language used and what is described as an expert determination is in reality an arbitration. Further, arbitration as a means of resolving disputes must also be distinguished from other processes such as valuation or certification. Therefore a process involving a reference to a person described as an "arbitrator" may not be an arbitration but a reference to a valuer to make a determination in accordance with that person's skill and knowledge.

An arbitration clause in an agreement between C Ltd and F may give T, the arbitrator, the power to 'open up review and revise any certificate' of an architect in their highway project. This special power was confined to T, the arbitrator, on whom it had been conferred by the arbitration clause. It could not be exercised by the courts. The arbitration clause, which gave power to an arbitrator to open up, review and revise a certificate, showed beyond doubt that the certificates in such cases were not conclusive and, the certificates not being conclusive, the court was not obliged to treat them as if they were.

4.1 Judicial powers

In principle, in an action based on contract the court can only enforce the agreement between the parties. It has no power to modify that agreement in any way. It is, therefore, not necessary to imply any term.

An arbitral award however may be set aside by the High Court only if the party making the application provides proof that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.

Inasmuch as the courts must embrace the principles of finality of awards, party autonomy and minimal court intervention in the context of the UNCITRAL Model Law legal regime, the courts cannot allow an award to stand in the face of a clear excess of jurisdiction and a breach of the equally important principle that arbitration proceeding is consensual and the mandate of the chosen arbitrator has to be limited to the terms of the submissions and the agreed issues. The arbitrator should also not be seen as introducing a 'new difference' which was irrelevant to the issues as submitted and agreed between the parties.

If the court concluded that the arbitration agreement conferred jurisdiction to determine whether the underlying contract was illegal and by the award the arbitrators determined that it was not illegal, prima facie the court would enforce the resulting award. If the party against whom the award was made then sought to challenge enforcement of the award on the grounds that, on the basis of facts not placed before the arbitrators, the contract was indeed illegal, the enforcement court would have to consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of awards in general and of awards in respect of the same issue in particular.

4.2 Precedents in arbitration

The lack of precedent or the non existence thereof can be a problem specially when C Ltd or F is looking for a guide before beginning a dispute or as an authority to support their claim. The claim that arbitrators do not create precedent recurs throughout the arbitration literature. Yet this claim conflicts with a small but growing body of evidence that, in some arbitration systems, arbitrators frequently cite other arbitrators, claim to rely on past awards, and promote adjudicatory consistency as an important system goal. Thus, although not every system of arbitration generates precedent, some clearly do (Weidemaier, C, 2010).

Uses of precedent as authority should be distinguished from its use as an informative analogy. In the case of the latter 'precedent' refers to the use of prior awards and their reasoning as persuasive for the matter at issue, not to a doctrine of strictly-binding case law such as implied by the common law doctrine of *stare decisis* (Posner, Richard A, 2000).

Jurisprudential conflict is also one of the driving forces behind the development of a system of precedent because it enables tribunals to engage in a critical discourse about the proper interpretation of investor rights in view of different perspectives. The normative impact on tribunal decision-making, precedent has following uses (Schill, Stephan W, 2011):

(1) precedent as a source of cautions analogizing with earlier decisions;
(2) precedent as a means of clarifying treaty provisions;
(3) precedent as an abbreviation of reasoning;
(4) precedent as a standard-setting device; and
(5) precedent as an instrument of system-wide law-making.

Philosophically however, this problem of precedent seems to exist only when one compares a tribunal with a court. Both dwells with its own short comings and both need the other for proper the administration. Therefore the lack of precedent does not mean there is problem for a tribunal rather it may be the solution sought by the system. Some associate arbitration with confidentiality and secrecy and assert a conflict between these characteristics and the production of law. Thus, whatever else arbitration may be, it is not 'law'—the kind of findable, studiable, arguable, appealable, restateable kind of law that courts produce (Weidemaier, C, 2010).

That being so the question hinges on how would the parties like C Ltd and F expect to know the chances or speculate the outcome before an arbitration process begins. The objectives of speculative philosophy among others is to take over the results of the various sciences, to add to them the results of the religious and ethical experiences of mankind, and then to reflect upon the whole. The hope is that, by this means, we may be able to reach some general conclusions as to the nature of the universe, and as to our position and prospects in it (Broad, C. D, 1923).

The first speculative principles bestowed on us by nature do not belong to a special power, but to a special habit, which is called the understanding or rational intuition of principles. These first practical principles, bestowed on us by nature belong to a special natural habit. This is said to be the law of our mind or the norm of our rational intuition, because it is a habit containing the precepts of the natural law, which are the first principles of human actions or attitude (Dawson, J. G. (Ed.), 1948).

5. Illegal And Void Contract

There are two general principles in relation to illegal contracts: The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends on proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it.

Where there is prima facie evidence from one side that an arbitration award is based on an illegal contract, the enforcement judge should inquire further to some extent. Thus he should inquire whether there is evidence on the other side to the contrary; whether the arbitrator has expressly found that the underlying contract is not illegal; whether there is a fair inference that he reached such a conclusion; whether there is anything to suggest that the arbitrator was incompetent to conduct such an inquiry; and whether there may have been collusion or bad faith, so as to procure an award despite illegality.

The effect of illegality on a contract may be threefold. The first, if at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is enforceable at the suit of the party having that intent. The second effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely on his own illegal act. He may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal. The third effect of illegality is to avoid the contract *ab initio*, and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.

The court declines to enforce an illegal contract, not for the sake of the defendant, nor for the sake of the plaintiff. The court is concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it.

There are material distinctions between awards and foreign judgments. First, an award can only be valid if the arbitrator had jurisdiction founded on a contract between the parties. If that contract is itself invalid the award will be unenforceable.

However the contract between C Ltd and F maybe void for several reasons. When one comes to voidness for illegality, it is particularly necessary to have regard to the purpose and policy of the rule which invalidates the contract and to ask, whether the rule strikes down the arbitration clause as well. There may be cases in which the policy of the rule is such that it would be liable to be defeated by allowing the issue to be determined by a tribunal chosen by the parties. This may be especially true of contracts *d'adhesion* in which the arbitrator is in practice the choice of the dominant party.

Where it is alleged that an underlying contract is illegal and void and that an arbitration award in respect of it is thereby unenforceable the primary question is whether the determination of the particular illegality alleged fell within the jurisdiction of the arbitrators.

Thus, saying that arbitration clauses, because separable, are never affected by the illegality of the principal contract is as much a case of false logic as saying that they must be, the same is true of allegations of fraud. In deciding whether or not the rule of illegality also strikes down the arbitration clause, it is necessary to bear in mind the powerful commercial reasons for upholding arbitration clauses unless it is clear that this would offend the policy of the illegality rule. The purpose and policy of a rule or rules of illegality and the commercial reasons for an arbitral clause depends on the sociological difference that exist within a society.

6. Public Policy

When an arbitration agreement has been construed and no breach of the agreed procedure found there may nevertheless arise a second and quite separate question: that is, whether, as a matter of public policy, a particular award, made pursuant to that agreed procedure, ought not to be enforced and ought, therefore, to be set aside; for T's award, unless set aside, entitles either C Ltd or F, which ever the beneficiary maybe, to call on the executive power of F, the state. to enforce it, and it is the function of the court to see that that executive power is not abused.

Public policy is the only rule that can overrule the intentions of the parties. Therefore the only rule that binds C Ltd and F is that which is based on public policy. What is for or against public policy would have to be first considered. Slavery for instance is

against public policy though prostitution may be against public policy in C Ltd and F's country but not in T's country. In this sense, the possession of all things in common and universal freedom are said to be of the natural law, because, to wit, the distinction of possessions and slavery were not brought in by nature, but devised by human reason for the benefit of human life (Dawson, J. G. (Ed.), 1948).

It has been repeatedly stated by various authorities that the expression 'public policy' does not admit of precise definition and may vary from place to place, from generation to generation and from time to time. Hence, the concept 'public policy' is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent the Court has to give its meaning in the light and principles underlying the arbitration act, contract act and Constitutional provisions of any one reigion. The logical solution for this is a set of common rules based on the sociology of a society since people are regarded as equals.

When, at the stage of enforcement of an award, it is necessary for the court to determine whether the arbitrators had jurisdiction in respect of disputes relating to the underlying contract, the court must consider the nature of the disputes in question. If the issue before the arbitrators was whether money was due under a contract which was indisputably illegal at common law, an award in favor of the claimant would not be enforced. This is because it would be contrary to public policy that the arbitrator should be entitled to ignore palpable and indisputable illegality. If, however, there was an issue before the arbitrator whether the underlying contract was illegal and void, the court would first have to consider whether, having regard to the nature of the illegality alleged, it was consistent with the public policy which would, if illegality were established, impeach the validity of the underlying contract, that the determination of the issue of illegality should be left to arbitration. If it was not consistent, the arbitrators would be held to have no jurisdiction to determine that issue.

The English courts, for instance, would not enforce an arbitration award, whether foreign or domestic, if enforcement would be contrary to English public policy. Such policy would not allow the parties to conceal, through the procurement of an arbitration, that one of them sought to enforce an illegal contract, since a private agreement could not override the court's concern to preserve the integrity of its process. Thus, where considerations of public policy were involved, the interposition of an arbitration award did not isolate the successful party's claim from the illegality which gave rise to it. Although the arbitration clause was valid, however the award referred on its face maybe an enterprise with an illegal object which the English court viewed as contrary to public policy.

There may also be a distinction between a specific reference on a question of law, and a question of law arising for determination by the arbitrator in the decision of the dispute. It is essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. The authorities make a clear distinction between these two cases, and, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one.

An error in law on the face of the award means one can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which can then be said is erroneous. It does not mean that if in a narrative a 'reference is made to a contention of one party, that opens the door to setting first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound.

7. Jurisprudence As Legal Philosophy

In general, arbitration does no more than provide an alternative method of resolving disputes and it is hoped that it is simpler, quicker and cheaper than resorting to a court of law. The tribunal is expected to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

The philosophy of arbitration follows that benefits should be centered rather than injuries, and benefits received rather than benefits conferred; to be patient when we are wronged; to settle a dispute by negotiation and not by force; to prefer arbitration to motion. For an arbitrator goes by the equity of a case, a judge by the strict law, and arbitration was invented with the express purpose of securing full power for equity (Dawson, J. G. (Ed.), 1948).

An offshoot to the philosophy of arbitration, the philosophy of contract, links the relationship between philosophical and economic theories of law. Efficiency is foremost in economic contract theories and seeks to promote individual autonomy and advances social welfare (Kraus, Jody S, 2004). Natural law theory relies on the implausible descriptive sociological claim that human beings are equally devoted to and united in their conception of aims that is the pursuit of knowledge and justice to their fellow men other than that of survival (Hart, H.L.A, 1958).

Arbitration clause in a contract is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other *hinc inde* (in all circumstance); but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution.

In English law the principle of separability of an arbitration clause contained in a written contract could give jurisdiction to an arbitrator under that clause to determine a dispute over the initial validity or invalidity of the written contract provided that the arbitration clause itself was not directly impeached. Furthermore, an issue as to the initial illegality of the contract was also capable of being referred to arbitration, provided that any initial illegality did not directly impeach the arbitration clause. In every case the logical question was not whether the issue of illegality went to the validity of the contract but whether it went to the validity of the arbitration clause.

There is however no general rule that, where an underlying contract is illegal at common law or by reason of an English statute, an arbitration agreement, which is ancillary to that contract is incapable of conferring jurisdiction on an arbitrator. The arbitrator can determine disputes arising within the scope of the agreement including disputes as to whether illegality renders the contract unenforceable. Whether such an agreement to arbitrate is capable of conferring such jurisdiction depends upon whether the nature of the illegality is such that, in the case of statutory illegality the statute has the effect of impeaching that agreement as well as the underlying contract. In the case of illegality at common law, public policy requires that disputes about the underlying contract should not be referred to arbitration.

The intention of C Ltd or F to create a private tribunal to substitute a government set tribunal in F, is based on the philosophy that certain rules bind certain parties by an agreement to be bound. Parties to this agreement seek a resolution without being subjected to laws or procedures normally applicable to parties unwilling to face the tribunal of resolution. These parties seek government bodies as a logical choice, where the unwilling party is forced to face off in court. Since C Ltd or F are willing parties, the first step to resolution is to form a dispute resolution tribunal headed by a neutral person or persons like T.

Any dispute can be submitted to third-party arbitration; but under a governmental system, in disputes between a citizen and the state, the state – which as a monopoly of course recognises no judicial authority but its own – necessarily acts as a judge in its own case (Roderick T. Long & Tibor R, 2008). Therefore for obvious reasons C Ltd prefers T to F as an arbitral tribunal. Since natural reason dictates matters which are according to the right of nations, as implying a proximate equality, it follows that they need no special institution, for they are instituted by natural reason itself (Dawson, J. G. (Ed.), 1948).

Following the theory of Market Anarchist (market anarchy), the choice of T as the venue and tribunal of arbitration designates the process by which two agencies C Ltd and F pre-negotiate a set of common rules in anticipation of cases where a customer from each agency of C Ltd and F is involved in a dispute. Courts in comparison are government set tribunals and subject to certain rules and regulations. A market anarchist' objection to government is simply a logical extension of the standard libertarian objection to coercive monopolies in general. First, from a moral point of view, among people regarded as equals it cannot be legitimate for some to claim a certain line of work as their own privileged preserve from which others are to be forcibly excluded; we no longer believe in the divine right of kings, and on no other basis could such inequality of rights be justified. Second, from an economic point of view, because monopolies are insulated from market competition and hold their customers by force, they lack both the information and the incentive to provide consumers with fair, efficient, and inexpensive service. The anarchist accepts these arguments, and merely asks why they should apply with any less force to the provision of legal services (Roderick T. Long & Tibor R, 2008).

8. Conclusion

In the epistemological stance the criterion for arbitration to exist are:

(a) there is a dispute or a difference formulated between the parties;
(b) the dispute or difference has been remitted to an arbitrator;
(c) the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and
(d) the parties have agreed to accept his decision.

When two parties agree to submit their differences to the adjudication of a third, and when that third party consents to give his services for the determination of those differences, the result is to set up a conventional tribunal which stands in a very peculiar, and in some respects a very difficult, position.

The famous Judgment of Solomon is often referred to as one of the earliest uses of arbitration. This arbitration clearly identifies the hallmarks of arbitration: flexibility, fairness and an expeditious outcome, with the experience and wisdom of the king as arbitrator, utilized to apply principles of equity and law, to resolve the case (Turner, William C, 2011).

On the one hand, an arbiter carries on his shoulders all the obligations of justice which rest upon a regularly constituted Court of law. On the other hand, he is dispensed - in his own discretion - from the observance of those well-tried forms of procedure which, in the case of an ordinary Court, provide the instruments by which the judicial function is performed and the means whereby the circumstances of a dispute are adequately and fairly ascertained, and which also afford to the parties invaluable safeguards and guarantees for the full and fair presentation of their contentions. When an arbitration is informally conducted, the arbiter is deprived of these aids to a just and even-handed inquiry into the disputes submitted to him; yet he is all the time under the strictest obligation to see that the proceedings, however informal, are so conducted that the substantial conditions of "fair justice between man and man" are never infringed.

The natural participation of Divine Wisdom is that there is in us the knowledge of certain general principles and part of it is speculative reason. This is not proper knowledge of each single truth, such as that contained in the Divine Wisdom. Likewise in

relation to the practical reason, man has a natural participation of the eternal law and certain general principles, but not as regards the particular determinations of individual cases, which are, however, contained in the eternal law or eternal norm (Dawson, J. G. (Ed.), 1948).

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CHILD TRAFFICKING AND RELIGION: A CASE STUDY OF ALMAJIRI EDUCATION IN NORTHERN NIGERIA

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ABSTRACT

Children are trafficked in Nigeria for various purposes which include prostitution, begging, hawking, rituals, etc and this has been on the raise, thereby posing a great challenge to the Nigeria Government despite numerous efforts put in place to fight the menace. The feature of Nigerian children as young as 5 to 12 years is threatened by this monster called child trafficking. Although, poverty, greed, corruption, peer pressure have been traditionally identified as factors responsible for child trafficking in Nigeria, manipulation of religion through "Almajiri" (traditional way of acquiring Islamic knowledge) have also been identified as factor playing very significant role in child trafficking in Northern Nigeria which has 90 percent of its population as Muslims. The paper adopted doctrinal methodology where it analysed the relevant literature in the area both primary and secondary. The focus of this study is to examine the manipulation of religion through Almajiri education for child trafficking in Northern Nigeria and its consequence on the child. There is scarce of information on Almajiri system of education as a form of child trafficking in Northern Nigeria, but through an examination of the historical antecedents of Almajiri education, the study discovers that although the concept was meant to prepare a Muslim child to become a useful adult in the society, the practice have been abused over the years. The finding of the paper reveals that there is no law put in place which controls the practice of Almajiri Education in Northern Nigeria and therefore recommend that Nigeria Government should regulate the activities of these Islamic teachers by enacting a law that controls such practices.

1. Introduction

Child trafficking is an act of moving, transporting or recruiting a child from a familiar environment to an unfamiliar environment for exploitative gains. Many factors could be responsible for child trafficking in Northern Nigeria which include poverty, corruption greed, peer pressure, family size and break down and many other factors. The menace of child trafficking in Nigeria could be traced to 1980s when structural adjustment programm was introduced by the then government of Nigeria. Women and children were made bread winners of their family. Hence they were made to search for what they can sustain the family. Traffickers therefore took advantage of their vulnerability to lured them into trafficking despite the consequences of trafficking on the child. This menace continues to have its toll on the family. Furthermore, apart from poverty , greed, corruption and other factors which cause child trafficking in Northern Nigeria, manipulation of religion through "*Almajiri*" is also considered as one of the factors if not the most important factor which causes child trafficking in Northern Nigeria. This involve the movement of large numbers of pupils, often teenage males, by an Islamic teacher (*Malam*) from their hometown to somewhere far away from home and sometimes even unknown to the parents through "Almajiri" system of education. The pupils learn from the scholar as they move from one town to another. They are often inadequately prepared for such a journey. The *Malam* (Islamic teacher) is frequently too poor to sustain his family or the pupils entrusted to him. Consequently, both the *Malam* and his pupils often rely on the benevolence of the community in which they happen to be guests. In most instances, the *Malam* lives on the support of his pupils who beg or perform menial tasks for food sellers and shopkeepers in public places and motor parks all over Northern Nigeria.[1] The practice amount to trafficking because of the servitude and exploitation that goes with it. Furthermore, Trafficking in Person Prohibition Law Enforcement and Administration (NAPTIP) Act, a law enacted to coordinate and enforce all laws on Child trafficking in Nigeria did not cover this practice, thereby allowing it to continue uncheck.

The article will examine the concept of Almajiri system of Education in Northern Nigeria as a form of child trafficking, and its implication on the Nigerian child, and conclude with recommendation that a law should be enacted to control the application of this practice in Northern Nigeria so that the rights of the Nigeria child in Northern Nigerian could be protected while obtaining Islamic knowledge through the Almajiri system of education.

2. Definition of the key terms; Child, Child Trafficking, Almajiris, and Northern Nigeria

2:1 Definition of a Child

[1] Zachariah, Yakubu The Almajirci Lurch, and Disguised Forms of Human Trafficking in Northern Nigeria, (2004) at 3-8.

The word "child" has been defined specifically in both the local and international instruments dealing with the rights and welfare of the child. In Nigeria, a child is statutorily defined as a person under the age of 14 years, while a young person is a child above the age of 14 years but who has not attained the age of 18.[2] This age ceiling in Nigerian law is lower than the age standard in the relevant international instruments. A child under International Instrument is every human being below the age of 18 years.[3] This definition has also been adopted by Nigeria Child Right Act,[4] and NAPTIP Act[5] The term child therefore in this article for all intend and purposes means a person below the age of 18.

2.2 Child Trafficking

The recognition of children's rights, and the resulting obligations for States Parties on the right of children, provide a legal basis to combat child trafficking. Child trafficking is defined as a trade in human being for domestic, sexual, reproductive, labour and other purposes. [6] It was also defined as the commercial trade "smuggling" of human beings, who are subjected to involuntary acts such as begging, sexual exploitation such as (prostitution and forced marriage) or unfree labour such as (unintentional servitude).[7] Child trafficking could also be defined as a serious form of organised crime that involves the exploitation of people.[8] In another work, child trafficking was defined as a means of illegal evacuation of people, or a trade in which women and or children are moved from one place to another as commodities or articles of trade for the purposes of exploitative labour or sex exploitation.[9] Some writers also defined child trafficking as a trade in human being for domestic, sexual, reproductive, labour and other purposes .[10] The act of child trafficking is usually done in secrecy and it is difficult to detect, hence the former President of the USA, George Bush had described child trafficking as another human crises hidden from human views which generates billions of dollars each year for its operators after drugs and gun running.[11]

2.3 Almajiri

The word "*Almajiri*" was derived from the Arabic word "Almuhajirun" meaning an emigrant. The term Almuhajirun refers to the companions of the prophet Mohammad (peace be upon him) who migrated to the ancient city of Madina in Saudi Arabia due to persecution by idol worshipers in Macca. They left Mecca to Medina because He and his followers were prevented from practising Islam in Macca[12] In Northern Nigeria context, it usually refers to a person migrates from his hometown to another place or to a learned Islamic teacher to acquired Islamic knowledge.[13] Under this arrangement, Muslims faithful are enjoins to seek knowledge from outside their home. Historically, it helps to empower children with Islamic knowledge. In recent years however, this practice is now been abused. This is because, these children are taking away by the Islamic tutors without adequate provision for their up keep. Some of the religious tutors (malams) take more pupils than they can care for and then the children are made to beg for survival. These children are seen going about the street begging, hawking and sometimes engage in an act that is injurious to their health as children.[14]

It is instructive to mention here that this type of situation where children are subjected to all form of exploitation and servitude amount to trafficking. Under this type of arrangement, where the child is transported and received by the tutors, and the parents were not aware of the situation that their children would find themselves in, can also be classified as a form of trafficking.[15]

2.4 Northern Nigeria

[2] See Ladan, M.T., "Rights of the Child in Nigeria: An Overview", being a paper presented at a two-day workshop on Human Rights, 4th-5th August (1997). See also Section 2 of the Children and Young Persons Act
Cap. 32 Laws of Nigeria and Lagos, 1958.
[3] Article 2, Organization of African Union Charter on the Rights and Welfare of the Child, also According to Article 1 of the United Nations Convention on the Rights of the Child.
[4] Section 62 of the Child Right Act, 2003.
[5] Section 82 Trafficking in Person (Prohibition) Law Enforcement and Administration Act 2015 as amended. Also referred to as (NAPTIP Act) 2015.
[6] Mallam Abubakar S.I in a report of a 2 days' workshop/seminar for the establishment of Anti-human trafficking network in endemic local Government and communities. Theme "Partnering against human traffickers" held at Women Development Centre, Adamawa State on 16th-17th October, 2006.
[7] Ibid.
[8] Dija, Ibrahim. In a two days workshop/seminar for the establishment of Anti- human trafficking network in endemic local Government Areas and communities of Yobe State. Held at State Secretariat Conference Hall, Damaturu on 9th-10th November, 2006.
[9] National Agency for the prohibition of trafficking in person and other related Matters (NAPTIP) Access to justice for trafficked person in Nigeria: A handbook for legal Actors and Assistance providers, Naptip, Abuja, Nigeria, 2009, at 6.
[10] Mohammed, G. Ngada at a two days workshop organised by the National Agency for the prohibition of trafficking in persons and related matters held at Women Development centre Yola, Adamawa state on 16th -17th October, 2006.
[11] Ibid.
[12] Jungudo, Maryam M. and Ani Kelechi, John Mary (2014) "Justice and human rights violations; A study on Almajirici in northern Nigeria" in G. M. T. Emezue, Inge Kosch and Maurice Kangel (eds) justice and human dignity in Africa: Collection of essays in honour of professor Austin Chukwu, oxford: Africa Book collection, at 40-55.
[13] Ibid.
[14] National Agency for the prohibition of trafficking in person and other related Matters Act (NAPTIP) Access to justice for trafficked person in Nigeria: A handbook for legal Actors and Assistance providers, Naptip, Abuja, Nigeria, 2009, at 11.
[15] Ibid.

Nigeria contains more historic cultures and empires than any other country in Africa.[16] Nigeria is divided into two regions with six geo-political zones. The Southern Region and the Northern Region. The southern region is made up of the South East,[17] South West[18] and South South.[19] While the Northern Region consists of the North east,[20] North West,[21] and North Central[22] with 90 percent of the Northern Nigeria habitants are Muslims.

The Northern Nigeria is an area rich in natural solid minerals and agricultural potential. It is home to around 60 per cent of the country's population. It covers nearly two-thirds of Nigeria's landmass –approximately 711,828 square kilometres and is twice the size of Germany. Until the first cycle of state creation in 1967, this area was officially designated the Northern Region, comprising of 19 out of the 36 states in Nigeria.[23]

3. The Concept of Child Trafficking in Nigeria

Child trafficking has been defined to;

> "Means the recruitment, transportation, transfer, harbouring or receipt of persons by means of threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power of a position of vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person or debt bondage for the purpose of placing or holding the person whether for or not involuntary servitude (domestic, sexual or reproductive) in forced or bonded labour, or in slavery-like conditions, the removal of organs or generally for exploitative purposes"[24]

From the above definition, child trafficking could be envisaged as the transfer of persons by fraudulent or coercive means for exploitative purposes. Furthermore, in Nigeria, child trafficking often occurs with the consent of the parents and, sometimes, of the children themselves. One can therefore deduce that child trafficking include but not limited to the following.

1. Buying and selling of Children for purposes.
2. Trafficking in slaves or slave trading.
3. Kidnapping from guardian by force or entice of a person under the age of eighteen years of age or of many children out of the custody of the lawful guardian, without the consent of the lawful guardian.
4. Procuring a person for defilement by threat or by intimidation or by administration of drug or by pretence to have a carnal connection with a man or animal in Nigeria or outside Nigeria.
5. Unlawful detention with intent to defile or conspire with another person to induce or detain person under the age of 18 years old against such person's will to have carnal knowledge of the person.
6. Procurement of person for prostitution, pornography or for armed conflict or for trafficking in drugs.
7. Exportation of a person from Nigeria, person under the age of 18 years against the will of such person to perform assigned duties.

3:1 Child trafficking in Nigeria

The incident of child trafficking in Nigeria dates as far back as 1980s following the severe economic hardship caused by structural adjustment programmes,[25] imposed at the time by the Nigerian government**.** Al though**,** the significant public recognition and focus on the issue only came to light in the mid-90, there are no exact figures and data on the number of trafficked victims.[26] However, there are indicators to show that the trend is assuming an alarming rate in Nigeria. One of such indicators is the growing population of women and children particularly children in the city centers.[27] An International Labour Organisation (ILO) estimate shows that over twelve million Nigerian children are engaged in child labour, and that a large

[16] Available on :http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ad41#ixzz3Pq97qzU3. Accessed on 25/1/2015.
[17] Ebonyi, Enugu, Imo, Abia and Anambra State.
[18] Oyo, Ogun, Lagos, Ondo and Osun State.
[19] Akwa-Ibom, Bayelsa, Edo, Cross River, Rivers and Delta State.
[20] Adamawa, Borno, Bauchi, Gombe, Taraba, andYobe state respectively.
[21] Jigawa, Kaduna, Kano, Katsina, Kebbi, and Sokoto State.
[22] Benue, Kogi, Kwara, Nasarawa, Niger, and Plateau State.
[23] Based on the 2011 population projections by the National Bureau of Statistics, 91.5 million out of nearly 170 million Nigerians – the country's estimated population – reside in northern Nigeria. Since the national census of 2006, the population growth rate appears to have risen much more quickly there than in the south. In 2006, the split of the population between northern and southern states was 53.6 percent and 46.4 per cent respectively. National and State Population and Housing Tables: 2006 Census Priority Tables (Vol.1). b National Bureau of Statistics, Annual Abstract of Statisics, 2011.
[24] Section 82 NAPTIP Act 2015.
[25] A plan implemented by the World Bank and the International Monetary Fund (IMF) in a developing nation to try to get their economies to be more productive. The goal of such a program is to help the borrowing nation pay off its debts and have a growing economy that will sustain them into the future.
[26]Aronowitz, Alexis A. *Human Trafficking, Human Misery: The Global Trade in Human Beings.(*Santa Barbara, CA: Greenwood Publishing Group), 2009, at 213.
[27] Ibid

percentage of these children in labour are victims of trafficking.[28] Similarly, with regards to women and girls, a survey indicates that over 10,000 Nigerians engaged in prostitution in Italy constitute about 80% of all prostitutes in the sex trade in Italy:[29] Most of these Nigerian women and girls are initially trafficked victims. Nigeria is the second largest source of child trafficking victim to the U.S. With Akwa Ibom State has the highest rate of child trafficking in Nigeria.[30]

Table of age distribution of rescued trafficked victims in 2013

Age range	Number	Percentage
0-17 years	602	61.3%
18-27 years	300	32.0%
28 and above	50	6.7%
Total	952	100.%

From: Research and programme development Department.[31]

The above table indicates age distribution of all people that were rescued from traffickers in 2013. Although, there was a general declined in number of people that were rescued in the year under review, this is not the same with child trafficking. Out of 952 people that were rescued, 602 of them were children from the age range of 0-17 constituting about 61.3% of the whole number of people rescued in that year alone. This has further proved our earlier submission that children are the most trafficked group of people in Nigeria.

3:2 Causes of Child Trafficking In Northern Nigeria

The factors that facilitate child trafficking in Nigeria are extremely complex and inter-connected but can be divided into two, namely: the push and the pull factors.[32] The push factors are those conditions conducive for trafficking of children which fall in the broader context. It usually drives people to leave a region in search for better life somewhere else.[33] The factors include but not limited to bad economic condition such as poverty; unemployment; broken homes; family size; greed; peer pressure; weak legal frame work; insecurity; restrictive immigration policies and law enforcement mechanisms are also contributors.[34]

3.1.1 Poverty

Poverty is a major factor responsible for child trafficking in Nigeria. It cannot be denied that abject poverty, unpleasant economic environment, unemployment, massive retrenchments, under employment and poor quality of life has made parents who would otherwise, have been most caring and loving, to neglect and even some times, abuse their children. Some families are living from hand to mouth as a result of insufficient income to cater for their families. They are out of job or business either as a result of retirement or insufficiency of the income to settle the children school fees, rents and feeding. That is a perfect situation of parents and children to fall victim of bogus promises of a good time abroad with the prospect of earning foreign exchange that will convert into tons of naira (Nigerian currency) back home in Nigeria.[35] Although Nigeria has enormous natural and human resources as well as the largest oil producer in Africa and the eleventh largest in the world,[36] it is rated as one of the poorest countries in the world with a GDP per capita of about US $1,000 for a population of over 160 Million.[37] With about two-third of its population living in rural areas without basic social amenities such as electricity, road, hospital, schools, good drinking water etc and earning less than $1 per day[38]. There is massive youth unemployment and a general lack of opportunities for economic

[28] Child Trafficking in West Africa: Policy Response, UNICEF, Innocent Insight Research Centre, April 2002.
[29] Statement by the Nigerian Ambassador to Italy, UNICEF, Innocenti Insight Research Centre, April 2002.
[30] Gary Foxcroft, "The Niger Delta Child Right Watch Project involves the NGOs: Stepping Stones Nigeria, Basic Right Counsel Initiative Centre for Environment, Human Right and Development" (2007) Available at gary@steppingstonesnigeria.org.Assessed on 26/2/2014.
[31] Ibid.
[32] UNODC, available at https://www.unodc.org/unodc/en/frontpage/2014/July/unodc-marks-first-human-trafficking-day-with-call-for-countries-to-step-up-fight-against-this-crime.html?ref=fs1, accessed on 10/12/2014.
[33] Ibid.
[34] Ibid.
[35] Monica, Imam "Human trafficking and HIV/AIDS" a paper presented at a 5 days sensitization/ awareness campaign in Five local government areas of Taraba state on 3rd-7th April (2006), at 2.
[36] Available at http://www.cia.gov/cia/publications/factbook/rankorder/217 3rank.html accessed on 29/11/2014.
[37] Available at http://www.cia.gov/cia/publications/factbook/geos/ni.html accessed on 11/11/2014.
[38] S. Abdulrahman and Oladipo A. R., "Trafficking in Nigeria: A hidden health and social problem in Nigeria" International Journal of sociology and Anthropology, (2010), Vol. 2 No. 3 at. 35.

ventures, low standards of living and devalued local currencies; these results in the failure to meet the health, food, housing and security needs of the people.

It has been observed that population living in political and economic instability often seek to migrate elsewhere in search of better opportunities. The destination of that migration is usually into bigger cities.[39] The rural areas of Nigeria, where the bulk of the population resides, are not industrialized and characterized with lack of electricity, access road, hospitals and insecurity caused by Boko haram Islamic sect among others. There are few job opportunities or institutions of higher learning. Consequently, even when the children do receive some education up to secondary school, there are no jobs at the end of their schooling nor additional institutions for them to attend. The economic situation is such that most parents are unable to care and properly feed their families. Parents subject their children to various forms of labour, including trafficking for economic gains.[40] It is also submitted that, poverty has a hand in child prostitution and sexual abuse.

In Nigeria[41] it can't be denied that some female children that are engaged in child labour such as hawking, domestic servant are sexually abused. The women unit of the Federal Ministry of Education portrayed the situation, thus, a report in the magazine 'Ladies Home Journal' estimates that sexual abuse of young girls is four times commoner than rape of adult women. The abuser is likely to persuade and pressurize the child, using all built-in authority of an older person. Children who hawk wares for their parents fall easy victims. They are coerced or bought with gifts. They are thereby prevented from telling their parents or even close friends about the incident. When parents are financially incapacitated to provide the basic necessities of life such as a comfortable house, food, clothes and sound education for their children, the children are sent into the labour market.[42]

3.1.2 Illiteracy

Illiteracy generally tend to increase individual vulnerability to child trafficking as it makes one not to benefit from any practical step taken to address the menace. Nearly a billion people entered the 21st century unable to read and write.[43] In Nigeria, there are about eight (8,000,000) Million children who are vulnerable to trafficking and have no access to education.[44] If one is educated he is enlighten and this will make him to understand the nature of any event or occurrence. In most countries including Nigeria where child trafficking is rife, illiteracy is a common cause of child trafficking. Statistics have also shown that fewer school age children are enrolled into school, and most of them will drop out of school before the completion of the primary grade.[45] Furthermore, due to high level of illiteracy among the rural dwellers in Nigeria, family planning is not adopted hence people reproduce children recklessly without planning for their education and general welfare, the end result being having more children than they can support hence the willingness to give out their children to agents of trafficking.[46] This practice is mostly found in Northern part of Nigeria where many parents can neither read nor write while their children are attending fourth rate schools, where they learn next to nothing. As a result, both group are easily deceived by fairly tales of milk and honey flowing bountifully in Europe and Saudi Arabia where people simply pick hard currency off the street.[47]

3.1.3 Unemployment

Lack of employment is one of the greatest factors which force many people in Nigeria to pursue insecure and unreliable employment in other places. Somebody who has no economic resources can easily be lured by the dream of better livelihood and may easily be trapped by traffickers. Unaware of the possible consequences such people will often consent to travel through undocumented migration routes to affluent cities and countries and are in the process caught up either domestic or International child trafficking. Unemployment in Nigeria has always been on high. Every year many young people graduate from secondary and high school institutions with no employment. After years of working the street in search of non-existent jobs they are ready to go anywhere to do anything, just as long as they can be gainfully employed. The negative impact of unemployment is far worse for those young Nigerians who have or no academic qualification.[48]

3.1.4 Corruption

[39] This poverty factor also explains in part human trafficking and exploitative migration from less endowed countries such as Togo, Benin to Nigeria. The same economic factors have driven Chadians, Malians and people from Niger to Nigeria and Nigerians to Europe, Middle East and other neighbouring African countries.
[40] "Human Trafficking in Nigeria: Root causes and recommendation", United Nation policy paper (2006) No. 14.2 (E) p. 34.
[41] Abdulrahim Oputu Shaibu (Director legal and prosecution National Agency for the Prohibition of Trafficking In Person, National Headquarters, Abuja- Nigeria) Interview by Author Abuja: Abuja Nigeria, Date 7th August, 2014. At 111.
[42] Hon. Justice H.N. Donli, Socio-Legal Consequences of Child Abuse in Women and Children under Nigerian Law, at 135-136.
[43] Unicef the State of theWworld Children 1999. Available at www.uncef.org/sowc99/index.html. accessed on 4/1/2015.
[44] Kongnyug, E., Kongnyug, A. and E. Richler "child labour in Cameroun" (2007) the internet journal of world health and societal politics Vol.5 No. 1 at 1.
[45] See Gray and Wouters "Country profile on women in development/Gender development in Combodia (1999), at.13.
[46] Ahmed Tijjani Umar, "Policy framework for combating human trafficking anf forced labour activities in KanoState" paper presented at a workshop organised by women development network, Kano in collaboration with the United Nations International labour Organisation and the prohibition against trafficking in west Africa (PATWA) (2006) at Daula Hotel Kano Nigeria.
[47] Monica Imam, "Human trafficking and HIV/AIDS" paper presented at a two days workshop organised by NAPTIP/UNDP (2010) on the danger of child trafficking in Nigeria at Zaranda hotel Bauchi, Bauchi State.
[48] Ibid.

The high level of corruption in Nigeria makes it possible for unscrupulous persons to use official channels to secure bogus travel documents for new recruit into prostitution abroad. Sometimes there is corruption even within the foreign missions themselves making it possible for criminal minded persons to procure visa for a fee.[49] Nigeria has attained a global status in corruption.[50] This submission found its support from a recent report by transparency international which tagged Nigeria as the 38th most corrupt nation in the global rating.[51]

3.1.5 Greed

This is an excessive desire to acquire or possess more than what one need or desires, especially with respect to material wealth.[52] It can also be described as being controlled by material things such as power, food, cloth, money etc.[53] Due to greed and the quest for better lifestyles, young people easily fall prey to traffickers who promise them better jobs away from home.[54] Poverty precedes other causes of child trafficking because it relate and inter connected with all other causes of child trafficking which make parents to go as far as selling their children. But a close look at a situation where parents sale his/her child cannot be said to be due to poverty alone. Because there are parents who are steamily poor but will not sale his/her child. Merchandised of children is not synonymous with poverty. Some people are by their nature so greed and so found sale of babies and children profitable. To them once there is profit, it does not matter what article of trade is involve. They can therefore be distinguished from ritual killers who use other human being to make money. The driving force here is not poverty but greed. Money or what money can buy is the god they worship.[55] This god blesses its worshipers with power to influence other in society and prestige that comes with wealth. Father who sold their so- called "lazy" or "disobedient" child into slavery were not forced to do so by poverty, they wanted a life of luxury. Also, there are women who go abroad for purposes of prostitution and fully aware of what they were going into. This category of people can best be described as greedy people who want to make a huge of money and live beyond their means. They believe they can do that by earning hard currency in Europe or Saudi Arabia which they can then convert to a lot of local currency to satisfy their greed.[56] Therefore in child trafficking, parents do not sell their children because they want to escape starvation but because of their greed. They ignored the value of life for which Africa people are known for.

There are reported cases in Nigeria where parents or guardians sell their children for money. One good example of this is the case of Jennifer Ogbonna from Aba area of Abia state of Nigeria. The report has shown that Jennifer was sold by her sister to one Ismail Yusuf, a man from Abeokuta, Ogun state of Nigeria, for the sum of one hundred thousand Nigerian naira (N100, 000).[57] This incidence was confirmed by the victim, where she stated "I was sold by my sister in Aba for the sum of N100, 000 naira and brought to Abeokuta by the trafficker. I don't know that they had already paid money on my head. I only got to know in Abeokuta when I overheard the trafficker and her husband talking about me."[58] In as much as poverty causes child trafficking in Nigeria, greed also play very important role in child trafficking. This may get its roots from the olden days when African leaders (Chief and elders) sacrifice African traditional value for life on the altar of the new god i.e money, power and prestige and since then Africa has never been the same and this spread across most African countries which Nigeria is not an exception.[59]

3.1.6 Peer group pressures

Peer group pressure is also one of the factors that influences child trafficking in Nigeria. Children fall victim to child trafficking because of peer pressure and lack of alternative opportunities within their impoverished home communities. They often seek out traffickers on their own initiative and are thus recruited.

3.1.7 Demand for female prostitution

One of the factors that strives child trafficking is the readily available market for customers of a trade in humans for sexual purposes. It is obvious that child trafficking would not have been on the raise if there exist no increase demand for it. Traffickers are kept in the business of child trafficking because there is high demand for it, and demand in supply of every product is associated with profit. When there is demand, the supply increases.[60] This is usually associated with a situation where there is

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[49] Ibid.
[50] Ibid.
[51] Ejike Ejike Leadership Newspaper of 4th December, 2014.
[52] The Free Online Dictionary. Available on http://www.thefreedictionary.com/greed . Accessed on 24/11/2014.
[53] AbdulrahimOputu Shaibu (Director legal and prosecution National Agency for the Prohibition of Trafficking in person, National Headquarters, Abuja- Nigeria) Interview by Athour Abuja: Abuja Nigeria, Date 7th August, 2014.

[55] Euckay U. Onyuzugbo "Child trafficking, a new slave trade: why it thrives in Africa" (2011) Afro Asian journal of social science. Vol.2 No.2.3, at 8.
[56] Monica Imam "Human trafficking and HIV/AIDS" paper presented at a two days workshop organised by NAPTIP/UNDP (2010) on the danger of child trafficking in Nigeria at Zaranda hotel Bauchi, Bauchi State.
[57] Ibid.
[58] Naij.com online Nigerian Newspaper of 8th April, 2014. Available at. :///C:/Users/Flex%202/Dropbox/Research_Stuff/CHAPTER%20%20THREE/How%20My%20Sister%20Sold%20Me%20With%20Pregnancy%20For%20N100,000%20%E2%80%94%20Victim.htm. Accessed on 24/11/2014.
[59] Euckay U. Onyuzugbo. P. 9.
[60] Torry and Dubin "Demand dynamics:the forces of demand in global sex trafficking (2003) at. 60: The root cause of trafficking is demand for commercial sexual services, without which trafficking for purposes of sexual exploitation would dissolve.

abundant male demand for sex but insufficient supply has resulted in aggrevatiating commercial sex industry.[61] A good example of this type of situation is the influx of American soldiers in South-east Asia in the 1960s which led to a sudden and rapid increase in the demand for commercial sexual services.[62]

3.1.8 Broken Home

A broken home is a serious and recurrent issue emanating from the home environment and as well, facilitates the trafficking of children in the contemporary societies like Nigeria. Thus, the issue nowadays requires much attention and further investigation in order to tackle the escalation of child trafficking and the vulnerability of children to trafficking in the society. Profiles of trafficked children interviewed revealed that most of the trafficked children were products of broken homes and/or orphaned children.[63] An estimate reveals that from Northern part of Nigeria alone, about 9.5 million children; who are between the ages of 6 to 15, and who are mostly orphans and are not exposed to western education, are said to have been trafficked from one place to another.[64] Broken homes and lack of fix place of abode always make children vulnerable to traffickers. In the past, parents cared for their children regardless of marital status. However, today, many parents abandon their children when the marriage ends in separation. The divorce of the child's parents and the broken home environment are contributory factors to child trafficking. In some polygamous family, where a husband takes another wife, some step wives are cruel to children of the estranged or former wife and would not hesitate to abuse such children.[65]

3.1.9 Family size

Child trafficking is more likely to occur in a crowded home with a large family. The size of the family may therefore, be a potential source of child trafficking especially where the family is large and poor.[66] Demographically, the growth rates and the densities are of such magnitude that available social amenities cannot go round or are too expensive for the average families. When the family cannot afford the basic necessities of life, either as a result of income insecurity due to unemployment or retirement, the children will asked to engage in some form of work such as hawking, begging, domestic servant. Although, the purpose of this is to make up for this shortage, the child is likely to fall victims of trafficking.[67]

3.1.10 High Profits

High Profits accrued in human trafficking, especially trafficking of children and women also pulls them into it. That is to say, child trafficking thrives because of its profitability. The UN estimates it to generate US $7-$10 billion annually, the third largest profits behind arms dealing and narcotics. It is also easier to move human cargo across borders than drugs or weapons which are seized when found. Human beings can be constantly re-used and re-trafficked – not so for drugs. Child trafficking is, by definition, a complex, clandestine, underground business, constantly changing and evolving both in response to demand and to remain sufficiently flexible to elude arrest and prosecution.

3.1.12 Low risk

Another pull factor to the child trafficking is the low risk that is involved in the process, especially when compared with other cross-border crimes which contain high level of risk. However, by its very nature, child trafficking is secret and dangerous, which helps explain the inadequacy of reliable information. Victims of trafficking are normally lured by the traffickers right within their families and villages (which often provided the funds for the journeys they anticipated and take the child to a job that could help support the family), and because of the stigma of prostitution, Fear and mistrust of police, the lack of documentation and fear of complicity also play a part in maintaining the victim's silence.[68] Most victims are poor, illiterate, from marginalized populations and are ignorant of their rights. Traffickers exploit not only bodies but the deepest anxieties and disadvantageous life conditions of the victims. This and many other factors made child trafficking with low risk as the whole business in conducted in secrecy and victims of child trafficking compound the issue by being unwilling to provide useful information about their traffickers, this may not be unconnected with the oath of secrecy victims are subjected to at the point of trafficking.[69]

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[61] Yen- Ovice and Men"A new approach to eradicating sex trafficking by reducing male demand through educational programme and aborlitionist legislation (2008) Journal of criminal law and criminology Vol. 98 No. 2 at. 653.
[62] Ibid.
[63] Husseini Musa (a 9 years old Almajiri found begging for arms at custom area of Maiduguri, Borno State) interviewed by Authour Maiduguri, Borno state, Nigeria on 10/6/2014.
[64] Kuni, Tyessi "Northern Governors and Almajiri Education" Leadership newspaper of 4th December, 2014. It can also be found from a joint report of new orphan estimates and a framework for action, at www.unicef.org/publications/index_22212.html, accessed on 20th October, 2014.
[65] Ibid.
[66] Hon. Justice H.N. Donli: Socio-Legal Consequences of Child Abuse in Women and Children under Nigerian Law, at140.
[67] Ibid.
[68] UN, Human trafficking in Nigeria: Root causes and recommendation" United Nation policy paper (2006) No. 14.2 (E) p. 36.
[69] There are also cases of churches in Benin, city (Edo State of Nigeria), which reveled that persons intending to be travelled to Italy (called italios) visit to pray against repatriated and for protection against violent customers. CF Grace Osakwe and Bisi Olateru Olagbegi (1999) A primer of trafficking in women, the Nigeria case.

4.0 Child Trafficking in Northern Nigeria

There is a peculiar form of child trafficking which occurs in Northern part of Nigeria which are predominantly Muslims. "Almajiri" the Islamic practice that enjoins Muslims faithful to seek Islamic knowledge from outside their home is known as "Almajiri" Historically, it helps to empower children with Islamic knowledge. In recent years, poor parents have been sending their children to different states, within and across Nigeria borders to Islamic tutors without adequate provision for their up keep. Some of the religious tutors take more pupils than they can care for and then the children are made to beg for survival. This is a systematic form of child trafficking; in which in the name of belief or religion, parents compromise their primary responsibilities to cater for the need of their children. Although, it is one of the forms of trafficking which are underplayed and not typically regarded as child trafficking *per se*. however, as a result of the child neglect by his parent to be taken away from his home to another place, makes it to be considered as an abuse as well as a child trafficking. This situation happens mostly in Northern part of Nigeria, which is dominated by Muslims. In Northern Nigeria, for example, child trafficking is often disguised as institutionalized migration known as "peripatetic scholarship"[70] or "*almajirci*" (traditional scholarship).[71] *Almajirci* however, when conducted in the pupil's hometown, is subject to parental care and does not therefore fall under the definition of trafficking. These children are seen going about the street begging, hawking and even a times engage in criminal acts. Tutors then take the proceeds of the begging and other activities.[72]

It is instructive to mention here that this type of begging in which the child is controlled and cannot leave, amount to exploitation. The child is transported and received by the tutors, and the parents were not aware of the situation that their children would find themselves in, can also be classified as a form of trafficking.[73]

It can, however, involve the movement of large numbers of pupils, often teenage males, by an Islamic teacher (*Malam*) from their hometown to somewhere far away from home and sometimes even unknown to the parents. The pupils learn from the scholar as they move from one town to another. They are often inadequately prepared for such a journey. The *Malam* is frequently too poor to sustain his family or the pupils entrusted to him. Consequently, both the *Malam* and his pupils often rely on the benevolence of the community in which they happen to be guests. In most instances, the *Malam* lives on the support of his pupils who beg or perform menial tasks for food sellers and shopkeepers in public places and motor parks all over northern Nigeria.[74] The rationale for traveling to the city, the quest of Islamic knowledge, is often forgotten when hunger and neglect begin to take their toll on the children.[75]

Unfortunately, both the benefactors and the pupils are often unaware that this constitutes a violation of the children's right and a deviation from the International norms. This *Almajirci* is like trafficking because of the servitude and exploitation that goes along with it.[76] Furthermore, children and young women are also lured into trafficking for sexual gains via their desire to go to Saudi Arabia for pilgrimage. This is another example of Islamic affair being manipulated for the purpose of trafficking. Young girls from nearly all the 19 Northern states of Nigeria are potentially vulnerable to this issue.[77]

In tackling the menace of child trafficking in Nigeria, Government has made efforts at promulgating laws that will help bring the problem to a conclusive end. These laws have in various ways attempted to legally address the problem of child trafficking in Nigeria by criminalizing child trafficking in all its ramifications. From the early days of the general criminal laws like the criminal code (apply in southern part), penal code (apply in northern part), children and young persons Act, to the more specific law; Trafficking in Person Prohibition Law Enforcement and Administration Act which specifically aims at criminalizing human trafficking including children, the aim has been the same: putting an end to the menace of child and human trafficking. However, the general performance of these laws has not been encouraging because they have failed to address emerging form of child trafficking such as Almajiri syndrome.

5.0 Impact of Almajiri Education

The concept of Almajiri education which is practice in northern Nigeria is to seek Islamic knowledge by children of Muslim faithful from outside their homes, and has historically been useful to children. However, in the recent past, poor parents have been sending their children to different states within and across Nigeria's borders to Islamic tutors without adequate provision for their up keep. Some of the religious tutors take more pupils than they can care for and then the children are made to beg to survive. Hundred of these children are seen roaming the streets begging and sometimes engaging in criminal acts. Tutors then

[70] UNESCO Policy paper 14.2: Human Trafficking in Nigeria: Roots Causes and Recommendations 2006 at 182

[71] Peripatetic scholarship is a traditional educational system in which a pupil or student straddles between two schools.

[72] National Agency for the prohibition of trafficking in person and other related Matters Act (NAPTIP) Access to justice for trafficked person in Nigeria: A handbook for legal Actors and Assistance providers, Naptip, Abuja, Nigeria, 2009, at 11.

[73] Ibid.

[74] Zachariah, Yakubu (Dr) (2004) The Almajirci Lurch, and Disguised Forms of Human Trafficking in Northern Nigeria, at 3-8.

[75] Until the introduction of Sharia and the closure of many brothels and houses of prostitutes in some States in Northern Nigeria, the almajirci were found running errands for prostitutes or handling their house chores.

[76] UN, op. cit, p. 36.

[77] There are also for example, churches in Benin, city (Edo State of Nigeria), that persons intending to be travelled to Italy (called italios) visit to pray against repatriated and for protection against violent customers. CF Grace Osakwe and Bisi Olateru Olagbegi (1999) A primer of trafficking in women, the Nigeria case.

take the proceeds of the begging and other activities.[78] The attendant consequence of Almajiri education on the children cannot be over emphasised. The practice destroys the natural good in an individual where he will not be seen with dignity, self respect and self esteem.

Begging in this form in which the child is controlled and cannot leave, is exploitative. Furthermore, as the child is transported and received by the tutors and the parents were not aware of the situation that their children would find themselves in, the situation can be classified as a form of child trafficking.[79] Although, It started originally as an organized and comprehensive system of education for learning Islamic principle, value, jurisprudence and theology just as Islamic centres in other muslim countries such as the madrasah in Malaysia, Pakistan, Egypt etc.[80] The practice in northern Nigeria have deviated from the laudable benefit associated with the practice, hence the Islamic teacher who suppose to provide shelter, feeding and other necessary of life for the children fail in this responsibility and pose great challenge to the right of the Nigeria child and national security.

The number of school age children that fall victim of this practice is frightening. This is because about 8.6 million children across Northern are involved.[81] With the North-West having 4.9 million, North-East 2.6 million, North-Central 1.1 million.[82] Although the plight of the Almajiri-child is common knowledge in Nigeria, it has, unfortunately, received very little attention from human rights groups. Lesser attention has been paid to it by government and policymakers in the country.[83]

The 2008 UNICEF report reveals that the Almajiri-child belongs to a group of vulnerable children (called the 'Almajiri) who constitute the subjects of this practice in Northern Nigeria. Their basic rights to survival and development as well as protection are violated as they are exposed to all forms of violence, discrimination, abuse and neglect by parent or guardians thereby making them vulnerable to trafficking.

Further studies have also shown that the Almajiri children constitute the bulk of child workers on farmlands, exposed to labour exploitation due to the seasonal migration and the fact of their situation as immigrant children. The resultant consequence is their vulnerability today as victims of child trafficking, ritual killings and of manipulation, because they are easily instigated or recruited to commit acts of terror or to serve as agents of destruction in time of civil disturbances, especially, ethno-religious conflicts in Northern Nigeria. In such situations, they also become victims of deprivation of their rights to life, to human dignity, to qualitative and quantitative education, to health and access to health care services, to grow up within a family with care, love and affection, and to a safe or secured environment free from violence, exploitation and all forms of abuse.[84]

We therefore recommend for the enactment of a law to regulate the activities of Almajiris education in Northern Nigeria that will emulate the practice in some Muslim countries where the practice is successful like the madrasah in Malaysia, Pakistan, Egypt, so as to achieve the purpose for which it was intended. This is believed, will save children from Northern Nigeria from the danger associated with the practice.

6.0 Conclusion

The concept of *Almajiri* education was traditionally meant to provide children of Muslim faithful with sound Islamic knowledge so as to prepare them to be useful members of the society. However, the practice has now been abused because it now involve the movement of large numbers of pupils, often teenage males between the ages of 5 t0 15 by an Islamic teacher (*Malam*) from their hometown to somewhere far away from home and sometimes even unknown to the parents. Hundred of the children are seen roaming the streets begging, hawking and sometimes engaging in criminal acts. The practice which was meant to prepare the children to be better adults has turned against them, thereby destroying the natural good in them where they will not be seen with dignity, self respect and self esteem. Begging in this form in which the child is controlled and cannot leave, is exploitative and can be classified as a form of child trafficking.

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[78] NAPTIP "Access to justice for trafficked persons in Nigeria" A hand book for legal actors and assistance providing (2009) at. 16.
[79] Ibid.
[80] Jungudo, Op.cit.
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SPECIALISED TRIBUNALS IN SOUTH AFRICA AND ACCESS TO JUSTICE

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ABSTRACT

In South Africa civil Tribunals are sui generis as it is falls within the ambit of both administrative and judicial functions. Each Tribunal in South Africa operates differently in relation to inter alia rules of procedure to the functions and powers of the tribunal. As is the case with Tribunals in India, certain civil Tribunals in South Africa can be described as 'haphazard' in the manner in which they function. The aim of the paper is to undertake a comparative study of jurisdictions to assist to enhance the South African civil tribunal model. The enhanced model will ensure that the 'haphazard' function of certain tribunal/s in South Africa is rectified to a unified system that operates in a manner that is 'effective, efficiently, coherently and is cost effective' and in the process, addressing access to justice in a sufficient manner. In France the civil administrative Tribunal has worldwide acclaim with regards to its ability to function optimally. In the United Kingdom the influence of both the Franks Committee and the Leggatt Report has assisted the United Kingdom to remodel their tribunal structure in line with the Leggatt Report, thus creating transparency for people whose disputes are heard before the tribunal. In New South Wales Australia the civil and administrative Tribunal has had many successes in relation to the structure and function of the tribunal, which has influenced other states within Australia. Access to justice becomes tangible when people are satisfied that their dispute/s are aired, heard and that a just decision was delivered rendering both parties gratified given the circumstances. Justice must not only be seen to be undertaken but also reach the minds of the people to be achieved. This paper aims to fleece out South African civil tribunals and the creation of access to justice through civil tribunals.

Key words: access to justice, tribunals, South Africa, leggatt report

Introduction

Section 34 of the Constitution states that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, **another independent and impartial tribunal or forum**.'(**my emphasis**) The establishment of tribunals are born from the implications of section 34.

The Hoexter Commissioner Report of Inquiry of 1997 ("Hoexter report") made recommendations for court-annexed mediation, which was proposed to create access to justice. The method of mediation is found in specialised tribunals. A specialised Judicial officer/commissioner is appointed to adjudicate matters at specialised tribunals.

The main aim of the paper is to analyse whether there is an international comparative tribunal structure applicable to a South African context, which will create access to justice and an efficient system.

In order to assess the Leggatt recommendations supporting a one user system it is important to use the report's objectives as indicators for a South African context:

> "The object of this review is to recommend a system that is independent, coherent, professional, cost-effective and user-friendly
> four main objects: first, to make the 70 tribunals into one Tribunals System that its members can be proud of; secondly, to render the tribunals independent of their sponsoring departments by having them administered by one Tribunals Service; thirdly, to improve the training of chairmen and members in the interpersonal skills peculiarly required by tribunals; and fourthly, to enable unrepresented users to participate effectively and without apprehension in tribunal proceedings."

The paper will evaluate the manner in which tribunals are funded and may be potentially funded in the future.
A comparative study becomes of necessary importance especially when the idea of a one system model was borrowed from the French and English tribunals. Australia, New Zealand and the United States of America have developed a fully functional tribunal and the paper will assess their civil tribunals in relation to *inter alia* access to justice to the hearing of matters.

Background

The necessary function of tribunals was to consider the dispute and to make a finding in the public interest. (Rose Innes, 1963) As a result of the creation of tribunals, a body of commissioners and judicial officers were required to specialise in a specific area of law, with the necessary expertise in order to be able to make competent orders. This provided a cheaper method for parties to approach specialised tribunals (Boraine,2012) to have disputes resolved. There are a cornucopia of tribunals that will be briefly

discussed to indicate the vast areas of laws applicable to tribunals. Tribunals in South Africa are haphazard as no civil tribunal operates in the same manner. (Bharwaney, 1976)

Tribunals

The definition of a tribunal is defined as: 'A body established to settle certain types of disputes' (Oxford Dictionaries). A Tribunal in South Africa consists of an administrative and judicial nature. (Burns & Beukes, 2006)
Tribunals in South Africa are established in terms of statute.

(a) National Consumer Tribunal (GN 789 of 28 August 2007)
(b) Competition Tribunal (Competition Act 89 of 1998 in terms of Section 26)
(c) Rental Housing Tribunal (section 7 of the Rental Housing Act 50 of 1999)
(d) Water Tribunal (Section 146(1) of the National Water Act 36 of 1998)
(e) Companies Tribunal (Companies Act 71 of 2008 section 193 and 195)

Some comparative notes

The Leggatt report sums the purpose and agenda of a tribunal adequately as it was written in a British context but applies succinctly to South Africa. The report states that:

> 'The arrangements for the funding and management of tribunals and other bodies by Government departments are efficient, effective and economical; and pay due regard both to judicial independence, and to ministerial responsibility for the administration of public funds;'(Leggatt Report,2001)

The issue with South African tribunals is that they do not all function efficiently, effectively and economically. (Loggerenberg &Boraine,2012) Tribunals are funded by government in order to operate and that the lack of competence of commissioners appointed at tribunals stagnates finalisation of matters. A lack of execution mechanisms also contribute to a further frustrated legal system, which amounts to wastage of monies that could have been spent for better delivery of justice to individuals.
Laverne argues that in order for the improvement of tribunals in regard to independence and impartiality a comparison on a sectoral basis can be undertaken meaning:

> 'by examining tribunals individually or in groups of those with similar natures or purposes as opposed to searching for a global notion of independence applicable to all administrative tribunals' (Jacobs, 2008)

Another method would be to have specific but fully functioning tribunals. However, in South Africa it has been ascertained that not all domestic tribunals are fully functional. It has been proposed that '[r]etaining a distinctive tribunal system should also provide a cost-effective alternative to pursuing a case through the courts.' (Radcliffe, 2007)

In France their Constitution does not specifically provide for administrative tribunals however in order to allow for it, their Constitution will have to be interpreted in a broader context. (Boyron,1998) The President of the Tribunal may appoint a single Judge to preside in a matter before the Tribunal de grande, where there is no complexity and the Judge's experience allows for the matter to be speedily resolved. (Boyron, 1998)

In England there were various reasons over the years for the establishment of specialised courts and tribunals, which are as follows:

- the ordinary courts of law were not able 'to deal with the economic, social, business, industrial relations and other considerations that lie behind certain types of dispute.' (Marsh & Soulsby, 2002)
- Procedure of ordinary courts was stifled and tribunals were created to decide upon matter expeditiously. (Marsh & Soulsby, 2002)
- Procedure in ordinary courts was costly. (Marsh & Soulsby, 2002)
- Ordinary courts operate in a very orthodox manner that does not allow for flexibility(Marsh & Soulsby, 2002)
- Ordinary courts do not allow an individual to enforce their rights in person (Marsh & Soulsby, 2002)

The abovementioned reasons can be equated to the South African context for the government also creating specialised courts and tribunals for the same multi-layered purpose.

In France there is a one tribunal that hears all matters at such a fast speed that it leaves global judicial courts stunned at its efficiency. The French seem to have perfected its tribunal system in the amount of cases that are heard and finalised, which is access to justice at its best.

Operation Of Tribunals Through Adr

Alternative dispute resolution (ADR) mechanisms have become a global phenomenon and trend in first world countries who are utilising this forum to solve disputes timeously resulting a less costly and effective platform. (Blake, Browne & Sime,2011) Through ADR parties to a dispute feel they actively participate in solving their dispute compared to litigation where the attorney/advocate represents the case in open court. (Brown & Marriott A,1993) technique that is a method of ADR is negotiation

that solves disputes in an innovative way. (Sander,1995) A few advantages of ADR is that it is not in the public media and that involves less anxiety than one would be exposed to during a trial. (Davis, 2002) ADR can also inspire further creative methods of resolving disputes not limited to negotiation, mediation, conciliation, arbitration and fact finding for the parties to reach a settlement. (Fine & Plapinger,1987) The future of dispute resolution that is summed up by Mackie is that:

> '[i]n stimulating this new awareness, it has also generated a new confidence for experimentation and action. It has mobilized academics and practitioners to rethink and challenges anachronistic, unsatisfactory and unchallenged dispute resolution processes, to seek new means to extend access to justice and in the process to explore anew definitions and forms of justice' (Mackie, 1991)

This is the impetus of dispute resolution is that it provides access to justice to all people in an expedited manner, cutting through the orthodox method of accessing the law.

In the United Kingdom the ADR mechanisms encourage the judges to be 'more interventionist and flexible to the point of acting as mediator in such disputes.' (Brown & Marriott, 1999)

Similarly in South Africa, both courts and tribunals adopt alternative dispute resolution mechanisms and it is necessary to unpack the efficacy of these methods in relation to costs and the time period that the dispute is resolved in relation to the complexity of the matter.

Establishment Of Specialised Tribunals

Section 34 of the Constitution states that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, **another independent and impartial tribunal or forum**.'(**my emphasis**) The establishment of specialised courts and tribunals are born from the implications of section 34. The establishment of specialised tribunals was created in terms of statute to resolve disputes specific to the cause of action such as, rental disputes which are heard at the rental housing tribunal.

South African law is deeply rooted in Roman Dutch Law and English Law. (Kleyn & Viljoen, 2002) When one analyses the sources of the Constitution in terms of the influence of foreign established Constitutions, it is apparent that South African codifiers were influenced by, France, Great Britain, United States of America, Canada, Japan and Germany. (Venter, 2000) The source of section 34 with specific reference to how tribunals and courts found its way into the Constitution, may be English law, because of the oldest statutes namely the Arbitration Act of 1698 that allowed for the resolution of disputes through arbitration. The establishment of the London Court of International Arbitration in 1892 stated its quintessential purpose as follows:

> 'This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peace-maker instead of a stirrer-up of strife.' (A Redfern & M Hunter et al,2004)

The core function was to ensure that matters were resolved in an expeditious and peaceful manner, and the reference to section 34 in the Constitution illustrates the same purpose.

However the history of administrative tribunals stems from the South African Law Reform Commission that proposed tribunals in 1992 and the proposal of a one administrative council for tribunals was rejected. In 1999 the South African Law Reform Commission suggested one administrative tribunal for South Africa.

Purpose And Need

The purpose of specialised tribunals is illustrated in the enabled statute for the specialised tribunal.

Functions And Role Of Specialised Tribunals

Montesquieu (French political philosopher), expanded the term *trias politica* in his thesis, that is 'the separation of executive, legislative and judicial power was a condition precedent for liberty,' which sums up the doctrine of separation of powers in a democracy. (Devenish, 2005) The South Africa Constitution sets out the separation of powers as three tiers, namely the executive, legislature and judiciary. The Courts fall under the judiciary tier and tribunals fall under the administrative function which is a tier of the executive. Hence the argument that there is an overlap of the sphere of the judiciary and executive by the establishment of tribunals. (Okpaluba, 2003) In the United States, 'the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.' (Okpaluba, 2003)Similarly in South Africa, the doctrine of separation of powers also means that the three tiers of powers function in unison in order not to impair each other. The aim of the principle was to prevent the maladministration of power, if the organ of state had excessive power. (Devenish, 2005) Courts perform a judicial function for review or appeal procedure, as a party may approach the High Court to confirm or amend the decision of the tribunal. De Ville describes separation of powers in another manner as

'the role of the courts in judicial review must be seen as a dialogue with parliament and the executive relating to the interpretation of the Constitution so as to promote the common good,' (de Ville, 2000)

The description illustrates the ironical harmonious nature of the separation of powers despite the description of separateness; there is a needed and necessary communication between the tiers. A dialogue implies an ongoing conversation, which is definitely a necessary action between the three tiers to serve the common good of the people through transparent discussions amongst the tiers to uphold the values of the Constitution for the people.

Upon consideration whether the establishment and function of the specialised courts and tribunals are constitutional or not, it is concluded with a resounding affirmation that specialised courts and tribunals are indeed constitutional. There was an argument that if a Judge had to appear in the High Court and later appears in the Magistrate Court and thereafter Equality Court, then these different roles usurp the powers of its function as a judicial officer, hence being unconstitutional. (Okpaluba,2003) This cannot be because each role and function is separate and an independent entity, and thus can only be analysed individually, and to amalgamate all the roles and to conclude unconstitutionality would be improbable. (Hopkins, 2006) Devenish has argued in view of case law that the doctrine of separation of powers is a 'flexible rather than absolute' (Devenish, 2005) measure, which is an argument that is more than agreeable, as all the powers certainly do overlap, and a rigid approach will result in more administration than smoother democracy of the specific functions.

Prescribed Rules

Each civil Tribunal in South is a creature of Statute and the legislation dictates the rules so that each tribunals adheres to a different set of rules.

Specialised Tribunals And The Operation Of Mediation And Adr Mechanisms

Alternative Dispute Resolution mechanisms have infiltrated specialised tribunals in that there is court annexed mediation for disputes that have no legislative protocol for disputes that can be mediated. In the Rental Housing Tribunal there is a hands on approach as the dispute is mediated between the parties with a third party to identify the key issues and to indicate where parties can reach consensus regarding their common interests. A skills set of any lawyer in any field of practice is to know how and when to engage in alternative dispute resolution. (du Plessis, 2007) An advantage of specialised tribunals is the inquisitorial approach that allows for the active participation of the chairperson. (Sainsbury & Durkin, 1995)

Specialised Tribunals And Access To Justice

Tribunals and Commissions are financially cheaper for a lay person to approach as opposed to court that requires attorneys/advocates in certain instances. Tribunals allow for robust proceedings without legal representation. Access to justice is a constantly evolving concept in society where peoples' different needs require attention. There are many faces to access to justice ranging from the poor in need for access to the law to alternative dispute resolution for an individual to control the processes to education of the law. All these facets require government to invest and ensure that the needs and interests of the people are met through non-governmental institutions and public law firms. Ongoing research will ensure that access to justice is met in the many different facets. (Hurter, 2011)

In a trendy global world, access to justice also needs an approach that is innovative and're-engineered' (Ramlogan, 2011) to deal with the daily needs of society and the judicial system.

Conclusion

In South Africa civil tribunals and access to justice is an ongoing and current discussion that needs to be fully realised in the future.

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TOWARD INDONESIAN KOPERASI LAW THAT BRING THE SOCIAL JUSTICE (STUDY OF RECONSTRUCTION KOPERASI LAW THAT ORIENTED WELFARE SOCIETY)

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ABSTRACT

The legal arrangement of Koperasi is still not open a broad role in the community to actively and effectively promote Koperasi causing injustice and discrimination in the community, and also for the Koperasi itself as a business entity. The aim of this study is to reconstruct the law of Koperasi in Indonesia, headed to the substance of social justice so oriented to the welfare of society. This study is a qualitative doctrinal research that only used secondary data. The analysis performed by using the ground norm concept and the stufenbau das recht theory from Hans Kelsen. The result shows that: Law No. 17 of 2012 on Koperasi did not provide social justice for all Indonesian people, and discriminatory that Koperasi services utilization is still closed, exclusive, only for its members in order to take advantage of Koperasi services. This condition is unfair and contrary to the Constitution of 1945, which states the purpose of the state, one of which is to promote the general welfare based on social justice for all Indonesian people. A suggestion that can be given in this study are: Community non-members should be given the opportunity to take advantage of Koperasi services both producer Koperasi, consumer Koperasi, services Koperasi, as well as savings and credit Koperasi; Profit or SHU derived from transactions from non-members of society must be distributed to members of the Koperasi, so that members also enjoy and are motivated to develop a Koperasi effort, so it can better deliver justice and benefits for society.

Key words: Reconstruction, Koperasi Law, Justice, Welfare, Society.

Introduction

National economic development aims to achieve political and economic sovereignty of Indonesia through the management of economic resources in a climate of development and empowerment of Koperasi which has a strategic role in the governance of the national economy based on the principle of kinship and economic democracy in order to create an advanced society, equitable, and prosperous based on Pancasila and the Constitution of the Republic of Indonesia Year 1945. In Article 33 paragraph (1) of the Constitution of the Republic of Indonesia Year 1945 confirmed that the economy is structured as a joint venture based on family principles. The provision is in accordance with the principle of Koperasi, because it got a mission for Koperasi significant role in developing the economy based on the principle of kinship and economic democracy that promotes the public welfare instead of wealth people privately.

Koperasi is a pillar of the principal economic support of the people. The pillar will only be strong if there is an active role not only from members but also from the wider community active and effective manner. [1] Currently the koperasi is still not open a broad role for the wider community to actively and effectively causing injustice and discrimination for the community, and also for the koperasi itself as a business entity.

Legal umbrella Koperasi today is Act No. 17 of 2012 is still only a society that is discriminatory against non-members with only accommodate the interests of a group of people are members of Koperasi alone. Thus it was in fact a Koperasi law have failed because they do not provide benefits to the wider community in order to have the opportunity to utilize and enjoy Koperasi. Besides the continuity of the Koperasi can also certainly be drowned and eaten by the octopus capitalist economic system in the era of globalization.

In Law No. 17 of 2012 concerning Koperasi, we can see the existence of discrimination to the general public non-members. Of the four types of Koperasi are consumer Koperasi, producer Koperasi, service Koperasi and credit unions, savings and borrow only special exclusive members can take advantage of both savings and lending services. This can be seen in Article 84 of Law No. 17 of 2012 which reads:

> "(1) The consumer Koperasi organize business activities in the field of service provision Members goods and non - Members.
> (2) Koperasi producers held a service business in the provision of the means of production and marketing, production of the resulting Members to Members and non - Members.
> (3) Koperasi services hosted services business activities of non - savings required by Members and non - Members.
> (4) Credit Unions run savings and loan business as the only businesses that serve the Members."

[1] Mubyarto, *Sistem dan Moral Ekonomi Indonesia,* Jakarta, PT. Pustaka LP3S Indonesia, 1998, hlm.76.

Besides of Law No. 12 of 2012 regarding Koperasi can see that credit union set if the member only allowed to borrow, while for deposits allowed. It is certainly different from the previous law, which is an opportunity for the public non - members participate in the loan in the Koperasi. This is certainly contrary to the Constitution of 1945 and of course to the values of social justice because it is not fair and is discrimination within. Furthermore, this situation has reflected that this was indeed the Koperasi law has failed, because it does not provide benefits to the public to be able to have the opportunity to utilize, enjoy, Koperasi, which in turn will inhibit the growth of Koperasi enterprises both in quantity and quality.

Then in Article 78 paragraph (2) of Law No. 17 of 2012 can be seen how the injustice in the koperasi return is contrary to the nature of the koperasi. As for Article 78 paragraph (2) reads:

> "(2) Koperasi Members are prohibited from distributing the surplus Results of Operations arising from transactions with non-Members.
> (3) Surplus Operating Results derived from non-Members as referred to in paragraph (2) can be used to develop koperasi businesses and improve service to Members."

By looking at the Article 78 paragraph (2) is then the question that arises is how members can develop, progress and prosperity a sovereign, when the benefits of the transaction are non-members of the community which is the largest market koperasi, even members do not get profit sharing. Distribution of surplus operating results is actually the rights of members. Surplus operating results is also one of the consequences of the principles espoused joint venture, with the principle of family on koperasi, so that koperasi will survive and thrive. Koperasi inherently organized to achieve maximum welfare for the members in particular, and society in general. Therefore, it is basically a koperasi effort undertaken by organized also by the members, then basically the koperasi members are entitled to receive the results of these efforts so that Article 78 paragraph (2) that is unjust, discriminatory and prosper.

Injustice, discrimination, the Act No. 17 of 2012 is certainly contrary to the Constitution of 1945. The existence of discrimination to the general public because that could take advantage of the services, especially savings and credit koperasi are just members only, the Act No. 17 of 2012 on Koperasi as described above was not in accordance with the spirit of the basic Act of 1945. This injustice is contrary to the Constitution of 1945, which entitles the public to be able to obtain a guarantee of fair treatment, namely:

> 1. Article 28 C (2) reads: Everyone has the right to advance himself in the fight for their rights collectively to build a society, nation, and country;
> 2. Paragraph D of Article 28 (1) reads: Every person has the right to recognition, security, legal protection and legal certainty that is fair and equal treatment before the law;
> 3. Article 28 D (2) reads: Everyone has the right to work and to receive remuneration and fair and decent treatment in employment;
> 4. Article 28 H (2) reads: Every person is entitled to the ease and special treatment to obtain the same opportunities and benefits in order to achieve equality and justice.

Legal umbrella koperasi today is Act No. 17 of 2012 on Koperasi. This Act legislation is discriminatory and turns will surely drown koperasi in Indonesia, making the koperasi into suspended animation, unable to thrive, because it is not capable of running the koperasi operation itself. This study actually motivated by the real condition of koperasi in Indonesia. Many of Koperasi does not have empowering function to society because the regulation that boundering Koperasi role. According from that reality, this study aims to redesign the law of koperasi in Indonesia moving towards a more socially equitable.

The remaining section of this paper will explain the research method that used in this study, the result and discussion about nowadays Koperasi reality in Indonesia, the concept of urgently reconstructing Koperasi Law as a tool for empowering economic society in Indonesia. After analyzed and discussed about the main problem, this paper will closed by the conclusion and suggestion section that drawing the crusial part of this study.

Research Method

This research is a doctrinal research, model of legal research is a comprehensive and analytical study that only used secondary data. The secondary data splitting to the primary legal materials (rules of koperasi), and secondary legal materials (books, journal, reports, results of previous research). Approach the problem using the statutory approach and the conceptual approach.[2] Data were analyzed qualitatively by describing the data generated in the form of an explanation of the study systematically so as to obtain a clear picture of the problem under study.

Analysis of the legal materials will done in two phases. First, by mapping the content analysis about the structure of rules, systematization of law indication to the problem that mapped and analyzed, interpreting and assessment of the occur rules.[3] The second phase, on the legal materials will analyze using the *Regulatory Impact Assessment* (RIA) method.[4] RIA method is a good

[2] Peter Mahmud, *Penelitian Hukum*, Kencana Prenada, Jakarta, 2005, hlm xx.
[3] D.H.M. Meuwissen, *Tentang Pengembanan Hukum, Ilmu Hukum, Teori Hukum, dan Filsafat Hukum* (translator B. Arief Sidharta), Bandung, Refika Aditama. 2007.
[4] Kolin Kirkpatrick and David Parker, *Regulatory Impact Assessment*, Edward Elgar Publishing, 2007.

tool to drawing and solving the problem in this tudy. Used RIA will clearly seen the main problem of Koperasi law that need to be reconstructing for a better regulation that can improve Indonesian social economic problem. The results of the data analysis will inferred deductively.

Result and Discussion

Globalization not only pulls upwards, but also pushed downwards, creating new pressures for the local economy.[5] Widespreading of globalization with one leg that is the capitalist economic system as conventional financial institutions such as banks, leasing, and so make the existence of the koperasi at this time tend to lose even "dead". It is also in harmony with the style and culture of the people of Indonesia are relatively hedonistic, individualistic, and seek opportunities to benefit themselves.

Indonesian society is in fact still reluctant to partner or utilize a koperasi as an institution that helps the wheels of life and choose and make conventional financial institutions such as banks, leasing, as a partner in running his life. It is a setback for the koperasi who had lost against the capitalist economic system.

The main factor that is seen and analyzed by the author as a cause of the defeat of the koperasi of the capitalist economic system with its banking or leasing is because the koperasi system did not cause injustice to the people of Indonesia, then very discriminatory. It can be seen from the koperasi membership is still to be closed, exclusive, only for its members in order to take advantage of koperasi services. The wider community is not able to utilize the services of the koperasi, for example, in a koperasi savings and loan, then you can obtain the loan is the koperasi members only, the general public who want to get a loan can not obtain loans if they are not a member.

This makes choosing the products of capitalist society such as loans to banks for example or leasing that do not require to be a member. Moreover, the capitalist financial institutions do not require capital investment. Just imagine, people who are in need of money to support his efforts if the loan will take advantage of koperasi lending services even have to enter the capital, became a new member gets a loan, of course, it is burdensome to society.

These factors make the koperasi according to the author is not yet a true benefit to the community including the koperasi law as Act No. 17 of 2012 on Koperasi, which is the legal umbrella of koperasi in Indonesia. For the author, the law in this case true koperasi law should be responsive and progressive course that is not rigid and always dynamic with the times to provide benefits and justice for the people, and without benefit of law and justice that was not successful.[6]

Under Article 84 of Law No. 17 of 2012 on Koperasi, it can be seen how the Koperasi Act currently only divide the koperasi into four types. Types of koperasi are consumer koperasi, producer koperasi, service koperasi and credit unions. It is indirectly Act No. 17 of 2012 on Koperasi has been restricting the type of business that can be done by the koperasi. This situation in the long run will turn off the koperasi itself. This provision is not in accordance with the empirical aspects of the operations of the koperasi that has been running the business koperasi, should cover the activities of other businesses. Whereas in the rural scope, business koperasi, many are actually managed. These conditions make the koperasi in Indonesia are paralyzed, cannot develop, because it is not capable of running the koperasi operation itself. To more clearly seen in the table below:

Table 1: Condition of Koperasi in Indonesia (2010-2014)[7]

No.	Year	Amount Koperasi/unit			Inactive Percentage
		Amount	Active	Inactive	%
1.	2010 (per December)	177,482	124,855	52,627	29,65
2.	2011 (per December)	188,181	133,666	54,515	28,97
3.	2012 (per December)	194.295	139.231	54.974	28,29
4.	2013 (per December)	203.701	143.117	60.584	29,74
5.	2014 (per June)	206.288	144.839	61.449	29,79

[5] Suteki, *Desain Hukum Di Ruang Sosial* , Thafa Media, Yogyakarta, 2013, hlm. 43.

[6] Unresponsive and unprogressive Koperasi law will give bad impact to society economic development, as the example this Koperasi law condition will impact law enforcement area. The bad laws will make the bad condition included the law enforcement part and conversely. According to Suteki, environmental influences on law enforcement as an institution can not be circumvented. Suteki, *Hukum dan Alih Teknologi, Pergulatan Sosologis*, Thafa Media, Yogyakarta, 2013, hlm. 21-22.

[7] http://www.depkop.go.id/index.php?option=com_phocadownload&view=sections&Itemid=93, diunduh pada hari Minggu, 7 Desember 2014.

From the table one above, it can be seen more and more koperasi status of inactive or dormant in Indonesia. Starting from the year 2010 amounted to 52.627, rose to 54.515, in 2011 then in 2012 amounted to 54.974, increasing to 60.584 in 2013, and increased again as many as 61.449 in 2014, or about 30% of the number of koperasi as much as 206.288. This means that currently only about 70% of koperasi are active, the rest is dormant or inactive.

From the above data can also be seen that the increase in the number of inactive koperasi is the greater of 52.627 in 2010 to 61.449 in June 2014. What is even more interesting that the percentage of koperasi inactive from 2010 until December 2012 showed a lower percentage, but since December 2013 increased the percentage of inactive, this certainly has something to do with Act 17 of 2012 koperasi.

In addition, it would make the demise of the koperasi because it will not be able to compete with the savings and loan financial services such as banking patterned conventional capitalist. Where koperasi posture becomes unhealthy, fat as income (savings) is greater than expenditure (loan) which in turn will inhibit the growth of credit (loans). Where these loans are the only source of income for savings and credit koperasi. For comparison of growth of bank lending and koperasi can be seen from the table two below.

Table 2: Comparison Volume of Koperasi Loans and Conventional Banking[8]

No.	Year	Credit Distribution Volume		Percentage
		Banking	Koperasi	
1.	2010/per December	1.765.845 Billion	45,56 Million	0,0025
2.	2011/per December	2.200.094 Billion	46,93 Million	0,0021
3.	2012/per December	2.725.674 Billion	48,86 Million	0,0017
4.	2013/per December	3.319.842 Billion	49, 78 Million	0,0015
5.	2014/per June	3.495 Billion	52,65 Million	0.0015

Based on the tables one and two described above, can be seen the condition of Indonesian koperasi unbalanced and far behind the conventional banking system characterized by capitalism. This condition is true to the spirit of social justice in Indonesia.

Law No. 17 of 2012 on Perkoperasian have been constitutionally reviewed to the Constitutional Court on 13 February 2013. The articles were tested is article 1, article 84, article 78 verse (2) . The substance of these articles on the same prinispnya with the substance tested the applicant is contrary to the principle of the family, and not bring social justice, discriminatory, so that this law would only kill the koperasi venture in Indonesia.

Despite Article tested with article writing is the same object, namely Article 84 and Article 78, but there is a difference of substance and ideas between the author with the applicant. The Petitioners argued that Article 82, Article 83 and Article 84 of Law No. 17 of 2012 on koperasi had obstructed their right to undertake concerted efforts based on family principle guaranteed in Article 33 verse (1) and verse (4) of the 1945 Constitution. Furthermore, according to the Petitioners, the third chapter of the limit of koperasi efforts to determine the type of business that is only producer koperasi mean just special to run a business in any customer, producer koperasi are the same only able to run a business in the production of it, and so did the savings and loan koperasi whereas during the koperasi economic actors have been living by running wheels Multipurpose koperasi (KSU) which runs the business of production, as well as business customers, as well as savings and loans, and all of them mutually support one another.

With the unification of the type of koperasi effort as Article 82, Article 83, and Article 84, then the result should be split its business management, AD/ ART changed, the asset is broken, broken businesses, and so on. Koperasi will be busy with a solving problem - solution and not to concentrate the operations. Koperasi which has a variety of businesses that have lived, as well as entrenched in Indonesia, KUD, KPRI, Kopwan, Kokar the whole unit held to meet all members' interests must be frozen and replaced with a kind of cooperative enforced this provision.

[8] Data dihimpun dari Statistik Perbankan Indonesia per Juni 2014 http://www.ojk.go.id/statistik-perbankan-indonesia-juli-2014 Otoritas Jasa Keuangan diunduh pada hari Minggu 14 Desember 2014, lihat juga pada http://internasional.kompas.com/read/2013/03/04/16422473/Volume.Usaha.Koperasi.Simpan.Pinjam.Rp.49.78.Miliar.

The applicant is different from the concept of the author has a new idea or concept to reconstruct the koperasi law in Indonesia in the future with social justice as the main principles of the koperasi in the future is not just exclusive to members of the community but also open to non- members.

Although the Constitutional Court has made a decision that Law No. 17 of 2012 has been declared inconstitutional and not enforceable binding, but the author remains worried about the future when the new law-making koperasi to replace Law No. 17 of 2012, the substance of Article 84, Article 78 verse (2) and Article 75 of the disputed Author cooperative membership is exclusive only by and for members of permanent raised by lawmakers considering the magnitude of the influence of capitalists or owners of capital in this country in the era of globalization. The influence of capitalist power is so large that can set the start of the product creation process to implementation legislation that would protect the interests of the capitalists.

According to the *grund norm* concept from Hans Kelsen, the norm is made according to the higher norms, and norms that higher was made according to the norms of higher again, and so on until we stop on the norms of the highest that was not created by the norm again melainkann applied prior existence by the community or the people. [9]

Hans Kelsen was named the highest norm is a norm *grund norm* or basic nature can not be changed. Through this *grund norm* all regulations arranged hierarchically and thus he is also the main source of value for the legal system and the motor that drives the entire legal system.

In the legal system of Indonesia, Pancasila is the source of all sources of law. Pancasila is Grundnorm of all legal systems and the system of laws and regulations in Indonesia. As a supreme source of law, then it should have any legal order or legislation made in Indonesia refers to Pancasila.

Pancasila is also the basis of the state sets a guidelines and state goals. In the Act of 1945, states the purpose stated in the fourth paragraph of the Preamble which argues: (1) to protect the people and the country of Indonesia; (2) Promote the general welfare; (3) Feeding the life of the nation; (4) participate in the establishment of world order, based on lasting peace and social justice. [10]

Pancasila legal system owned by the Indonesian nation, giving guidance in building the political rules of national law. The guidance rule is the prohibition for the emergence of laws that are contrary to the values of Pancasila, namely the value of the Deity and religious civilized, human values and human rights, there should be no laws that threaten the integrity of ideology and territory of the nation and state of Indonesia, there should be no law which violates the principle of people's sovereignty, and must not violate the values of social justice.

In connection with the values of social justice, in the context of koperasi law, then the broader role of koperasi should serve the community both members and non-members. There should not be any discrimination that only members can take advantage of koperasi services.

Koperasi law in the future must be able to accommodate the interests of society at large, the public happiness, and justice for the people of both community members and non-members. Preparation and reconstruction of the law in the future in Indonesia, presumably should refer to the guiding principles and laws that must be followed by signs of Pancasila as the basic norm in the political and economic law, especially the law of development of koperasi in Indonesia.

In a reconstruction of the koperasi laws effort, going forward, be it producer koperasi, consumer koperasi and koperasi should be given the opportunity to grow, grow more prosperous with the way members earn profit sharing or SHU from the transactions with non-members of society. In fact the Act 17 of 2012 does not currently provide an opportunity for the members of both members of producer koperasi, consumer and services to grow because it cannot benefit from the transactions with the non-members, but quite the biggest market for the benefit for the koperasi is performed transaction with non-members. Compare this with the capitalist free enterprise producing, selling to the general public and enjoy the whole outcome of the transaction directly.

Later in the face and compete against the era of globalization, the free market is the economic system of capitalist such as banking services conventional, leasing services and others, the writer has a concept referred to above, namely the use of koperasi services should be open is not just for members only, but the general public non-members can also participate in the facility utilizing the services of the koperasi.

Do not blame society if amid the need for funds to run the wheel of life, the wheels of the economy people will still turn to financial institutions capitalists such as banking and lending institutions leasing, or pawn shops and at the same time the koperasi arising sinking is still shut down and do not give loans to the people who need that just because these people are not members of the koperasi. Koperasi should look at opportunities to attract people and take him as a partner in their business development and expected to one day be able to become members because they understand the system of koperasi.

In terms of deposits, is currently in the print media often we see and read the financial statements of financial institutions capitalists such as banking, almost every year gain tremendous savings fund society that is collected and then given back to the community in the form of loans or credit. In the case of any sale of the koperasi sinking of modern shops that are currently

[9] Esmy Warassih, *Pranata hukum: Sebuah Telaah Sosiologis*, Semarang: Suryandaru Utama, 2005, hlm. 32.

[10] Mahfud MD, *Peranan Mahkamah Konstitusi Dalam Pembangunan Hukum Progresif Untuk Keadilan Sosial*, Jakarta, Mahkamah Konstitusi Republik Indonesia, 2009, hlm. 106.

mushrooming in the community, such as Alfamart, Indomart, Hypermart, Carrefour, and so forth. Obviously with the concept of writer that is open to this, the koperasi could receive capital from the public and working with the community to open shops or other business units so that the cash flows of capital and it can be increased and the koperasi can provide benefits for the welfare of the Indonesian people.

Based on author interviews with the actors of venture koperasi, koperasi enterprise turns out in practice to serve the community in the community are still non-members. This is done in order to maintain the existence of the koperasi itself. Then the empirical facts in the community are also found business koperasi were forced to remain in operation even though it has been deleted by Act No. 17 of 2012 concerning Koperasi.

From social facts above prove, savings and credit koperasi societies continue to serve non-members. Multipurpose Koperasi Enterprises and still living in the community after they were deleted by Act No. 17 of 2012 on Koperasi. This can happen because at the level of Indonesian society does not recognize any dichotomy or divisions within society. Social condition proves that the perpetrators of Koperasi, still run the koperasi according to the Law of Koperasi of time, namely Law No. 25, 1992, where the Act provides an opportunity for koperasi to access the market (public non-members) as well as a way to promote and disseminate the koperasi to the public. These people's behavior actually reflects the values of social justice as precepts 5th namely "social justice for all Indonesian people" are not found in Law No. 17 of 2012 which does not provide justice for all Indonesian people.

Indeed, individual and group profit is not the main goal of Indonesia's economic activity but rather as the God commands, then this benefit must be distributed evenly among all the people in a way that the fairest, no discrimination and democratic. Especially with regard to the true koperasi who benefit from the services of the koperasi was not confined to mere members but non-members can also feel it.

Besides the fact we can also see from the politics of economic law and democratic national kinship is also true oriented and principled in Article 33 UUD 1945 which reads: [11]

> "(1) The economy is structured as a joint effort based on the principle of family;
> (2) The production branches which are important for the country and the lives of many people controlled by the state;
> (3) The earth, water, and natural riches contained therein shall be controlled by the state and used for the greatest prosperity of the people:
> (4) The national economy shall be organized based on economic democracy with the principles of togetherness, efficiency, justice, sustainability and environmental friendliness, independence, and balancing economic and national unity."

From Article 33 UUD 1945 in particular paragraph (4) of this, can we see the values of non - discrimination, the values of democracy, the system of national economy and (4) it provides an opportunity for koperasi to open up to the market system. Therefore, the koperasi membership and his services must be open to society common as well and not just confined or exclusive to members and the koperasi members should also be able to enjoy the benefits of the transactions with the non - members, because it is not fair, contrary to values of democracy, justice and non - discrimination as Article 33 paragraph (4) and also against Sila 5th namely social justice for all Indonesian people.

Conclusions and Suggestions

Based on the problem and the foregoing discussion, conclusions can be stated as follows: The main factor is seen as the cause of unsuccessful koperasi in achieving social justice for all Indonesian people because the law of koperasi today is Act No. 17 of 2012 does not provide social justice for all Indonesian people, and discrimination that koperasi services utilization is still closed, exclusive, only for its members in order to take advantage of koperasi services. Koperasi law does not provide space for the community as widely as possible. Not all people can use the services of the koperasi. In addition, Law No. 17 of 2012 precisely turn down and off the koperasi itself and provide opportunities for the business sector capitalists. So also in the sharing of benefits derived SHU koperasi of transactions with non-members can not be enjoyed by members of the koperasi. With only provide benefits to small communities or groups are members of koperasi without providing equal justice for the public to enjoy the benefits or facilities koperasi, then it was unfair and contrary to the Constitution of 1945 as the opening Act of 1945 which mention the purpose of the state, one of which is to promote the general welfare based on social justice for all Indonesian people. To be able to continue to grow and compete against the capitalist economic system with conventional banking, leasing and others stersebut, the reconstruction effort is the use of koperasi law koperasi should be open on a limited basis is not only for members of the general public alone but also can participate.

Some suggestions are given related to the discussion in this paper is: Public non-members should be given the opportunity to take advantage of koperasi services both producer koperasi, consumer koperasi, services koperasi, as well as savings and credit koperasi in accordance with the values of Pancasila and the 1945 Constitution, namely social justice for the people of Indonesia that the state goal was achieved, namely the welfare of the Indonesian people for koperasi law is fair and beneficial for the people of Indonesia; Profit or SHU earned from transactions of the non - members should be distributed to members of the

[11] See, Article 33 UUD 1945.

koperasi, so that members also enjoy and are motivated to develop a business koperasi, and also so that people are more interested in entering or attempting by means of koperasi because koperasi provide justice and benefits for society.

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THE SAUDI CAPITAL MARKET: THE CRASH OF 2006 AND LESSONS TO BE LEARNED

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ABSTRACT

Saudi Arabia's stock market crash of 2006 was a defining moment in the economic, and political, life of the Kingdom. In many ways, economic growth during the 1980s and 1990s exceeded the government's ability to control it, resulting in a very inefficient capital market. The damage was so widespread– from large multinational corporations to retirees and workers – that, it seemed, the Kingdom might not be able to recover. Yet the real question is not who was to blame for the capital market's sudden, unexpected, and sharp downturn. There is more than enough blame to go around, from the government to the media to the investors themselves. Instead, this paper focuses on the remedial events that have taken place since the crash, and how they affect the Kingdom's future. The government's response to the crisis, especially in the early stages, was mostly inadequate, as inexperienced agencies sought to cope with the tragedy. However, in the decade since the crash, the capital market has moved towards fairness and transparency, which should mean that the economy will be much less traumatized by future incidents.

Key words: Saudi Stock Market, Market Crash of 2006, Market Efficiency, Transparency, Insider Trading, Manipulation, Saudi Capital Market Authority.

I. Overview[1]

The Saudi capital market had not experienced a major crash until 2006. Beginning in 2003, the capital market suddenly expanded significantly, and the Tadawul All Share Index ("TASI") closed at 4437.6 points at the end of the year, compared with a 2518.1 close at the end of 2002. As a Saudi Arabian Monetary Agency ("SAMA") annual report indicated, the growth and expansion in the capital market was caused by the growth of the domestic economy, enhanced confidence in the market, high earnings of many companies, the declining rate of return on deposits, and a large number of new market investors.[2] At the end of 2004, the TASI increased 84% to 8,206.23 points.[3] At the end of 2005, the TASI closed at 16,712.64 points, rising by 103.7%.[4]

Behind the numbers, the market capitalization of issued shares increased rapidly from US$75 billion in 2002[5] to US$157 billion in 2003,[6] and again from US$306 billion in 2004[7] to US$650 billion by the end of 2005.[8] Eventually, the TASI registered the highest point in its history, 20,634.86, on February 25, 2006.[9]

The main reason for the dramatic and sustained rise was the large increase in demand due to a large number of additional investors in the stock market, either directly or through banks with various types of portfolios.[10] At one point, more than half of Saudi adults invested money in the capital market. Unfortunately, many of these people borrowed money or liquidated their assets to finance stock purchases.[11]

According to SAMA annual reports, the gross loan balance among individuals in 2002 was SAR 50.5 billion- US$13.4 billion,[12] and only three years later, the outstanding balance increased sharply to over SAR180 billion- US$48 billion.[13] Consumer lending patterns changed dramatically as well. In 2002, most of these loans were granted for real estate, durable goods and equipment,

[1] Note: this article is part of the author's S.J.D. dissertation at Dedman School of Law, Southern Methodist University.
[2] Saudi Arabian Monetary Agency, (2004). *40th Annual Report*, p. 140-41.
[3] Saudi Arabian Monetary Agency, (2005). *41st Annual Report*, p. 137.
[4] Saudi Arabian Monetary Agency, (2006). *42nd Annual Report*, p. 105.
[5] Saudi Arabian Monetary Agency, (2003). *39th Annual Report*, p. 146.
[6] Saudi Arabian Monetary Agency, *40th Annual Report* at 141.
[7] Saudi Arabian Monetary Agency, *41st Annual Report* at 138.
[8] Saudi Arabian Monetary Agency, *42nd Annual Report* at 106.
[9] Saudi Stock Exchange "Tadawul", (2006). The *2006 Annual Report*, p. 3.
[10] Al-Twaijry, Abdulrahman A. (2007). *Saudi Stock Market Historical View and Crisis Effect: Graphical and Statistical Analysis*, J. Human Sciences, 34, 1, 8.
[11] Niblock, Tim & Malik, Monica, (2007). *The Political Economy of Saudi Arabia*, p. 218, London: Routledge.
[12] Saudi Arabian Monetary Agency, *39th Annual Report* at 108.
[13] Saudi Arabian Monetary Agency, *42nd Annual Report* at 69.

and lines of credit. Also, there is a classification for "Other Purposes," which amounted to a mere SAR 29.5 billion-US$ 7.8 billion in 2002.[14] However, in 2005, "Other Purposes" loans exceeded SAR137 billion- US$36 billion out of a total US$ 180 billion. In other words, more than three quarters of consumer loans in 2005 were for something other than real estate, durable goods or lines of credit.[15] It seems apparent that many people saw an opportunity to invest in the capital market at a time when the market showed evidence of extremely high growth. To many, it was worth the additional risk of investing money that they did not have.

According to a Saudi expert, other factors were at work as well. After 9/11, a large amount of capital returned to the Kingdom from abroad, due to investor fears of overseas instability. Since there were no effective investment alternatives at the time, much of that money went directly into the stock market. Trading shares was largely unsupervised, banks provided both easy credit and physical facilities for investors, and there was a considerable amount of legal and illegal speculation in the shares of some companies. Ultimately, after a series of decisions by the Capital Market Authority ("CMA"), most notably one that the daily stock price fluctuation limit of listed companies decreased to 5%,[16] the bubble burst in February 2006.[17]

The TASI started to fall dramatically at the end of February 2006 and quickly lost about 13000 points. Within the first three weeks after November 25, 2006, TASI fell from 20,634.86 to 15000 points, decreasing 25%. The TASI then appeared to stabilize, hovering above 15000 for several weeks. But the TASI then fell for the second time to reach almost 10000 points within less than a month. The total lost of the TASI during these two and a half months was 50%.[18] By the end of 2006, TASI had bottomed out at 7,933.29 points, decreasing 52.53% from the previous year.[19] Ultimately, TASI lost about 65% of its value during 2006 from its highest level, 20,634.86 points.[20] Moreover, the market capitalization dropped to US$326.9 billion by the end of 2006, falling 49.72% from 2005.[21]

During this period, over four million Saudis had invested money in the stock market.[22] Many of these investors were rather unsophisticated and inexperienced. Moreover, a number were widows, retired persons and other lower-income people who liquidated their savings and other assets, unrealistically expecting big returns. These persons could ill afford to lose significant sums of money in the stock market, and their losses had repercussions throughout the economy.[23] To make matters worse, instead of making investment decisions based on a company's performance, the overall economic outlook, and other related factors, these people based decisions on advice from family and friends, public announcements, and prior pricing patterns.[24]

Unrealistic expectations may have fueled investment, but certain aspects of the market itself also contributed to the stock market bubble of 2004 and 2005. Prices rose artificially, because certain wealthy investors essentially bought and sold stock among themselves, thus creating the illusion of high margins and fervent trading activity. There were noneconomic factors as well which contributed to spiraling prices. Inside information was certainly an issue in some cases, and in other cases, the rumored profits simply did not exist. Smaller investors took note of these trends and, after assuming that the upward spiral would continue, purchased shares at already inflated prices. Too many times, instead of providing sound financial advice, banks acted as enablers by granting credit to overextended borrowers.[25]

The crash hit working families the hardest. Many people lost their jobs and/or sought psychiatric help, while others resorted to begging or were incarcerated because of a failure to pay debts, since they had essentially lost their entire life savings.[26] As the crash was completely unprecedented, some investors had a difficult time coping with the new economic reality. Many became physically ill, even to the point of death in some cases.[27] All told, the country lost a significant portion – SAR 2 trillion - US$533 billion – of its overall wealth.[28]

The crash's impact spilled over into other Gulf Cooperation Council ("GCC") countries. Investors in these nations began to

[14] Saudi Arabian Monetary Agency, *39th Annual Report* at 111.
[15] Saudi Arabian Monetary Agency, *42nd Annual Report* at 69.
[16] Capital Market Authority, the Board of the Capital Market Authority Resolution Number 1-141-2006, dated 24/01/1427 H (Feb. 23, 2006). On March 27th, 2006, the Capital Market Authority issued a decision to return the daily stock price fluctuation limit of listed companies back to 10% starting April 1st, 2006, because the risks associated with market prices correction have decreased. Capital Market Authority, the Board of the Capital Market Authority Resolution Number 3-154-2006, dated 27/02/1427 H (Mar. 27, 2006).
[17] Al-Ghamidi, Abdulsalam S. (2010). *The Fogginess of Saudi Stock Market Crash 2006 and the Effect of Firm's Financial Performance*, The Arab J. Acct., 13, 86, 89.
[18] Al-Twaijry at 9
[19] Saudi Stock Exchange "Tadawul", *2006 Annual Report* at 15.
[20] Al-Twaijry at 26.
[21] Saudi Stock Exchange "Tadawul", *2006 Annual Report* at 3.
[22] Al-Nwaisir, Sami, (2012). *Saudi Stock Market Needs to Be Reformed*, Arab News, http://www.eurasiareview.com/11012012-saudi-stock-market-needs-to-be-reformed-oped/
[23] Al-Nwaisir, *Saudi Stock Market Needs to Be Reformed.*
[24] Al-Twaijry at 18.
[25] Niblock at 218.
[26] *Id*.
[27] *Id*. at 2.
[28] Al-Nwaisir, *Saudi Stock Market Needs to Be Reformed.*

question the level of transparency and fairness in the market, and as a result, some chose to limit their investment activity in Saudi Arabia. There were policy considerations as well. Before the crash, most GCC states adhered to a policy of "popular capitalism" which relied on large initial public offerings of state-owned companies to serve as vehicles for investment. But in the wake of the crash, most GCC states abandoned that approach. The result has been a "polarisation [*sic*] between small-time stockholders and well-connected 'big fish' who manipulate local markets." The investing landscape has yet to fully recover.[29]

The crash was not bad news for everyone. The economic elite took full advantage of the artificially high prices by selling their shares just before the fall. Most of these people were from very wealthy Saudi families.[30] There were also a significant number of speculators in the market as the bubble grew. Since these investors cared little about the market's long run share performance, they helped prop up prices and reaped high profits when they suddenly withdrew their money.[31]

The Saudi stock market might be seen differently from most other markets in the world during and after the 2006 crash. Because of the speculation and artificial spiral, a company's performance had little, if anything, to do with share prices. In fact, some of the worst performing companies in 2005 and 2006 had some of the highest values on the capital market.[32] At the same time, many large speculators bought and sold these shares as both individuals and groups, so the price went up even further based on trading volume. Because of the lack of oversight and penalties, some of these acts continued even after the 2006 crash. [33] The CMA finally intervened in 2007, by suspending trading in companies whose losses exceeded 75% of their capital.[34]

There were other factors at work that artificially increased prices. First, domestic liquidity was still growing, so prices increased to an unreasonable level regardless of the listed companies' financial statements. In effect, some companies were able to use their capital reserve to disguise their operating losses. Second, abusive practices occurred continually because the CMA feared possible negative consequences from any tough action that might be taken against manipulators in the market, possibly because the inexperienced CMA had only been formed in 2004. Regardless of the reason, the Agency's hesitation encouraged violators to persist in their behavior and their illegal acts.[35] Many of these behaviors were evident as far back as 2000, but the speculation and counter-speculation continued almost unabated. At the same time, these speculators purchased as many inflated shares as possible, to maximize their return. Along with inexperienced investors who may have made questionable decisions, for whatever reason, the speculators essentially created the bubble.[36]

Some other factors also contributed to the 2006 crash. One of them was the lack of transparency and disclosure by listed companies, banks, and some governmental agencies that were related to the stock market. Many listed companies failed to disclose their financial statements. These, and other, violations occurred continually with little, or no, response from the government. Such violations included insider trading, manipulating prices, and making false statements. Rumors steadily increased during 2005 and 2006, and there was no effective method to detect and punish violators, partially because some investors had power and relationships that allowed them access to material inside information. These investors used the inside information as individuals or groups to speculate in the market illegally. Furthermore, the large size of liquidity in the Saudi economy with few listed companies led to inflation in the market. Also, the selfishness, greed and the lack of responsibility in some Saudi banks led these banks to expand their lending policy, instead of restrict it, which flooded the capital market with liquidity.

The CMA's lack of experience in dealing with the emerging market led the CMA to issue decisions, procedures, and statements without fully examining them. These actions by CMA made the capital market unstable, and many investors lost confidence in the market. The CMA could not identify the real issue at the time of the crash so the CMA used questionable procedures that worsened an already deteriorating situation. Finally, some government officials and analysts continued to issue statements until the end of 2005 encouraging citizens to invest in the market. These statements brought new investors to a market that was on the verge of collapse.[37]

In a nutshell, the crash was caused by a confluence of factors that included weak investor knowledge as to the nuances of investment and securities, readily available financing from financial institutions which essentially encouraged these individuals to continue to invest money that they simply could not afford to lose, a tepid response to disclosure and insider trading violations which resulted in significant damage to market transparency, and a lack of leadership from government authorities who did not

[29] Hertog, Steffen, (2012). *Financial Markets in GCC Countries: Recent Crises and Structural Weaknesses*, (p. 8), NOREF Policy Brief, https://www.ciaonet.org/attachments/22070/uploads
[30] Niblock at 219.
[31] Al-Twaijry at 21.
[32] Alsultan, Abdulrahman Mohammed, (2006). *New Bubble is Forming in the Saudi Stock Market*, Al Eqtisadiah Newspaper, http://www.aleqt.com/2006/07/03/article_5702.html
[33] *Id*.
[34] Masari, Abdulsabor Abdulkawi, (2012). *The Legal Regulation of the Corporate Governance*, (p. 150), Riyadh: Maktabt Alganon Oa Alagtsad.
[35] *Id*.
[36] Al-Aqeel, Mohammad & Spear, Nasser, (2006). *Private Information Trading in Emerging Markets: Evidence from GCC Security Markets*, paper presented at Ways to Develop Accounting Conference, 11th Meeting, (p. 3), Riyadh, 5-6 December.
[37] Aljuhani, Hamdi Hamzah, (2006). *The Stock Market Crisis in 2006 is a Warning and a Call for Reforming*, (pp. 178-181), Riyadh: Obekan Printing and Packaging.

have the experience to deal with the rapid uptick in trading volume.

To be fair, the unprecedented nature of the crash may have caught some officials off guard. The Kingdom had never experienced an economic crisis of this magnitude. Alas, large crashes are basically inevitable in a capital market. So, the real question is not so much what happened, but rather what will the government do to prevent, or at least contain, the next economic catastrophe?

II. The Government's Response

Based on Article IV of the International Monetary Fund's ("IMF") Articles of Agreement,[38] the agency concluded at the end of 2005 "authorities needed to be cautious in light of the continuing strong increase in stock prices." Nevertheless, IMF "commended the authorities for the steps already implemented, and encouraged them to further strengthen prudential oversight on stock market-related lending and on consumer lending."[39]After the IMF's conclusion, SAMA, Ministry of Commerce, CMA, and the Committee for the Resolution of Securities Disputes ("CRSD") were encouraged to take some measures to prevent the stock market crash.

Action began almost immediately. On January 1st, 2006, SAMA started to enforce the Regulation for Consumer Finance, which is applicable to financing contracts and all related guarantee agreements executed by banks and authorized institutions.[40] The next day, CMA published a CRSD decision regarding three defendants who violated Article Forty-Nine of the CMA and Article Three of the Market Conduct Regulations. The three defendants conducted manipulative and deceptive acts in eight listed companies in the Saudi stock market. CRSD imposed penalties on these three defendants totaling SAR 169 million - US$ 45 million. This money went directly to the CMA. Additionally, CRSD barred these three defendants from working in the listed companies in the stock market or membership in a Board of Directors for three years.[41]

Next, on January 22, 2006, CMA changed Article Twenty-Five and Thirty of the Listing Rules.[42] These changes aimed to impose greater transparency and disclosure about transactions made by big investors, members of boards of directors, and senior executives. The new articles also monitored any changes in their investments.[43]

On January 23, 2006, CMA Board issued a resolution[44] that prohibited listed companies from buying or selling shares of other joint stock companies, unless their articles of incorporations allow them to do so and the transaction was not inconsistent with relevant regulations. Also, the resolution required joint stock companies whose investment did not comply with the resolution to correct their statuses within a period of three months from the date of the resolution and provide the CMA with their plans to correct their conditions within one month from the resolution.[45]

Many Saudi experts welcomed the CMA's decision, even though it was late. The CMA found that many listed companies invested primarily in the stock market when their business types were in something else, which caused them to neglect their main course of investments. But, while it was intended to refocus investors, this decision would cause many of these listed companies to liquidate their stock portfolios, thereby decreasing the market prices. Moreover, CMA failed to coordinate with Minister of Commerce, which is responsible for businesses registrations and licensing, among other things. Some experts criticized the CMA's decision because it did not contain any sanctions for any companies that violated the decision.[46]

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[38] Under Article IV of the IMF's Articles of Agreement, the IMF holds bilateral discussions with members. A staff team visits the country, collects economic and financial information, and discusses the country's economic developments and policies with the proper officials. On return to headquarters, the staff prepares a report, which forms the basis for discussion by the Executive Board.

[39] International Monetary Fund, (2005). *IMF Executive Board Concludes 2005 Article IV Consultation with Saudi Arabia*, Public Information Notice No. 05/161.

[40] Saudi Arabian Monetary Agency, (2006). *The Regulation for Consumer Finance*, http://www.sama.gov.sa/News/Pages/News14270214.aspx

[41] Capital Market Authority, (2006). *Announcement Regarding imposing penalties on three violators who violated the Capital Market Law Amount of Hundred and Sixty Nine Million Riyals and Ban them from working in Joint Stock Companies*, Capital Market Authority, http://www.cma.org.sa/Ar/News/Pages/CMA_N151.aspx

[42] The Board of the Capital Market Authority Resolution Number 2-128-2006, dated 22/12/1426H (Jan. 22, 2006).

[43] Capital Market Authority, (2006). *The Decision of the Capital Market Authority Board No. 2-128-2006, Dated 12/22/1426 H Corresponding to 01/22/2006 AD*, http://www.cma.org.sa/Ar/News/Pages/CMA_N156.aspx

[44] The Board of the Capital Market Authority Resolution Number 5-126-2006, dated 23/12/1426H (Jan. 23, 2006).

[45] Capital Market Authority, (2006). *A Decision from the Capital Market Authority Board Regarding the Investment of Joint Stock Companies In the Share of Other Joint Stock Companies*, http://www.cma.org.sa/Ar/News/Pages/CMA_N157.aspx . Later on June 24, 2006, the CMA Board extended the correction period for joint stock companies for three more months, until October 23, 2006. Capital Market Authority, (2006). *CMA Board's Decision to extend the Period of Correction for Joint Stock Companies to Correct its Investments*, http://www.cma.org.sa/Ar/News/Pages/CMA_N235.aspx

[46] Albashari, Ali, (2006). *Experts: Regulating the Investment of Saudi Companies in the Stock Market Stimulates their Main Businesses Activities*, Alsharq Al-Awsat News, http://awsat-a.com/details.asp?section=6&article=345409&issueno=9923#.VIDeR74kNUQ

Tadawul announced on the 29th of January 2006 that after CMA approval, the tick size[47] would be changed from SAR 0.25 to SAR 1.00 starting on February 4th, 2006. As Tadawul mentioned, this change was due to the huge increase in many stocks prices in the market.[48]

On February 14, 2006, the CMA board requested a department in the CMA to accelerate the investigative procedures in the activities of a number of traders in the capital market. This request came when the trading data showed abnormal increases in speculations by a number of traders over a period of only a few weeks. As the CMA's Board stated, these activities improperly influenced the prices of some listed companies because these companies did not disclose any information to justify these high price levels. These activities threatened to compromise the integrity of the capital market and harm investors, especially small investors. Thus, the Board ordered the specialized department to speed up the inquiry and investigation procedures to detect any manipulation or misleading transactions, and then take the necessary actions in accordance with the Capital Market Law ("CML").[49]

On the same day it requested an accelerated investigation, the CMA's Board ordered Tadawul to immediately stop executing any buy orders for a certain trader who engaged in abusive practices. The CMA had evidence that this trader intentionally sold and bought stocks with huge amounts of money to create a false impression of the prices of some companies' stocks. The decision also included a lawsuit to be filed against this trader before the CRSD in accordance with the CML.[50] Similarly, on February 21, 2006, CMA made a similar request to Tadawul to stop a trader from buying stocks. Allegedly, the trader was engaging in abusive practices and circulating untrue statements of material facts and statements of opinions on the Internet for the purpose of influencing the price of a security. These acts are prohibited under Article Forty-Nine of the CML and Article Eight of Market Conduct Regulations.[51] It is worth noting that the CMA only prevented these two traders from buying stocks, not selling them. Thus, these two big investors likely increased the market supply that caused the market prices to decrease.

On February 23, 2006, the Board of CMA made a decision[52] to change the daily stock price fluctuation limit of listed companies in the Saudi capital market to 5% instead of 10%. This new policy started on February 25, 2006,[53] which was one day before the crash. Also on February 23, CMA requested Tadawul to not execute any buying orders for yet another trader due to abusive practices.[54] Again, CMA prevented this large investor only from buying stock, which would likely increase supply and reduce stocks prices. These actions were a surprise to many investors and served as a warning for the beginning of the market crash.[55]

On February 26, 2006, the Saudi capital market started to fall from its highest point of 20,634.86. [56] The market continued to fall until it reached 7,933.29 points at the end of 2006, losing 52.53% comparing to the previous year.[57] In the first two days, the market lost over 1,500 points and most of the listed companies reached the maximum decline, which was 5%.[58] After the second day of the crash, the stock market sent a clear message to investors that a steep price decline was approaching fast.[59]

On March 1st, 2006, CMA declared that Alhayat newspaper had published untrue statements on its front page stating that the CMA forgave speculators and detainees. The Board of the CMA also confirmed its intention to apply all the CML articles and its regulations on all violators. Moreover, the CMA declared its intention to take legal action against anyone who published or promoted untrue statements.[60]

On March 11th, 2006, the Board of CMA made a decision[61] to impose fines on two listed companies because these two

[47] The tick size is the minimum price movement of a stock.
[48] Saudi Stock Exchange "Tadawul", (2006). *Announcement Regarding Changing the Tick Size*, http://www.tadawul.com.sa/wps/portal/!ut/p/c0/04_SB8K8xLLM9MSSzPy8xBz9CP0os3g_A-ewIE8TIwN_D38LA09vV7NQP8cQQ3dnA_3gxCL9gmxHRQCtDLXm/?x=1&PRESS_REL_NO=601
[49] Capital Market Authority, (2006). *Announcement from the Capital Market Authority Regarding the Acceleration of the Investigative Procedures in the Activities of a Number of Traders in the Capital Market*, http://www.cma.org.sa/Ar/News/Pages/CMA_N170.aspx
[50] Capital Market Authority, (2006). *Announcement from the Capital Market Authority Regarding Stopping Dealing with Investment Accounts for One Trader*, http://www.cma.org.sa/Ar/News/Pages/CMA_N171.aspx
[51] Capital Market Authority, (2006). *Announcement from the Capital Market Authority Regarding Stopping Dealing with Investment Accounts for One Trader*, http://www.cma.org.sa/Ar/News/Pages/CMA_N178.aspx
[52] The Board of the Capital Market Authority Resolution Number 1-141-2006, dated 24/1/1427H (Feb. 23, 2006).
[53] Capital Market Authority, (2006). *Capital Market Authority Announcement in Regarding to a Change in the Daily Stock Price Fluctuation Limit of Listed Companies from 10% to 5%*, http://www.cma.org.sa/Ar/News/Pages/CMA_N179.aspx
[54] Capital Market Authority, (2006). *Announcement from the Capital Market Authority Regarding Stopping Dealing with Investment Accounts for One Trader*, http://www.cma.org.sa/Ar/News/Pages/CMA_N180.aspx
[55] Aljuhani, *The Stock Market Crisis in 2006 is a Warning and a Call for Reforming* at 119.
[56] *See* Saudi Stock Exchange "Tadawul", *2006 Annual Report* at 13.
[57] *Id*.
[58] Aljuhani, *The Stock Market Crisis in 2006 is a Warning and a Call for Reforming* at 119.
[59] *Id*. at 120.
[60] Capital Market Authority, (2006). *Announcement Regarding What Alhayat Newspaper Has Published Today, Wednesday*, http://www.cma.org.sa/Ar/News/Pages/CMA_N184.aspx
[61] The Board of the Capital Market Authority Resolution Number 1-148-2006, dated 11/2/1427H (Mar. 11, 2006).

companies failed to disclose their financial statements during the required period. The Board's decision was enforced immediately.[62] It is worth noting that the CMA has started to impose fines against companies who failed to meet the deadlines for financial statements disclosures only on July 20, 2005.[63]

The Supreme Economic Council held a meeting headed by King Abdullah in March 14, 2006 to discuss recent events in the Saudi stock market, specifically the sharply declining prices. The Council expressed its confidence in the strength of the Saudi economy and its ability to grow and flourish in various types of economic sectors, which, according to the Council, meant a suitable investment future. Furthermore, the Council also expressed its confidence in national companies, likening the investments in these companies to investments in the nation and for the future of its citizens. The Council encouraged the citizens to not follow rumors and misleading information but to make their investment decisions on a sound basis.[64]

On March 15, 2006 according to King Abdullah's instructions, the Minister of Finance held a meeting with a group of Saudi private sector representatives to discuss the Saudi stock market situation. The Minister confirmed that what was currently happening in the capital market was not supported by national economic indicators. The Minister also restated what the Supreme Economic Council had earlier expressed: investments in the national economy and its companies are an investment in the nation and the future of its citizens. Far from discouraging additional investment, the Minister stressed that the government expected businesses to accelerate their investments for the good of the economy. Furthermore, the Minister revealed some of the Supreme Economic Council's recommendations from its meeting the previous day regarding supporting the stock market and allowing investors to take advantage of the available opportunities in the Saudi capital market. Some of these recommendations were to allow non-Saudi residents to invest directly in the stock market and not limited to investment funds, and to reduce the par value of stock that would allow splitting the stocks.[65]

Less than a week from King Abdullah's instructions, the CMA announced on March 20, 2006 that non-Saudi residents could invest in the Saudi capital market, and they were no longer limited to investment funds. Non-Saudi residents could start investing in the market beginning on March 25, 2006.[66] A day later, the CMA also announced that the Minster of Commerce and the Head of the CMA had agreed to submit a proposal to the King to change the par value of the stocks in the listed companies in the market to SAR 10.[67] On March 23, 2006, CMA published the terms and requirements for opening investment portfolios for non-Saudi residents, allowing them to trade in the Saudi capital market.[68] However, even with these actions that were designed to prop up prices, the market index continued to decline, and many investors began to question the level of market transparency. The market at that time was characterized by unstable prices that seemed to rise and fall randomly without any interpretation or clue.[69]

On March 27, 2006, CMA's Board issued a decision[70] to change the daily stock price fluctuation limit of listed companies in the capital market back to 10% instead of 5%. Moreover, the decision also changed the tick size back to SAR 0.25.[71] The reason for these changes, as the CMA alleged, was because the risks that were associated with the market had been reduced.[72] Moreover, the CMA made another decision[73] regarding the reduction of the par value of stock, which would allow splitting the stocks. The par value of a stock was reduced from SAR 50 to SAR 10 and the stocks of listed companies in the market were splitting to five

[62] Capital Market Authority, (2006). *Announcement Regarding imposing fines against two companies for not disclosing financial statements during the required period*, http://www.cma.org.sa/Ar/News/Pages/CMA_N187.aspx

[63] The Board of the Capital Market Authority Resolution Number 11-57-2005, dated 28/2/1426H (Apr. 7, 2005).

[64] Capital Market Authority, (2006). *Press Release about the Supreme Economic Council Meeting which held on Tuesday 3/14/2006*, http://www.cma.org.sa/Ar/News/Pages/CMA_N191.aspx

[65] Capital Market Authority, (2006). *Press Release About the Minister of Finance's Meeting with Private Sector Representatives*, http://www.cma.org.sa/Ar/News/Pages/CMA_N192.aspx

[66] Capital Market Authority, (2006). *Announcement Regarding Allowing Non-Saudis Residents to Invest Directly in the Saudi Stocks*, http://www.cma.org.sa/Ar/News/Pages/CMA_N193.aspx

[67] Capital Market Authority, (2006). *Announcement Regarding Reducing the Par Value of Stock Which Would Allow Splitting Listed Companies' Stocks*, http://www.cma.org.sa/Ar/News/Pages/CMA_N195.aspx

[68] Capital Market Authority, (2006). *The terms for Opening Investment Portfolios for Non-Saudi Residents for Trading*, http://www.cma.org.sa/Ar/News/Pages/CMA_N196.aspx

[69] Aljuhani, *The Stock Market Crisis in 2006 is a Warning and a Call for Reforming* at 120.

[70] The Board of the Capital Market Authority Resolution Number 3-154-2006, dated 27/2/1427H (Mar. 27, 2006).

[71] The tick size was changed for the third time in September 13, 2008 to a new formula. The tick size is based on the share price, at three new bands. In band one, which is shares SAR 25.00 or below, the tick size would be SAR 0.05. In band two, which is shares SAR 25.10 to 50.00, the tick size would be SAR 0.10. In the last band, which is shares SAR 50.25 and above, the tick size would be SAR 0.25. Tadawul intended the new implementation to keep pace with the increasing growth in the Saudi Stock Market trading. Moreover, the new rule aimed to improve the quality and efficiency of share pricing, as well as boost liquidity and volume of share trading. For more details, *see* Saudi Stock Exchange "Tadawul", (2015). *Tick Size*, http://www.tadawul.com.sa/static/pages/en/TickSize/TickSize.html; Alriyadh Newspaper, (2008). *Applying a New Tick Size for Stock Prices After a Week According to 3 Bands Which Are Congruence with Global Markets*, Alriyadh Newspaper, http://www.alriyadh.com/371886

[72] Capital Market Authority, (2006). *Capital Market Authority Announcement in Regarding Increasing the Daily Stock Price Fluctuation Limit of Listed Companies from 5% to 10%*, *http://www.cma.org.sa/Ar/News/Pages/CMA_N202.aspx*

[73] The Board of the Capital Market Authority Resolution Number 4-154-2006, dated 27/2/1427H (Mar. 27, 2006).

shares in a gradual manner, based on the number of shareholders in these listed companies. Splitting the stocks started on April 1, 2006 and ended on the 22nd of the same month.[74]

On April 9, 2006, the CMA's Board made a decision[75] that levied sanctions against two traders who violated Article Forty-Nine of the CML and Article Three of the Market Conduct Regulations. The decision ordered Tadawul to immediately stop executing any buy orders in the Saudi capital market for these two traders due to abusive practices. The CMA had evidence that these two traders intentionally sold and bought stocks with huge amounts of money in order to create a false impression of the prices of some companies stocks. The decision also included the intention to file a lawsuit against these two traders before CRSD in accordance with the CML.[76] Once again, CMA prevented these two big investors only from buying stocks, which was likely to increase market supply.

On May 12, 2006, King Abdullah issued a Royal Decree[77] to relieve the chairman of the CMA, Jammaz Al-Suhaimi, from his duties and appoint a new chairman for the CMA, Abdultahman Altuwaijri.[78] Many experts and investors were happy with the decision as they were looking for some positive reform in the capital market.[79]

On the whole, the government, the media and the traders themselves share responsibility for the crash. Some decisions came late, or not at all. At the same time, the investing public was largely unaware of investing protocol and strategy. In fact, many leapt at the opportunity to make money without really knowing how to invest at all. Instead of sound financial advice, many Saudis made decisions based on informal recommendations and media reports. This same media indirectly encouraged continued speculation, even though prices were unreasonably high, because there was no real warning about an imminent collapse and many writers lacked financial or capital market expertise.[80]

The 2006 crash brought about a major change in many peoples' attitudes about the government's ability to manage the economy. Some investors openly questioned the integrity of the system, and called for more intensive government supervision and intervention to better control market dynamics. Specifically, many were concerned that the market favored large investors at the expense of smaller ones, by giving these large investors access to information that resulted in an unfair advantage.[81]

Properly grounded investor confidence and equal access to information are two major keys to a successful capital market. The government may have performed a disservice by pumping up prices and confidence at a time when the market was clearly at a breaking point, and the media was unwilling, or unable, to question these government policies. So, instead of early and effective intervention that could have possibly contained the damage, problems festered and, in many cases, actually became worse.

We now move to the same question that many investors asked in the wake of the crash: is the Saudi capital market, as it is presently constituted, consistent with the Kingdom's overall economic goals?

III. Is The Saudi Capital Market Efficient?

Over the past several decades, a number of studies have been conducted to try and answer this question, and the majority of this research has concluded that the Saudi stock market is inefficient. The study authors cite various reasons for this deficiency, including high transaction costs, lack of information, inadequate infrastructure, lack of transparency, and several other factors.

A study by Butler and Malaikah tested the efficiency of Saudi Arabia and Kuwaiti stock markets over the period of 1985-1989. Along with volatile prices and a rather weak rate of return, the authors concluded that high transaction costs contributed mightily

[74] Capital Market Authority, (2006). *Announcement for CMA Regarding Splitting the Stocks of Listed Companies in the Market,* http://www.cma.org.sa/Ar/News/Pages/CMA_N203.aspx
[75] The Board of the Capital Market Authority Resolution Number 1-160-2006, dated 11/3/1427H (Apr. 9, 2006).
[76] Capital Market Authority, (2006). *Announcement from the Capital Market Authority Regarding Stopping Dealing with Investment Accounts for Two Traders,* http://www.cma.org.sa/Ar/News/Pages/CMA_N208.aspx
[77] Royal Decree No. A/41, dated 14/4/1427H (5/12/2006).
[78] Abdultahman Altuwaijri was also relieved from his duties in February 5, 2013. Mohammed Alsheikh appointed by a Royal decree to serve as chairman of the CMA. Royal Decree number A/92, dated 24/3/1434 H (Feb. 5, 2013). In January 2015, Mohammed Aljadaan was appointed as the chairman of the CMA by a Royal Decree number A/90, dated 9/4/1436 H (Jan. 29, 2015). Mr. Aljadaan has served until now as the chairman. Mr. Aljadaan has opened the Saudi stock market in the 15th of June, for the first time, to qualified foreign investors. The CMA issued in May 2015 rules that regulate qualified foreign investors, "Rules for Qualified Foreign Financial Institutions Investment in Listed Shares." Capital Market Authority, (2015). *CMA Announcement in Regard to the Rules for Qualified Foreign Financial Institutions' Investment in Listed Shares*, http://cma.org.sa/En/News/Pages/CMA_N_1742.aspx
[79] Alaqrara, Abdulaziz, (2006). *The Saudi Stock Market is Hugging Altuwaijri by the Green Color, and Investors Are Waiting the New President's Decisions,* Alriyadh Newspaper, http://www.alriyadh.com/154289 ; Sharkawy, Hazem & Almoshkas, Munira, (2006). *Royal Decree: Relieve Al-Suhaimi from his Duties and Appointed Altuwaijri to Be the Head of the Capital Market Authority*, Aljazirah Newspaper, http://www.al-jazirah.com/2006/20060513/ec1t.htm
[80] Al-Twaijry at 28.
[81] Al-Aqeel & Spear at 3.

to overall inefficiency. The two researchers also cited illiquidity, trading delays and market fragmentation, and the absence of official market makers.[82]

A pair of studies examined the capital market's performance in the late 1980s to the mid 1990s. One study, conducted by Al-Razeen, examined the efficiency of the Saudi stock market by applying the weak-form test for the period of 1992-1995. The study result was that the Saudi stock market had a low level of efficiency.[83] Another study, from Khababa in 1998, examined the efficiency of the Saudi stock market for the period of 1985 to 1997.[84] The results strongly suggested inefficiency for the Saudi stock market in both informational and operational aspects.[85]

Later, Alkholifey examined the informational efficiency of the Saudi stock market in 2000. This study concluded that the Saudi stock market was weak and informational inefficient.[86]

The Saudi Chamber of Commerce in Riyadh conducted a survey in 2005 in order to examine both the Saudi capital market's efficiency and its role in supporting the Saudi economy.[87] The finding of the survey was that the market did not have the fundamental factors needed to be efficient. One of the major drawbacks was the difficulty to access information about the listed companies and shares. Many traders in the market had the ability to influence stock prices, and due to high costs for trading in the market, stock prices in the market moved in random paths and away from available information about listed companies, and many traders in the market did not have the same opportunities to gain profits. Moreover, a large class of traders and market makers could make higher profits than other traders in the market. Also, the number of listed companies, 77 at that time, [88] was inadequate.[89] Specifically, the result of the analysis was that the Saudi stock market had, at best, a medium level of efficiency, yet the level of efficiency was closer to the weak level than a strong level. Moreover, the survey pointed out that the Saudi stock market had, to that point, not played a fundamental role in the economy.[90]

Elango and Hussein examined in 2008 the efficiency of the capital markets across the countries of the Gulf Cooperation Council (GCC)[91] during the period of 2001-2006.[92] The results of this study was that the hypothesis pertaining to random walk and weak-form efficiency of the seven capital markets in GCC countries was rejected for all these markets during the target period of this study.[93]

Onour's study[94] used a number of tests in 2009 to examine the weak-form efficiency of the Saudi capital market.[95] The findings of the tests in the study rejected the hypothesis of random walk behavior of Saudi stock price returns at all three levels including individual, sectoral, and aggregate levels.[96] The study indicated that the major causes of the inefficiency of the Saudi capital

[82] Butler, Kirt C. & Malaikah, S. Jamal, (1992). *Efficiency and Inefficiency in Thinly Traded Stock Markets: Kuwait and Saudi Arabia*, Journal of Banking & Finance, 16, 197, 209-10.
[83] Al-Razeen, Abdullah Mohamed, (1997). *The Weak-Form Efficiency of the Saudi Stock Market*, p. 233, PhD Thesis, Leicester: University of Leicester.
[84] Khababa, Nourredine, (1998). *Behavior of Stock Prices in the Saudi Arabian Financial Market: Empirical Research Findings*, J. Fin. Mgmt. & Analysis, 11, 48, 50. This study applied two tests to find evidence for weak form efficiency, namely Auto-correlation and Runs test.
[85] The study found several reasons behind the informational and operational inefficiency that were associated with the natural and structure of the Saudi stock market. First, the absence of official traders market and brokers in the market caused significant delays in operation and the associated high transaction costs. Second, the government and/or a few investors dominated share holding, leading to a thinness of trading that affected the behavior of price movement and price level in the market. The third reason was related to illiquidity in the market, because banks were not allowed to trade stocks for their own accounts. *Id*. at 54.
[86]Alkholifey, Ahmed, (2000). *The Saudi Arabian Stock Market: Efficient Market Hypothesis and Investors Behavior*, p. 105, PhD Thesis, Fort Collins: Colorado State University.
[87] Saudi Chamber of Commerce in Riyadh, (2005). *Explore to What Extend the Efficiency of the Local Stock Market and its Role in Supporting the National Economy*, p. 24, the 15th Annual Meeting of Saudi Economic Association, Riyadh, 13-15 November.
[88] Saudi Arabian Monetary Agency, *42nd Annual Report* at 115.
[89] Saudi Chamber of Commerce in Riyadh, (2005). *Explore to What Extend the Efficiency of the Local Stock Market and its Role in Supporting the National Economy* at 24.
[90] *Id*.
[91] The six GCC countries have seven capital markets including: Saudi Stock Market-Tadawul (Saudi Arabia); Kuwait Stock Exchange (Kuwait); Doha Securities Market (Qatar); Dubai Financial Market (United Arab Emirates); Abu Dhabi Securities Market (United Arab Emirates); Bahrain Stock Exchange (Bahrain); and Muscat Securities Market (Oman).
[92] Elango, Rengasamy & Hussein, Mohammed Ibrahim, (2008). *An Empirical Analysis on the Weak-Form Efficiency of the GCC Markets Applying Selected Statistical Tests*, Int'l Rev. Bus. Res. Papers, 4, 140, 146.
[93] Elango and Hussein's study analyzed the market efficiency of the GCC stock markets over the period between October 2001 and October 2006 based on the data available of these exchanges at the time of conducting this study. The study used the "Kolmogorov Smirnov test" and Runs test to examine the normality and randomness respectively. *Id*. at 152.
[94] Onour, Ibrahim A. (2009). *Testing Efficiency Performance of Saudi Stock Market*, JKAU: Econ. & Admin., 23, 15, 16.
[95] Onour's study employed unit root test, stationarity test, and variance ratio test to examine whether the Saudi capital market is efficient. *Id*. at 23-24.
[96] *Id*. at 25.

market are inadequate information and lack of market transparency.[97]

Al Ashikh examined also the efficiency of the Saudi stock market in 2012. The result was that the Saudi stock market was inefficient and the day-of-the-week effect existed. The study indicated that the returns of the Saudi market are high on the first trading day of the week, and the lowest volatility in Saudi market occurs on the last two trading days of the week. Moreover, the main factors of the existence of seasonal patterns in returns and volatility are measurement errors, trading delay and settlement differences, and non-trading periods, timing of corporate news releases, and time zone differences.[98]

Asiri and Alzeera conducted a test for the weak-form market efficiency of the Saudi stock market between 2006 to the end of 2012. The study concluded that the Saudi stock market was weak-form efficient,[99] because there are no investors who could generate significant returns with an investment formula based on information gleaned from prior data and technical analysis, at least on an ongoing basis.[100]

Al-Ajmi and Kim evaluated in 2012 the GCC stock markets, to determine whether these markets are efficient in the weak form. The study used three new multiple variance tests, including wild bootstrap test of Kim, joint sign test of Kim and Shamsuddin, and the Chen and Deo's test.[101] The study concluded that all GCC markets are inefficient in the weak form. The findings hold for both observed returns and the returns corrected for thin trading in all markets. The result against market efficiency is stronger when the daily data is used.[102] The study indicated the reasons behind inefficiency in the weak form in the GCC markets including relatively low institutional ownership, significant government ownership of listed companies, prohibition of short sales in all markets, the limited number of brokerage firms publishing analysts recommendations, none of which published analysis forecasts, non-availability of derivatives for trading in all markets, with the exception of Kuwait, and the failure in matching international standards, although all markets had taken a number of measures to improve disclosure level, transparency and corporate governance requirements.[103]

However, a recent study was more hopeful. In 2014, Jamaani and Roca tested the GCC stock markets to find out whether GCC stock markets are weak form efficient both as single markets and as a regional stock market.[104] The study employed daily index prices denominated in local currencies for the period from the end of December 2003 to the end of January 2013 by applying a number of tests.[105] Findings and results of the study proved that all GCC stock markets are not weak form efficient, in the sense that current stock price movement can be predicted from past price movements. As the efficiency of GCC as a regional stock market, the result is that GCC stock market prices is co-integrated in the long run, so that the past movements of other GCC market prices can predict the movement of individual GCC stock market prices.[106]

IV. Conclusion

The inefficiency that contributed to the 2006 crash can be traced back several decades. The bottom line is that the market's infrastructure was insufficient to support a growing economy. Although the existing capital market served a vital function until the economic expansion in the 1970s and 1980s, it was inadequate for a modern economy and modern people. For whatever reason, the government chose not to take a remedial action until after the crisis was already in motion. Progress has been made, but some substantial structural deficiencies still need to be addressed, particularly in terms of transparency and the flow of information.

This overall inefficiency came to light in the crash of 2006. It was, in many ways, the perfect storm: the government, the media and the investors themselves all bear some measure of responsibility for the crash. The fact that the crash was an unprecedented event helps explain some of the actions, and inactions, that took place around that time, and in the years leading up to the crash. Government policies at the time are a very good example. Due to their inexperience, and also due to a lack of cooperation and coordination among SAMA, CMA, and others, the decision-makers often took actions without considering the long-term consequences. In many cases, these shortsighted moves simply made a difficult situation almost unbearable.

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[97] *Id*.
[98] Al Ashikh, Abdullah I. (2012). *Testing the Weak-Form of Efficient Market Hypothesis and the Day-Of-The-Week Effect in Saudi Stock Exchange: Linear Approach*, Int'l Rev. Bus. Res. Papers, 8, 27, 48.
[99] Asiri, Batool Kasim & Alzeera, Hamad, (2013). *Is the Saudi Stock Market Efficient? A Case of Weak-Form Efficiency*, Res. J. Fin. & Acct., 4, 35, 41. In this study, four tests are applied: Dicky-Fuller unit root, Pearson correlation coefficient, Durbin-Watson (autocorrelation), and Wald-Wolfowitz runs-tests.
[100] *Id*.
[101] These tests are well known to have desirable small sample properties. *See* Al-Ajmi, Jasim & Kim, J. H. (2012). *Are Gulf Stock Markets Efficient? Evidence from New Multiple Variance Ratio Tests*, Applied Economics, 44, 1737, 1746.
[102] *Id*.
[103] *Id*. at 1746-47.
[104] Jamaani, Fouad & Roca, Eduardo, (2014). *Are the Regional Gulf Stock Markets Weak-Form Efficient as Single Stock Markets and as a Regional Stock Market?*, Res. Int'l Bus. & Fin., 33, 221, 244.
[105] Jamaani and Roca applied in the study different tests including a battery of parametric, nonparametric, unit root, and Johansen co-integration tests. *Id*.
[106] *Id*.

Just as the crash had an impact on other nations, there are also lessons that other nations may glean from Saudi Arabia's experience. Countries should take a proactive approach to market fairness and transparency by not only passing concrete laws that prohibit insider trading and manipulation, but also enforcing these laws in a consistent and firm manner. Additionally, governments should not hesitate to ask for assistance from other nations or international organizations like the World Bank or IMF when it appears that their capital markets might reach a crisis point. Moreover, World Bank or IMF recommendations should be fully and seriously considered.

Now, based on the capital market's current situation, it clearly appears that the Kingdom of Saudi Arabia is on the right track. There are laws and regulations in place to help ensure fairness and transparency. While these laws will not prevent another crash, because no statute has such a capability, the capital market's legal and economic infrastructure is well positioned to, if nothing else, minimize and contain the fallout from any sharp declines that inevitably will occur in the future.

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DOMESTIC VIOLENCE AND SCHOOL BULLYING: AN EXAMINATION OF THE INEXTRICABLE LINK BETWEEN THE TWO AND THE USE OF RESTORATIVE JUSTICE TO BREAK THE CYCLE

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ABSTRACT

Domestic violence, which takes place within the home environment, and school bullying, which takes place within the compulsory education system, are inextricably linked. They both involve unauthorised force or violence, either psychological, emotional or physical. They both cause harm to the victim, the perpetrator and the wider community. This paper discusses the causal link between these two acts of violence and proposes a system of restorative justice to break the cycle.

Key words: School bullying, domestic violence, law enforcement, restorative justice.

1. Introduction & Rationale

Over the past several decades the issue of bullying in Australian and international schools has gained increasing prominence because of the impact that it has on a student's psychological well being, welfare and ability to succeed scholastically.[1] Concurrently there has also been an increased awareness of the issue of domestic violence and the impact that this has on all parties involved. This paper discusses the inextricable link between these two issues and the need to address the issue of school bullying via a system of restorative justice within the school itself to break the cyclical link between domestic violence and school bullying. This process has an impact on the educational provider, the individual's involved and wider society. Whilst the focus is on the Australian experience, it is submitted that there are implications which could be world wide.

Clear statistics have emerged that both domestic violence and school bullying have developed into significant issues impacting large numbers of people. Statistics from the Federal government of Australia indicate that 1 in every 4 children between the ages of 4 and 9 fall victim to school bullying,[2] and more than a quarter of students between the ages of 10 and 16 were bullied every few weeks or more during a school term.[3] Whilst the following statistics demonstrate the prevalence of domestic violence within Australian society. The Australian Bureau of Statistics estimated in 2013 that at least 23% of women in Australia had experienced domestic violence.

There can be little doubt that both domestic violence and school bullying are important social issues, but what is less well known is the cyclical link between the two issues. In this paper we state:

1.1 School bullying and domestic violence are both acts of violence that have devastating, potentially life threatening impacts upon all of the parties involved, but especially children. School bullying and domestic violence both have a significant impact on the psychological, emotional and academic development of the child[4]

[1] Lee A Beaty and Erick B Alexeyev, 'THE PROBLEM OF SCHOOL BULLIES: WHAT THE RESEARCH TELLS US' (2008) 43 ProQuest Social Science Journals, 1. <http://njbullying.org/documents/beaty-adolesc-research3-08.pdf>. Kevin Petrie, Student Peer Bullying: A Brief Overview Of The Problem And Some Associated Myths (2013) Research.avondale.edu.au, 4. <http://research.avondale.edu.au/cgi/viewcontent.cgi?article=1118&context=teach>. Also, Findlaw.com.au, Bullying At School (2015) <http://www.findlaw.com.au/articles/230/bullying-at-school.aspx>.

[2] Nobullying.com, General Bullying Statistics (2014) <http://nobullying.com/general-bullying-statistics/>.

[3] Qld.gov.au, Bullying And Cyberbullying Facts | People With Disability | Queensland Government (2013) <https://www.qld.gov.au/disability/children-young-people/bullying/facts.html>.

[4] For a better understanding of the impact of domestic violence on children see: Effects of domestic violence on children.
Penelope K Trickett and Cynthia J Schellenbach, Violence Against Children In The Family And The Community (American Psychological Association, 1998. See also, Kathleen J. Sternberg et al, 'Effects Of Domestic Violence On Children's Behavior Problems And Depression.' (1993) 29 Developmental Psychology. See also, David A Wolfe et al, 'The Effects Of Children'S Exposure To Domestic Violence: A Meta-Analysis And Critique' (2015) 6 Clinical Child and Family Psychology Review <http://www.learningtoendabuse.ca/sites/default/files/Wolfe%20Crooks%20Lee%20(2).pdf>. See also, John W. Fantuzzo and Wanda K. Mohr, 'Prevalence And Effects Of Child Exposure To Domestic Violence' (1999) 9 The Future of Children. See also, Stephanie Holt, Helen Buckley

1.2 Whilst domestic violence and school bullying are both defined as a crime, law enforcement traditionally, except in exceptional circumstances, is only applied to domestic violence. School bullying is usually captured and dealt with under the various and differing policies operating in individual schools.

1.3 Without knowing any better and by mimicking the behaviour of role models within the home, children potentially replicate the domestic violence they may witness in the home within the school they attend.

1.4 Used within the schooling environment by administrators of the school, restorative justice can improve the environment for the child by resolving school bullying conflicts in a more appropriate manner and break the nexus between domestic violence and school bullying.

We advocate for a recognition of the clear link between domestic violence and school bullying and promulgate the process of restorative justice as a means of breaking this cycle.

2. The similarities between school bullying and domestic violence

2.1 School bullying and domestic violence defined

School bullying and domestic violence are both acts of abuse and destruction. They both consist of an imbalance of power relations between the parties and an abuse of that power relationship. That is, the perpetrator uses their power over the victim to make them feel powerless, frighted, alone, intimidated and anxious. The perpetrator is in a position to manipulate their victim into doing anything that they want.

School bullying can be defined as a systematic abuse of power in a relationship formed at school characterised by:

1. Aggressive acts directed towards victims that a reasonable person would avoid

2. Acts which usually occur repeatedly over a period of time

3. Acts in which there is an actual or perceived power imbalance between attacker and victim(s), with victim(s) often being unable to defend themselves effectively from per attacker.[5]

Although not simply about physical abuse[6], domestic violence can be defined as "...pattern of abusive behaviour in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person. This includes any behaviour's that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone."[7]

2.2 The connection between school bullying and domestic violence

According to Baldry there is an inextricable link between school bullying and domestic violence.[8] That is school bulling often stems from situations in which the bully is exposed to inter-parental physical and psychological violence within the home and the student normalises these experiences and acts them out when in a schooling environment.

The following diagram demonstrates some of the key links between domestic violence and school bullying:

Diagram 1: Similarities of school bullying and domestic violence

Bullying	**Domination**	• Power imbalance
		• Controlling
	Abuse	• Harm
		• Manipulation
	Intimidation	• Terrorising
		• Threatening

and Sadhbh Whelan, 'The Impact Of Exposure To Domestic Violence On Children And Young People: A Review Of The Literature' (2008) 32 Child Abuse & Neglect.

[5] Peter K Smith and Sonia Sharp, School Bullying (Routledge, 1994). Cited in, S.A Hemphill, J.A. Heerde and R. Gomo, 'A Conceptual Definition Of School-Based Bullying For The Australian Research And Academic Community' [2014] Australian Research Alliance for Children and Youth, 2. <https://www.aracy.org.au/publications-resources/command/download_file/id/265/filename/A_Conceptual_definition_of_School-Based_Bullying_-_FINAL_JUNE_2014.pdf>.

[6] Santi Owen and Kerry Carrington, 'Domestic Violence (DV) Service Provision And The Architecture Of Rural Life: An Australian Case Study' (2015) 39 Journal of Rural Studies.

[7] Justice.gov, Domestic Violence | OVW | Department Of Justice (2015) <http://www.justice.gov/ovw/domestic-violence>.

[8] Anna C Baldry, 'Bullying In Schools And Exposure To Domestic Violence' (2003) 27 Child Abuse & Neglect.

Many of the physical, verbal and non verbal characteristics associated with school bullying and domestic violence are identical. The following diagram illustrates many of those similarities:

Diagram 2: Comparisons between school bullying and domestic violence

School Bullying	Domestic Violence
Physical: Hitting Pulling hair Spitting Throwing objects Pushing Biting Scratching Damaging property Pinching	**Physical:** Hitting Pulling hair Spitting Throwing objects Pushing Biting Scratching Damaging property Pinching
Verbal: Verbal insults Name calling Racist remarks Intimidation Abusive language Sexually suggestive remarks Abusive telephone calls Spiteful teasing Abusive electronic messages	**Verbal:** Verbal insults Name calling Racist remarks Intimidation Abusive language Sexually suggestive remarks Abusive telephone calls Spiteful teasing Abusive electronic messages
Non-Verbal: Threatening/obscene gestures Ignoring Removing and hiding belongings Isolating Manipulating and/or ruining friendships Deliberate exclusion from group or activity Financial controlling	**Non-Verbal:** Threatening/obscene gestures Ignoring Removing and hiding belongings Isolating Manipulating and/or ruining friendships Deliberate exclusion from group or activity Financial controlling

2.2 Bullying and domestic violence - the endless cycle of violence

Both bullying and domestic violence behaviours are learnt from an early stage in life. Children who are exposed to domestic violence, or bullied by their parents, siblings or members of their extended familles without any form of intervention are much more likely to suffer from psychological harm and to continue to perpetuate this violence outside of the home. This is noted by Coleman who categorically states "Those who are bullied as young individuals end up having a greater probability of abusing in later years"[9] This then means that children who witness or are the victims of domestic violence are likely, without intervention, to normalise this type of behaviour and perpetuate it within the schooling environment. That normalised behaviour has an impact on their psychological development. Bullies may see their behaviour as not only normal, but as something that is praised or rewarded if it is normalised by parents.

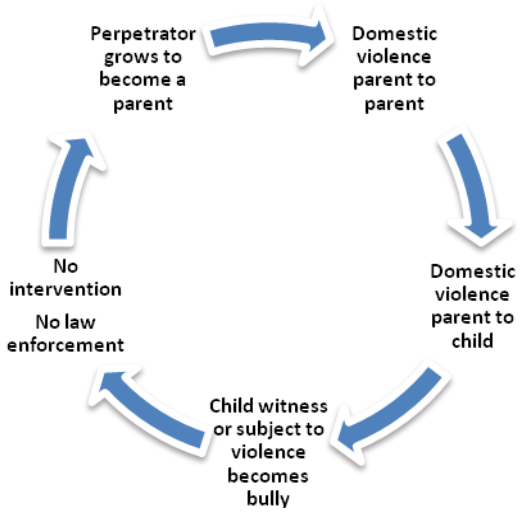
Similarly Cohen notes that there "is a significant correlation"[10] between domestic violence and school bullying, but that this cycle or connection can be broken if intervention is taken at the school level, particularly by school administrators. This means that school administrators will be required to take positive action towards addressing the problem and to take steps towards its reoccurrence. Cohen notes "Kids who get effective treatment such as trauma focus, cognitive behavioural therapy or other effective treatments in childhood are not doomed to go on to have these negative power and control focused relationships in adulthood...They can go on to have positive equal relationships."[11] These comments from Cohen strengthen the point we make that there is an inextricable link between domestic violence and school bullying which, if not addressed through some restorative measures, will continue.

[9]Pittsburgh.cbslocal.com, Study Finds Connection Between Bullying, Domestic Violence (2011) <http://pittsburgh.cbslocal.com/2011/06/06/study-finds-connection-between-bullying-domestic-violence/>.
[10] As above, n 9.
[11] As above, nn 9- 10.

Children learn vital life skills by observing the interactions of their parents so that "parents are a very powerful role model for their children; children mimic the behaviour of their parents."[12] Figures from the Australian Human Rights Commission indicate that approximately 60% of family violence that occurs is witnessed by children and young adults.[13] When domestic violence becomes a way of life in a household, children are more likely to use violence towards each other in the home and in the schooling environment.[14] Thus an endless cycle of violence develops. By failing to intervene and allowing a bully to act within a schooling environment the bully's approach to defiance increases and there becomes the potential that they will go onto commit other offences as well as continue the same cycle within their new family when they become parents.

Certainly this is the view of Bowers, Smith and Binney, who as a result of a research study conducted towards the end of the twentieth century, found that children who bully are more likely to come from family environments where domestic violence occurred or was normalised.[15] The following diagram illustrates the perpetual nature of this cycle:

Diagram 3: Endless cycle of violence



The above diagram is also representative of the views of Kothari who clearly indicates the link between domestic violence and school bullying and advocates a breaking of this cycle when they state "If a child always falls victim to bullying, with no outside help or intervention, this child may grow to feel that this is the best they deserve to be treated in their relationships – hence making them more vulnerable to domestic violence later in life"[16] Hence we actively advocate of a strengthening of an intervention role for school administrators to break the cycle.

3. Law enforcement

3.1 School bullying and domestic violence law enforcement

In this paper we indicate that law enforcement means that the prescribed court based and statutory laws are enforced by the relevant government authorities. In most instances this would mean the involvement of a state based police force, although this may vary in different parts of the world. In Australia there are a serious of stated based, but also federally based laws which are designed to protect an individual from physical violence, harassment, threats and intimidation, but we submit that these laws are not being consistently or uniformly applied in the schooling environment. Similar laws exist throughout the world.

3.2 Relevant Australian Federal and State legislation

The problem with dealing appropriately with school bullying and domestic violence is not that there are a lack of appropriate laws, rather the problem is that these laws are not consistently applied with respect to school bullying. Throughout Australia there exists a plethora of legislation which relates to bullying, harassment, discrimination and violence. Inter alia, this includes:

[12] Joel Schwarz, Violence In The Home Leads To Higher Rates Of Childhood Bullying | UW Today (2006) Washington.edu <http://www.washington.edu/news/2006/09/12/violence-in-the-home-leads-to-higher-rates-of-childhood-bullying/>.
[13] AIHW, A Picture of Australia's Young People (2009). Cited in, Bullying.humanrights.gov.au, Children And Young People | Bullying (2015) <https://bullying.humanrights.gov.au/violence-harrassment-and-bullying-children-and-young-people-5#fnB66>.
[14] Schwarz, As above, n 12.
[15] L. Bowers, P. K. Smith and V. Binney, 'Perceived Family Relationships Of Bullies, Victims And Bully/Victims In Middle Childhood' (1994) 11 Journal of Social and Personal Relationships. Cited in Jodie Lodge, 'Children Who Bully At School' [2014] Australian Institute of Family Studies Child Family Community Australia.
[16] Chevon Kothari & Todd Herrenkohl (2007) 'The Link Between Bullying and Domestic Violence', <http://www.anti-bullyingalliance.org.uk/media/2279/thelinkbetweenbullyinganddomesticviolence.pdf>

1. Disability Discrimination Act 1992 (Cth)
2. Human Rights and Equal Opportunity Commission Act 1986 (Cth)
3. Racial Discrimination Act 1975 (Cth)
4. Racial Hatred Act 1995 (Cth)
5. Sex Discrimination Act 1984 (Cth)
6. Criminal Code 1899 (QLD)
7. Crimes Act 1900 (NSW)
8. Crimes Act 1958 (VIC)

3.3 Examples of legislation in context

There exists various versions of a Crimes Act throughout Australia which declare, from a statutory perspective, what matters would be considered a crime by each respective state. In the context of this paper it is relevant to discuss the matter of assault and to examine how this is deal with via statutory law and then to examine how this is represented in a schooling environment. Take for example the provisions of assault as set out in legislation in New South Wales and Queensland.

Section 245(1) of the Criminal Code 1899 (QLD) deals with assault and provides for the following:

> A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an assault.

Section 59(1) of the Crimes Act 1900 (NSW) deals with assault and provides for the following:

> Whosoever assaults any person, and thereby occasions actual bodily harm, shall be liable to imprisonment for five years.

From these sections, a fairly clear definition of assault could be taken that it is the use of unauthorised force by one individual against another individual. Whilst these provisions are enforced regularly against ordinary citizens, including those involved in domestic violence situation (with some discretion by relevant police enforcement agencies), they are rarely enforced against school students who may well engage in assault within the definition of these provisions but within the schooling environment. The point we make is that many types of school bullying involve assault as defined under statute law, but this is rarely enforced by the police. Rather the situations are dealt with by school administrators in ways which may not effectively resolve the physical and psychological problems which result.

Bullying which involves unauthorised physical contact is an example of assault, which depending upon its severity can lead to significant punishments. Whilst a child under 10 years of age is understood to lack the ability to understand the criminality of their actions (doli incapax) and cannot, save for exceptional circumstances, be charged with committing a criminal offence, there still remains a significant number of potential perpetrators who would be over the age of 10 years of age who could be charged with committing a criminal offence but are not prosecuted simply because they are a student. An argument could be made that this occurs because the assault is deemed to be of a minor nature, but as the various provisions above demonstrate there is no such prohibition under the law for deciding that something is a minor assault. Rather this is for the court to determine, rather than school administrators.

Of course assault is not necessary the only example of school bullying which may constitute a criminal offence. The following table proves some further examples of bullying activities which could also constitute criminal offences:

Table 1: Maximum penalties for bullying offences

Offence committed	Maximum penalty
Menacing, harassing or offensive use of the internet or a mobile: It is a crime, to use a phone or the internet to threaten, harass or seriously offend a person. A message or post could be considered offensive if it is likely to cause serious anger, outrage, humiliation or disgust.	3 years gaol
Threats and intimidation: It is a crime to intentionally frighten someone by threats or intimidation. This can be via your phone, text message, emails or online posts or threatening to kill someone.	10 years gaol
Stalking: Stalking occurs when a person receives repeated attention that intimidates or frightens them. Stalking can include making unwanted phone calls, emails, text messages and messages via social media platforms. Stalking is a crime in NSW if you intend to cause the other person to fear for their own safety.	5 years gaol
Defamation: It is a crime in NSW to publish untrue information about someone in order to cause them serious harm.[17]	3 years gaol

[17] Lawstuff.org.au, Lawstuff Australia - Know Your Rights - - Topics - Bullying - Cyber Bullying (2015) <http://www.lawstuff.org.au/nsw_law/topics/bullying/cyber-bullying>.

3.4 Specific legislation for schools

In New South Wales, the Crimes Act contains specific provisions for some matters which may occur within a schooling environment. This includes section 60E, headed 'Assaults etc at schools' which states:

> (1) A person who assaults, stalks, harasses or intimidates any school student or member of staff of a school while the student or member of staff is attending a school, although no actual bodily harm is occasioned, is liable to imprisonment for 5 years.
> (2) A person who assaults a school student or member of staff of a school while the student or member of staff is attending a school and by the assault occasions actual bodily harm, is liable to imprisonment for 7 years.
> (3) A person who by any means:
> (a) Wounds or causes grievous bodily harm to a school student or member of staff of a school while the student or member of staff is attending a school, and
> (b) is reckless as to causing actual bodily harm to that student or member of staff or any other person, is liable to imprisonment for 12 years.

It is therefore evident that, at least at a governmental level, there is an awareness of dealing with these matters at a special level. However, what is also evident is that these special provisions are rarely enforced. What appears to be occurring is that either the schools themselves do not involve the police who could begin prosecution proceedings against an accused individual student who was suspected of committing one of these offences, or when the police are involved they use their discretion not to proceed to prosecution at all or when they do prosecute they choose not to lay charges under these specific provisions, but lay charges instead under more general provisions which carry lighter punishments.

So whilst all schools in Australia are required to design and implement their own bullying policies within the school, the policies contents and enforcement are matters left to the discretion of the school principal or school administrator. It is the school principle/administrator who, in consultation with the wider school environment, decides what the contents of the policy will be, how the policy will be presented to staff and students, how students will be educated about the policy, and how the policy will be enforced. That is, it may be the case that a school principle/administrator decides that there may be no legal repercussions if the policy is broken. The school principle/administrator therefore wields enormous power in dealing with school bullying matters.

It is the enforcement part of the policy which is critical. If the principal/administrator, for example, decides rarely to or never to enforce the policy then that policy is of little value. Unless the principal/administrator chooses to actively enforce the policy and follow through with the full legal consequences of actions that bullies have undertaken then there is once again little value to the policy. Protecting a school bully within the schooling environment may seem like the best thing to do for the bully, but this isn't necessarily the correct course of action to take.

A principal/administrator who chooses to suspend a student who was involved in bullying, may be following the stated policy but choosing to ignore the legal consequences of the activities of the offending student. In effect they are 'sweeping the problem' under the carpet and there is a stigma attached to bullying which can portray a negative image to the wider society and potentially have impacts on school enrolments and funding. Whilst this suspension may in the short term solve the problem that the school has of dealing with a disruptive situation, it does not permanently solve the problem.

It is only via actually enforcing the law that student's learn the consequences of their behaviour. That is, the school's and an individual principal's/administrator's discretion should be removed in deciding whether to report the criminal actions of students to the police. It should be a matter for the police, once they receive notification of a potential crime, to decide how to proceed with and resolve the matter as prescribed by the relevant law. A culture which does not promulgate a law enforcement regime sends a clear message to the bully that there are little to no consequences flowing from their actions.

4. Walgett case study

Walgett Community College[18] is an example of a school located in New South Wales which can be used to demonstrate a number of the points made in this paper. Including that the existing procedures of dealing with school bulling are ineffectual.

Over the past decade, although the school had a mandated bullying and harassment policy in place, it was demonstrated to not be working. Students at the school were failing academically, and exhibited significant social and psychological problems. Due to the systemic violence at Walgett Community College, which included serious violent instances which resulted in some children transferring to alternate schools hundreds of kilometres away, Walgett Community College has become the first school in the state to have a police officer permanently located on site.

There was a long history of bullying and violence amongst the students and between students and staff at the school. The school had attempted to often deal with bullying and violence matters within the school and this had failed. Hence all matters are now directly referred to the police that are stationed onsite. Whilst the decision to station police at the school has only recently

[18] Julie Power, Walgett Community College A Hotbed Of 'Violence And Criminal Behaviour' (2015) The Sydney Morning Herald <http://www.smh.com.au/nsw/walgett-community-college-a-hotbed-of-violence-and-criminal-behaviour-20150422-1mqfvj.html> accessed 18/9/2015.

occurred, the police involved are hopeful that they can provide a resolution to the problems that exist, with one police officer commenting "Over the past month there've been no incidents."[19]

5. Restorative justice

5.1. What is restorative justice?

At present there appears to be no universal definition of 'restorative justice'. It has been described by Marshal as "a process whereby all the parties in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implication for the future." [20] McCold and Wachtel describe it as "a process where those primarily affected by an incident of wrong doing come together to share their feelings, describe how they were affected and develop a plan to repair the harm done or prevent reoccurrence."[21] Therefore for the purposes of this paper the term 'restorative justice' shall be taken in its broad sense to mean that all parties come together in an attempt to resolve a conflict in an amicable, non judicially binding manner, designed to prevent a recurrence of the same type of instance.

5.2 The significance of implementing restorative justice in schools

It is unlikely that simply enforcing the established law without any type of early intervention will satisfy the desires of the wider community. That is, whilst there will always be a section of the wider society that was completely pro law enforcement and would only accept that an accused person was subject to the full force of the law, it is submitted that the majority of the community would be satisfied via discretion being used in law enforcement in conjunction with restorative justice principles. That is, not simply letting the perpetrator escape with out any consequences, but using the principles of restorative justice to 'educate' them about the consequences of their actions.

Restorative justice is best used to repair the damage done by the bully as well as addressing the needs of the victim, assisting in healing and reconciliation between the victim and the perpetrator. Restorative justice leads to a better understanding of why the abuse originally occurred as well as providing for strategies to ensure that its potential for reoccurrence is limited.

5.3 Examples of restorative justice that could be used

Whilst it is not the intention of this paper to discuss in detail the types of restorative justice that can be used within the schooling environment to break the cycle between domestic violence and school bullying, it is nonetheless useful to provide a few examples of the types of activities we suggest could be used to good effect. These include:

5.3.1 Restorative justice example one

Conference/group mediation/early intervention: this involves a meeting with the victim, perpetrator and their parents/ guardians. This is done by giving the victim support and understanding, and encouraging the perpetrator to take responsibility for their own actions, and helping both the victim and perpetrator to reintegrate within the school and interact better with their peers.

5.3.2 Restorative justice example two

Restorative practice: once the bully has been identified they will be made to do an assignment on the harm caused to the victim, which will also help the perpetrator to learn that their taunting and harassment comes with devastating consequences for their victim. During this stage the perpetrator will be encouraged to write an apology to their victim, family and wider school community. The letter for the victim will be read by the perpetrator to their victim and family during the mediation process. [22]

6. Conclusion

There can be no doubt that domestic violence and school bullying are linked in a concomitant way. Domestic violence and school bullying are both acts of violence. The current system lets down the victims, families, community and the perpetrator by not taking seriously actions towards the growing epidemic of bullying. School bullying needs to be appropriately addressed via law enforcement mechanisms, including restorative justice, from the beginning of schooling to teach children that their actions are serious and that there are real consequences if their actions breach the law.

Children learn bullying type behaviours such as discrimination, racism and violence from role models in their lives including their parents. If parents model this type of behaviour it is not unexpected that it would be replicated in the schooling environment. When schools then fail to properly deal with this same problem by involving law enforcement mechanisms it sends

[19] Philippa McDonald, Police Stationed Inside Troubled Walgett School (2015) ABC News <http://www.abc.net.au/news/2015-07-05/police-stationed-inside-troubled-walgett-school/6590964> accessed 18/9/2015.
[20] Tony F. Marshall, 'The Evolution Of Restorative Justice In Britain' (1996) 4 European Journal on Criminal Policy and Research, 21-43 (4).
[21] Paul McCold and Ted Wachtel, In Pursuit Of Paradigm: A Theory Of Restorative Justice (2003), 4. http://www.iirp.edu/ <http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/paradigm.pdf>.
[22] This will also open the door for the perpetrator to speak about how they feel and give them the chance to make things right. Ken Rigby, 'What Can Schools Do About Cases Of Bullying?' (2011) 29 Pastoral Care in Education.

a clear message to children that this type of behaviour is acceptable. This is a cycle which is doomed to be repeated unless their is some type of intervention.

This paper has advocated the use of restorative justice in schools to address this problem and break the cycle. Whilst we acknowledge that there may be other methods besides restorative justice to achieve the same result of breaking the cycle, by using restorative justice children learn that they are breaking the law at an early stage in their lives and that there are serious consequences for their actions. We advocate that schools be obliged to use restorative justice mechanisms to teach all students that domestic violence is not normal behaviour, has profound consequences for all parties involved, is against the law, and is not acceptable.

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LEGAL POLITICS OF WATER RESOURCES REGULATIONS IN INDONESIA

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ABSTRACT

Implementation of watershed management and conservation of soil and water are not corelation directly with the cancellation of Law No. 7 of 2004 on the Water Resources Act, as a basic regulation been regulated in Law Number 37 of 2014 on the Soil and Water Conservation which is currently in the process of completion and harmonization at the State Secretariat. As we know that the cancellation of Law No. 7 of 2004 on Water Resources by the Constitutional Court with Decision No. 85 / PUU-XII / 2013 dated February 18, 2015, stems from a request Testing Act proposed by 11 (eleven) applicant through their Legal Counsel to Assembly Law Team and Human Rights of Muhammadiyah and the petition filed on September 23, 2013.

Key words: Legal, Politic, Water Resources, Regulation.

A. Introduction

According to Bagir Manan, the conception of a modern constitutional state is the combination of the concept of rule of law and the welfare state. In this concept of state or government task not solely as security or public order, but have responsibility for social justice, general welfare and the greatest prosperity.1 In their petition, the Petitioners filed a 10 (ten) norm Act on Water Resources, which is the norm of Article 6 paragraph (2), Article 6 paragraph (3), Article 7, Article 8 paragraph (1), Article 8 (2), Article 9 paragraph (1), Article 11 paragraph (3), Article 29 paragraph (3), Article 40 paragraph (4), Article 49 to be declared contrary to the 1945 Constitution and has no binding legal force, as follows:

1. Article 6 (2): The control of water resources referred to in paragraph (1) is held by the Government and / or regional governments based on customary rights of indigenous and local communities rights serupadengan that, to the extent not contrary to the national interests and regulations legislation.
2. Article 6 (3): customary rights of indigenous people on water resources as referred to in paragraph (2) continues to be recognized throughout the reality is still there and has been confirmed with local regulations.
3. Article 7: Paragraph (1) The right to water as referred to in Article 6 paragraph (4) in the form of water utilization and water exploitation rights .; Paragraph (2) The right to water as referred to in paragraph (1) can not be rent or transferable, partially or completely.
4. Article 8 (1): Water utilization right was obtained without permission to meet daily basic needs for individuals and for the people who are farming in irrigation systems.
5. Article 8 (2): The right to use water as referred to in paragraph (1) requires a permit if:
    a. How to use it is done by changing natural conditions water sources;
    b. Intended for groups that require amounts of water big; or
    c. Used for farming folk outside the existing irrigation system.
6. Article 9 paragraph (1): water exploitation rights may be granted to an individual or entity with the permission of the Government or regional government in accordance with their authority.
7. Article 11 (3): The preparation of water resources management scheme as referred to in paragraph (2) is done by involving the community and business world widely.
8. Article 29 paragraph (3): Provision of water to meet daily basic needs and irrigation for the agricultural community within the existing irrigation systems is a top priority in the provision of water resources for all needs.
9. Article 40 paragraph (4): cooperatives, private enterprises, and the public can participate dalampenyelenggaraan minum.Pengaturan development of water supply system for the development of water supply system aims to:
    a. The creation and management of drinking water services quality at an affordable price;
    b. The achievement of the balance between the interests of consumers and providers services; and
    c. Increased efficiency and coverage of drinking water services.
10. Article 49: Paragraph (1) The utilization of water for other countries are not allowed, except for the provision of water for various needs as referred to in Article 29 paragraph (2) were met; Paragraph (2) The utilization of water for the other countries

1 Bagir Manan, *Politik Perundang-undangan dalam Rangka Mengantisipasi Liberalisasi Perekonomian*, FH-UNILA, Bandar Lampung, 1996, Hlm. 16.

referred to in paragraph (1) shall be based on water resources management plan sungaiyang region concerned, and considering the interest in the surrounding area; Paragraph (3) The water utilization plan for the other countries is done through a process of public consultation by the government in accordance with its authority; Paragraph (4) The utilization of water for the other countries referred to in paragraph (2) and (3) must obtain a permit from the Government on the recommendation of the local government and in accordance with legislation.

B. Problems

How create legal politics of Water Resources Regulation in Indonesia?

C. Methods

1. Method of Approach.

The approach used in the research problem is to use an empirical approach and normative approach. The study documents the analysis consists of legislation and various policies relating to the subject matter studied in Jabodetabek area and the problems it faces and report the results of the various meetings, seminars, public hearings and so on.

2. Types and Sources of Data

The data used in this study can be classified into two types:

a. Primary Data
   The primary data sources such as interviews, questionnaires and observations from the field.

b. Secondary Data
   Secondary data sources include primary legal materials, secondary and tertiary, which include: laws, government regulation and other legislation relating to the policies in the Local Government as well as the applicable provisions that support the research data.

3. Methods of Data Collection

To obtain the data of primary legal materials and secondary legal materials and legal materials tertiary study conducted with business documents or literature studies which include data collection efforts by visiting libraries, reading, literature review and study materials that have a strong link with subject matter. Furthermore, the data obtained, edited, specifically identified objectively and systematically, clarified, presented and then analyzed further in accordance with the objectives and research problems. To obtain primary data conducted in-depth interviews with stakeholders, questionnaires, field surveys, and also performed in the form of colloqium with relevant sources, as well as intensive discussions with the participants is limited.

4. Data Analysis

Data were analyzed inductively, all existing data is interpreted and translated by basing on the prevailing theories. The analysis model is used interactively (Interactive Model of Analyis). This analytical model includes four phases: data collection, data reduction stage, stage presentation of the data and drawing conclusions stage of verification or interactive, as visualized in the following cycle materials.

D. Analysis and Discussion

1. The 1945 Constitution

One state institution that is present after the 1945 changes (Third Amendment) is the Constitutional Court, which determined its authority under Article 24C of the Constitution NRI 1945, called: (1) a law against the Constitution; (2) rule on the dispute the authority of state institutions whose authorities are granted by the Constitution; (3) dissolution of political parties; (4) to decide disputes concerning the results of the election. The authority is in the first and final level, and the Constitutional Court decision is final, that directly has permanent legal force and there is no attempt to change the law. In addition to the authority, the Constitutional Court is also obliged to examine, hear and decide on the opinion of the House that the President and / or Vice President has violated the law in the form of treason, corruption, bribery, other felonies, or misconduct, and / or opinions that the President and / or Vice President is no longer qualifies as President and / or Vice President (Article 7B). It should be noted that this decision is not final because its subject (subject to) the decision of the Assembly, a political body that is authorized to dismiss the President (Article 7A). So different in the United States that put the political process rather than the process hukum.2

Under the authority of the Court is the guardian of the constitution associated with the four powers and the obligations it has. That brings consequences MK serves as interpreter of the Constitution. The Constitution as the supreme law regulating the conduct of states based on the principles of democracy and a constitutional function is to protect the human rights guaranteed in

2 Ni'matul Huda, *Politik Ketatanegaraan Indonesia Kajian Terhadap Dinamika Perubahan UUD 1945*, Cetakan Kedua, FH UII Press, Yogyakarta, 2004, Hlm. 195-200.

the constitution so that the constitutional rights of citizens. Therefore, the Court also serves as a guardian of democracy, protector of citizens' constitutional rights as well as the protector of human rights.3

The subject matter is the reason for the Petitioners in this case:

1. That Testing Act (PUU) This is a test back, because previously the Court has issued a ruling on the SDA Law Case Number 058-059-060-063 / PUU-II / 2004 and Case Number 008 / PUU III / 2005 in a verdict declared rejected Applicant.

2. The applicant in perkaraNomor 85 / PUU-XI / 2013 view of the fact that the opinion of the Court which gave guidelines in the management of natural resources as stipulated in consideration of Decision No. 058-059-060-063 / PUU-II / 2004 and Case Number 008 / PUU -III / 2005 ignored.

3. That the elaboration Decision No. 058-059-060-063 / PUU-II / 2004 and Case Nomor 008 / PUU-III / 2005 is not fully implemented because of the substance of the Act which gives leeway to foreign capital. Because historically, the formation of water resource Act originated from the government's need for donors who provide assistance to Indonesia in the face of crisis. Among other things one of the agreements made between the Indonesian government and the IMF some of them are directly related to the conglomeration and trade arrangements. This is evident in the provisions of Article 9 paragraph (1), Article 11 paragraph (3), and Article 14 of the Law on Water Resources.

4. The shift of responsibility in natural resource management appears from Regulation No. 16 Year 2005 on Development of Water Supply System (SPAM) Section 1 Item 9, which states, "Implementation of Development SPAM is the state / local enterprises, cooperatives, private enterprises, or group public. "where it should be according to Article 40 paragraph (2) of the water resources that SPAM development is the responsibility of the central government / local government.

5. In the description hereinafter, the Petitioners principally outlines some flaws / weaknesses of the Law on Water Resources to the argument as follows: 1) Law on water esources containing the charge control and monopoly of resources of water that is contrary to the principles of state-controlled and used for welfare of the people; 2) Law on water resources containing payload position that water use is skewed to commercial interests; 3) Law on water resources contains a payload that triggered social conflicts, especially between the river areas identified with the administrative area; 4) Law on water resources eliminate the responsibility of the state in water supply; 5) Law on water resources is discriminatory (Article 91) because it reduces everyone's right to defend life and living on its needs for water.

The Constitutional Court expressly in pertimbangannyamenggariskan six conditions for the development of water restrictions that are tight in order to preserve the availability and sustainability of water for the life of the nation in accordance with the basic principles adopted in Article 33 paragraph (4) of the 1945 Constitution. Furthermore, the Court found the requirement constitutionality of the water resources is that the Law on Water Resources in the implementation must ensure the realization of the constitutional mandate of the right of state control over the country's top water Which by 1945 is mandated to make policy (beleid), still holds the lead in carrying out the maintenance action (bestuursdaad), regulatory action (regelendaad), operations (behersdaad), and control measures (toezichthoudensdaad). The concept of the Right to Water rights should be distinguished from the concept of rights in a general sense. The concept of the Right to Water rights should be in line with the concept of res communes that should not be the object of prices in the economy. Right to Water has two properties: 1) the rights in personayang is a reflection of human rights and therefore inherent in human subjects who are inseparable. Embodiments of the nature of the first Right to Water exists on Right to Use Water; 2) The rights arising solely from the permission granted by the government or local government daerah. The principle of "beneficiaries of water resource management services required bear the costs of management "should be interpreted as a principle that is not placing water as an object to be charged the price is economics.

Thus, there is no water pricing as a component of calculating the amount to be paid by the beneficiaries. In addition, this principle must be flexible by not wearing the same calculation without considering the kinds of utilization of water resources. Therefore, farmers water users, users of water for agricultural purposes the people released from the obligation to finance water resource management services. Customary rights of indigenous people (MHA) surviving over resources. Water is recognized, in accordance with Article 18B (2) Constitution 1945. Adanya MHA provisions on strengthening of unity alive through the regulation must be interpreted as not constitutive but rather declarative. The Court found six Government Regulation (PP) which is prepared by the Government, namely: 1) Regulation No. 16 Year 2005 on Irrigation; 2) Regulation No. 20 Year 2006 on Irrigation; 3) Regulation No. 42 Year 2008 on the Management of Water Resources; 4) Regulation No. 43 of 2008 on Groundwater; 5) Regulation No. 38 Year 2011 on the river; and 6) Government Regulation No. 73 Year 2013 concerning Swamp, does not meet the six basic principles of water resources management restrictions as has been considered by the Court. But to Regulation No. 69 Year 2014 on the Right to Water, the Government has set them long after the Court ended the trial in this case, namely on March 18, 2014, so that the PP is not taken into account in this Decision.
The Constitutional Court at the end of the decision states clearly that the right of control by the state over the water is the "spirit" or "heart" of the Law on Water Resources. The enactment of the right of control by the state over the water as "spirit" or "heart"

3 See *Enam Tahun Mengawal Konstitusi dan Demokrasi, Gambaran Singkat Pelaksanaan Tugas Mahkamah Konstitusi 2003-2009*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, Cetakan Pertama, Jakarta, 2009, Hlm. 13.

of the overall implications for the cancellation of the norm in the Constitution of 1945. In addition, in order to avoid a legal vacuum, the court ruled that Act No. 11 of 1974 on Water reinstated.

2. Regulation of Watershed

Watershed is an area of land which is an ecosystem with a river and its tributaries which serves to accommodate, store, and drain the water from rainfall to the lake or the ocean naturally, that the limit on land is a topographic divider and the sea boundary to the irrigation area are still affected by land activities. Watershed management is man's attempt to control the interrelationship between human activities and natural resources (particularly soil, vegetation and water) in the watershed to obtain the benefits of the goods and services at the same time preserving the watershed and improve the welfare of society. Up to now no one institusipun that manages all aspects of the watershed is in intact from upstream to downstream, besides that there are many differences in the understanding of the definition of a watershed at the level implementers and decision makers. Watershed management objectives are: 1) the creation of watershed optimal conditions, such as adequate water yield (quality, quantity, and continuity) and controlled erosion, sedimentation, floods and droughts; 2) Increasing the productivity of land and the Environment; 3) Increased awareness, ability and public participation; 4) well-organized institutional watershed management; and 5) The realization of sustainable development and environmentally friendly. Watershed management is done through planning, implementation, monitoring and evaluation, coaching and supervision is carried out in accordance RTRWP and Resource Management Pattern Water. Watershed management implemented based Watershed Management Plan which has been set and the reference sector development plans and plans the construction of the restored river basin and watershed carrying capacity carrying capacity will be maintained. Medium Monitoring and evaluation shall be conducted in watershed management in both the recovery and maintaining the carrying capacity to obtain performance data.

In essence the construction of a conscious effort to manage and exploit natural resources, including land and water in order to improve the quality of life of the people. National development which is and will be implemented by the Indonesian people need land and water, both for the development of agriculture and infrastructure in all regions of the country. In the development of agriculture, the soil is a natural resource is a container / a nutrient for plants, the media for the growth and development of plant roots and storage of water in everyday life. In land used as an element of production to meet the needs of human life all the time, either in the form of food, clothing or boards. Indonesia recorded total area of ± 190 million hectares, of which including the critical area of ± 24.3 million hectares (2014). Condition critical land has caused global concern that the adoption of the Convention of the United Nations on the Control of Desertification / land degradation (UNCCD) in conjunction with the UN Convention laintentang Biological Diversity (CBD) and the UN Convention on Climate Change (UNFCCC) and the 2015 has been set by The UN as the International Year of Soil. Law No. 37 Year 2014 on the Soil and Water Conservation (KTA) regulate the implementation of soil and water conservation is complete and comprehensive, so it is a system of legal rules that round. It is hoped the law could be used as a legal basis for soil and water conservation activities for the period lama.Kegiatan is proper soil conservation is an obligation that must be carried out either by individuals, groups or entities that manage and use land. Facts show that prime land conversion that occurred in the cultivation area of about 100,000 hectares per year. Due to the land conversion led to decreased land productivity, and ultimately, food sovereignty, water, energy, quality, quantity and environmental services will be threatened. Forest and land rehabilitation efforts were carried out in 2009-2014 through the state budget is only capable of 2.5 million hectares or 500,000 hectares annually. In the National Medium Term Development Plan (RPJMN) 2015-2019, forest and land rehabilitation efforts will be implemented area of 5.5 million hectares in supporting the resilience of water and food. To achieve these objectives, the watershed management into major programs to be implemented from upstream to downstream. Watershed management is an effort that is very important as a result of environmental degradation watersheds in Indonesia caused by the management of natural resources that are not environmentally friendly and increasing the potential of sectoral ego and ego cantonal due to the utilization and use of natural resources in the watershed involves the interests of various sectors administrative areas and disciplines. To improve the performance of watershed management in order to improve water resistance that can support other programs, among others, will be implemented through: a) Internalization 108 RPDAS into RTRWP; b) Determination of Watershed / MoU on Cross Country Watershed Management; c) Application of new innovations such as the use of Hydrological Model SWAT (Soil and Water assesement Tool) in the preparation of watershed management plans and implementation of watershed management in all parts of Indonesia; d) Preparation of government regulation as the implementation of Law No. 37 Year 2014 on the Soil and Water Conservation (KTA), which was promulgated on 17 October 2014 and e) Increasing public participation through the acceleration of forest and land rehabilitation, among others carried out by the Local Government, Community and Business. The basic policy of watershed management as the Government Regulation No. 37 Year 2012 on Watershed Management, namely: 1) Do a holistic, integrated, well-planned and sustainable; 2) Target management area is full of local watershed upstream to downstream; 3) Do the responsible decentralized approach to river basin as the unit of management areas; 4) Based on public participation and consultation at every stage of watershed management; 5) To overcome the limitations of government funds, should the application of "Beneficeries pay principle, poluter pay principle and costsharing"

3. Management Position Watershed

With regard to the decision of the Constitutional Court Number 85 / PUU-XII / 2013 dated February 18, 2015 against the cancellation of Law No. 7 of 2004 on Water Resources, Law No. 7 of 2004 on Water Resources regulates the planning, implementation, monitoring and evaluation of the conservation, utilization and control of power river basin-based water damaged and its implementing regulations have been published as:

a. Government Regulation (PP) No. 16 of 2005 on Water Supply System (SPAM).
b. Government Regulation No. 20 Year 2006 on Irrigation.
c. Government Regulation No. 42 Year 2008 on the Management of Water Resources.

d. Government Regulation No. 43 Year 2008 on Groundwater.
e. Regulation No. 37 Year 2010 on Dams.
f. Regulation No. 38 of 2011 on the River.
g. Regulation No. 73 Year 2013 concerning the Swamp.
h. Regulation No. 69 Year 2014 on the Right to Water.
i. Presidential Decree (Decree) No. 149 Year 2014 on Water Resources Board, which the Minister of Forestry and Environment Minister a member of the National Water Resources Board (DSDAN).
j. Presidential Decree No. 33 Year 2011 on the National Policy of Water Resources Management.
Overall canceled and returned to the Law No. 11 of 1974 on Water.
Based on the above conditions Ministry PUPERA along the National Water Resources Board (DSDAN) where the Ministry of Environment and Forestry are included in DSDAN, have taken steps as follows:
a. Develop RPP implementation of Law 11 of 1974 concerning Irrigation adapted to current conditions;
b. PUPERA issued Decree on Establishment of the River Basin, as the basis for the implementation of the tasks Center / Center for River Basin (UPT DGWR);
c. Reviewing the substance of Law No. 7 of 2004 on SDA and adapted to the decision of the Court to draw up a new law on natural resources.
Implementation of watershed management and conservation of soil and water are not corekation directly with the cancellation of Law No. 7 of 2004 on the Water Resources Act, as a basic regulation been regulated in Law Number 37 of 2014 on the Soil and Water Conservation (KTA) which is currently in the process of completion and harmonization at the State Secretariat.
In connection with the foregoing, the Ministry of Environment and Forestry Cq. Directorate General of Forest Protection and Watershed Management has coordinated, consolidated by involving experts Watershed and Soil and Water Conservation and Forestry Development Agency researchers to discuss:
a. Strengthening Law No. 37 of 2014 concerning the issuance of PP KTA and the acceleration of the Planning and Implementation KTA;
b. Refinement and adjustment of Government Regulation No. 37 Year 2012 on Watershed Management with Law No. 23 Year 2014 on Regional Government.
c. Discussion Draft Government Regulation (RPP) On Exploitation of Water Resources (NRM);
d. RPP Discussion About the Water Supply System (SPAM);
e. Draft Decree of the President of the National Water Resources Council.

E. Conclusion

a. RPP on Exploitation of Water Resources and RPP about SPAM is derived from Act No. 11 of 1974 on Water Resources, which is a very urgent need in overarching implementation of utilization of water resources and provision of drinking water that is currently underway as well as the legal basis for the implementation of task Center / Center for River Basin (BBWS) Unit of the Ministry PUPERA;
b. The substance in the RPP on Water Resources Exploitation that has not been agreed in discussions with the Ministry of Justice and Human Rights are: 1) Related to permit utilization of water resources (authority of the Ministry PUPERA) and ground water exploitation permit (the authority of the Ministry of Energy and Mineral Resources); 2) priority allocation of water; 3) The authority of state enterprises, and private enterprises;
c. The substance in the RPP of SPAM that has not been agreed in discussions with the Ministry of Justice and Human Rights are: 1) Licensing implementation of SPAM; 2) Setting the pipe network within and outside the state-owned enterprises or local government service; 3) Monitoring the implementation of drinking water services; 4) the determination of rates / levies and private drinking water.
d. Coordinating Minister for Economic affirmation in the RPP discussion above, among others: 1) The preparation of CSPs is expected to range Ministry PUPERA have to change the mind set of powers, licensing and investment; 2) the maintenance of underground water outside the authority of the Ministry PUPERA and has been regulated in the Law on Mining and implemented olej Ministry of Energy and Mineral Resources; 3) Control and supervision (control) can be done with government regulations, and the Secretariat of State in guarding the CSP process be consistent;

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Putusan MK Nomor 85/PUU-XII/2013

RECONSTRUCTION POLICY OF PUBLIC SERVICE PROVISION BASED ON PASSENGER TERMINAL EXPEDIENCY VALUES

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ABSTRACT

The aims in this study are (1`) study and analyze the weaknesses of the implementation of the public services policy provision in the existingpassenger terminal. (2) Reconstruct public service policypassenger terminal provision value-based benefit. The method of approach in this study was juridical sociological study of the real state of society or community to find the facts (fact-finding) and then identified the problem, which in turn leads to problem solving (problem solution). The results showed that (2) the fundamental weakness of public service provision terminal are, the first—fromthe planning aspect—is the low quality of products related to access services including terminal facilities and infrastructure. Second, is the poor quality of operational management aspect of the provision services related to terminal services. The third aspect is the lack of access to justice for vulnerable groups, including people with disabilities. Fourth, the rigidity that is the lack of a complaint mechanism relating to community dissatisfaction with the implementation and quality of terminal services. The fifth is public participation aspect. This aspect related to the lack of public participation in the implementation of the service. And the sixth is the lack of evaluation management control of the performance of public service providers, causing mindset is not well established in the community to serve the passenger terminal. (3) Reconstruction of public service policy providing value-based passenger terminal expediency of Law No. 22 of 2009 on Road Traffic and Road Transport, Government Regulation No. 74 Year 2014 on Road Transport, Government Regulation No. 79 Year 2013 on Network Traffic and Road Transport, based on a reconstruction of the value concept of the benefit in passenger new terminal is the benefit of the passenger terminal is not only for get in and out the passengers but also for passanger to obtain a secondary and teresier necessity by providing a comfortable waiting room, orderly, fun, providing refreshing the image of the highest satisfaction for happiness for users with sincere service, fast, precise, rigid and comprehensively integrated with global services.

Key words: Public Services, Passenger Terminal, Value Benefits

A. Introduction

Value expediency was inspired from moral philosophy of utilitarianism is an ideology that is fighting for the principle of utility—thegreatest happiness of the greatest number (the greatest happiness of the greatest number)[1]. This philosophy states the fundamental doctrine of the best action is the action that produces the greatest happiness which is commonly known as the principle of the greatest happiness (the GreatesHappinies Principles). The principle of general utility is an action considered correct if it produces more happiness than any other actions, and action is considered one otherwise.[2]

The purpose of moral and political philosophy of classical utilitarianism is to maximize utility and some of the teachings of utilitarianism. Credo utilitarianism today stressed that the utility should be the primary source for legal and social reforms and even to be used as guidelines for legislators.[3]

The phenomenon of the transportation sector provision of public facilities in Indonesia is sufficient passenger terminal is complex. One of the complexity problems is the infrastructure provided by District / City Government, the Provincial Government and the Central Government is not working properly, even the most left impressed useless. According to the Traffic Law No. 22 In 2009, the terminal is a road transport infrastructure for the purpose of loading and unloading of people and/or goods and regulates the arrival and departure of public transport, which is one form of transportation network.[4]

[1]Zainal Asikin, 2013, Mengenal Filsafat Hukum, Bandung Pustaka Reka Cipta hal 124
[2]K. Berterns. *Etika.*Jakarta: GramediaPustakaUtama, 2004. Halaman 247
[3]Ekky al-Malaky.*Filsafat untuk Semua: Pengantar Mudah Menuju Dunia Filsafat.* Jakarta: Penerbit Lentera, 2002. Halaman 84
[4]Undang-Undang Republik Indonesia Nomor 22 Tahun 2009 Tentang Lalu Lintas Dan Angkutan JalanLembaran Negara Republik Indonesia Tahun 2009 Nomor 96

One of the goals of the National Indonesia stated in the Preamble[5] of the Constitution of the Republic of Indonesia 1945 in the fourth paragraph; is to promote the general welfare. For that purpose, it has been many efforts made by the government. In an effort to improve overall welfare of the people, the central government handed over some of its powers to the autonomous regions to set up and administer governmental affairs within the framework of the Unitary Republic of Indonesia.[6]

In a unitary state like the Republic of Indonesia, the district has no such state power as in central government. Its is authorized as an instance of the power of the state to take care of certain government affairs according to the principles of the regional administration. In principle, regional policy is conducted by decentralizing some authority which is previously centralized by the Central Government. In the process of decentralization, central government powers is transferred to local governments as appropriate to realize a shift of power from the center to the regions. In the era of regional autonomy, local governments have a strategic role in realizing the acceleration of the achievement of national goals, one of which promotes the general welfare. In addition, local governments have the authority to organize a number of governments to regulate and manage the household area. Government Affairs unrelated to fundamental services that become obligatory functions of local government, one of which is the Provision of public transportation facilities.[7]

The not optimum of terminal utilization can be seen from the itsmain function to serve the interests of the three principal stakeholders, namely passenger, government and transport operators. Quoted from the Director General of Land (Kemenhub)—afterinspection Traffic Safety and Road Transport in KampungRambutan Terminal, East Jakarta, on Monday, on March 23, 2015—Djoko Sasonosaid that:

> The Ministry of Transport (Kemenhub) has continued to improve service, safety and security to the users of public transport modes of road transport. In the case of servicing passengers, the Ministry will develop passengers' services in the terminal like the service at the aerodrome (airport). "In the next three years, passenger services in terminals such as at the airport," said Director General of Land KemenhubDjokoSasono after Safety Inspection Then Traffic and Transportation in KampungRambutan Terminal, East Jakarta.[8]

Based on Law No. 25 of 2009 on Public Service regulation which is the principles of good governance is the effectiveness of the functions of government itself. Public service performed by the government or corporations that can effectively strengthen democracy and human rights, promote economic prosperity, social cohesion, reduce poverty, enhance environmental protection, wise in the use of natural resources, deepen confidence in government and public administration.[9]

The state is obliged to serve every citizen and resident to fulfill the rights and basic needs within the framework of public service which is mandated by the Constitution of the Republic of Indonesia Year 1945, build community trust in the public service who performed public service providers is an activity that must be performed in line with expectations and demands of all citizens and residents about improving public services, as an attempt to reinforce the rights and responsibilities of citizens and residents as well as the realization of the responsibility of states and corporations in administering public services, necessary legal norms provide regulation clearly, in an effort to improve the quality and ensure the provision of public services in accordance with the general principles and good corporate governance and to provide protection for every citizen and resident of abuse of authority in the public service.[10]

Based on the description of the background of the problems as described above, the problems arise that need to be investigated is what are the weaknesses of the implementation of the policy of public service provision terminal? And how the reconstruction of public service policy passenger terminal providing value-based benefit?

B. Methods

The method that the researchers did was sociological juridical approach. Namely the study of the real state of society or community to find the facts (fact-finding) and then be identified (problem identification), which in turn leads to problem solving (problem solution)[11]. After the completion of the data collection process, then the next stage is the processing of data. Data obtained from field research and literatures were analyzed using descriptive qualitative method. The research method is descriptive qualitative research method that is based on the philosophy post positivism often also referred to as interpretive and constructivist paradigm.

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[5]UUD 1945 bersama dengan penjelasan resmi dimuat dalam Berita Republik Indonesia (BRI) Tahun II (Tahun 1946) No.7 dandimuatdalam LN Tahun 1959. No.75 danBerita Negara 1959, No.69.meliputi Pembukaan, Batang Tubuh dan Penjelasannya bersama-sama dengan DekritPresiden 5 Juli 1959 beserta amandemen pertama dimasukkan dalam Lembaran Negara no 11 tahun 2006, amandemen kedua Lembaran Negara no 12tahun 2006, amandemen ketiga Lembaran Negara no 13 tahun 2006, dan untuk amandemen dimasukkan pada Lembaran Negara no 14 tahun 2006.

[6]Undang-Undang Republik Indonesia Nomor 23 Tahun 2014tentang PemerintahDaerah . (Lembaran Negara Republik Indonesia Tahun 2014 Nomor 244, Tambahan Lembaran Negara Republik Indonesia Nomor 5587).

[7] ibid

[8]http://nasional.kontan.co.id, diaksespenulispadatanggal 10 AgustusTahun 2015

[9]Undang-Undang Republik Indonesianomor 25 Tahun 2009 tentang Pelayanan Publik tambahan Lembaran Negara Republik Indonesia Nomor 5038

[10] ibid

[11]SoejonoSeokanto 1982, *PengantarPenelitianHukum*, UI Press, Jakarta, hlm.10).

C. Results And Discussion

1. Implementation of policy Passenger Terminal Supply Current

Provision of public services policy passenger terminal currently holds a strategic role in major components of the transportation system in which road, vehicle, operating system, a passenger terminal elements are interlinked in the national transportation system, locally and even internationally. Operating systems regulate human, vehicle, road and terminal elements which are interrelated in meeting the demand coming from the community. From that point we can say that the field of transport services is a system, not apart from the provision and management of various infrastructure supports such as roads, terminals and vehicles. Terminal management as one of the infrastructures supporting transportation system is crucial and strategic, because in addition to function as a center of transportation services that can accommodate passenger and vehicle flow properly, adequate and comfortable, it also serves as a public service to load and upload of passengers as well as for efforts to control traffic.[12]

The local government has not been functioning the terminal as it should and seem useless because many government founding had been disbursed for the construction of a passenger terminal but it was not working well.Thus, passenger terminal can not provide benefits to the region, especially in terms of revenue as a source of localrevenue for the budget annual expenditures. It is kind of unfortunate, abundant billions of rupiah were allocated for construction of the terminal but could not be used by the public. Supposedly in the passenger terminal development planning can already be taken into account the feasibility of the benefit aspects of public services. The positive impact of terminal development can not be perceived by the government, transport operators and the community that can provide regularity of transportation in urban and rural areas. Other impacts for local governments are the emergence of bad public perception toward performance of public services by the state unaccountable, inefficient, and inaccurate. Some issues about the performance of government dissatisfaction, desires and expectations did not be responded well, their rightis shackled, aspects and opportunities for the public inhibited, the dominance of the right people, acting repressive and forget that this sovereignty belongs to the people, even the choice to the needs of the public and the sound of substantive democracy that have been abandoned or ignored by government officials.

Since the people is the one who hasrights as an important instrument in initiating discourse of the government, that is why the implementation of public service based on the general interest, legal certainty, equal rights, the balance of rights and obligations, professionalism, participation, equality or discriminatory treatment, transparency, simplicity and affordability was so good on paper but fails in its implementation. Efforts to improve public services still tend to prioritize the substance and structure of the law but not touching the legal aspects or cultures. In practice the author has a moral revolution the idea of public service culture indefinitely Ultimate Public Service (UPS), where the public service is sincere serve as a loss of clarity and pollute everything. The meaning of good willing is sincere heart, soul cleanse and purify the intention. Ultimate Public Service carries a moral message utilitarian as the demands of contemporary society today. Teachings utilitarian attitude raises the pros and cons of other thinkers. Among the pros, they admit that the first service of utilitarian ethics is the rational nature. This view states that people should not obey the regulations except legislation itself, but for the purpose or benefit to be justified rationally. Example: Lying, it is allowed in order to benefit most of the community. Second, utilitarianism is also as instrumental in teaching ethical values of universality of human action. The intent of this second service is the resulting benefits not only for the actors themselves, but also for many people who are affected by the action, both directly and indirectly. So, everyone should take consideration about the effects and the impact of his actions toward the other people. This point of view argues that the merits of an action dependon its usefulness or beneficial. The cons, gave criticism by showing the weakness of the doctrine of utilitarianism. The first shortcoming lies in its view of the benefits are less clear. So, among the cons is to understand the benefits it differently by adherents as pleasure (hedonistic), as happiness (eudaimonis), or as a variety of value as well as economic and political value. Ambiguity understanding resulted term benefits are used for various purposes that could harm people. Second weakness is in terms of justice and respect for human rights. Means, a person or group of persons want to provide benefits for many people; however they also sacrificed a lot of people to achieve these benefits. Example: The government wants to create a reservoir / dam with the intention of improving the welfare of the people but on the one hand the government also forcibly evicting small communities and their homes. Is the public interest should take precedence?Utilitarianism make benefits equate meaning with pleasure (hedonic), some equate with happiness (eudaimonis), and one sees the benefits of the plurality of values (plural). Pleasure and happiness are not much different, happy meaningful satisfied and relieved, without feeling troubled and disappointed while happiness is satisfaction aware that fell by someone because of his desire to have the good that has been accomplished. Pleasure and happiness that we are looking for is not enough to simply excited and happy from the physical aspect, but more important is the pleasure and happiness of the spiritual (soul).[13]Utilitarianism which teaches that man must seek benefits or due to both as possible for as many as possible people in their actions. Utilitarian principle should include the principle of fairness, so that people do not sacrifice the rights of others in the pursuit of maximum benefit. The term "benefits" needs to be cleared, so that people do not fall again into the ethical hedonism. So the idea of Ultimate Public Service or Public Service[14]without Borders (PPTB), namely public service willing to get rid of personal considerations, cut the greed of the world, eroding the impulses of lust and others. Be serious and sincere charity for God, in accordance with the values of Pancasila Belief in God Almighty.

[12]Marlok, K.E., 1995. *Pengantar Teknik dan Perencanaan Transportasi*, Erlanga, Jakarta hal 269

[13]Bryan Magee 2001, The Story of Philosophi, Kisah Tentang Filsafat, Takhayul membakar dunia, filsafat memadamkannya (Voltaire), Kanisius Yogyakarta hal.183

[14]Arti kata ultimate dalam bahasa Indonesia adalah: kb. yang paling mewah. *That is the u. in cars* Itulah yang paling mewah diantara semua mobil. -ks. 1 penghabisan, terakhir. *the u. purpose* tujuan terakhir. 2 pokok, asal. -ultimately kk. (pada) akhirn disadur darihttp://kamuslengkap.com/kamus/inggris-indonesia/arti-kata/ultimate

Bentham's ideas is about law reform, the role of constitutional and social studies for the development of social policy with the aim to bring benefits to as many people. When it is associated with the concept of welfare state that was popularized by JM Keynes, the welfare state is a country whose government ensuring the welfare of the people. The welfare state is a child of the struggle of ideologies and theories must be grown in our country that embraces the welfare state. The concept of the welfare state includes not only a description of a way of organizing welfare (welfare) or social services (social services), but also a normative concept or ideal approach system which emphasizes that everyone should obtain social services as a right. The welfare state is also a child of the struggle of ideology and theory, especially for left wing view, such as Marxism, socialism, and the Social Democratic (Spicker, 1995). However, and interestingly, the concept of the welfare state actually thrives in democracies and capitalist, not socialist countries.

In Western countries, the welfare state is often seen as a strategy of 'detoxifying' capitalism, namely the negative effects of free market economy. Therefore, the welfare state is often referred to as a form of "good capitalism hati'.Meski with different models, state-capitalist and democratic states such as Western Europe, the US, Australia and New Zealand are some examples of adherents of the welfare state. Meanwhile, countries in the former Soviet Union and Eastern Bloc is generally not embracing welfare state, because they are not democratic or capitalist country.

Because the welfare state as a form of "good capitalism", then in the welfare of the people should be based on the five pillars of the state, namely: Democracy (Democracy), Law Enforcement (Rule of Law), the protection of Human Rights, Social Justice (Social Juctice) and anti-discrimination which are characteristic of the principles of good governance as a new paradigm of public service. According J.M. Keyness and Smith (2006), the basic idea of welfare was statedin the 18th century when Jeremy Bentham (1748-1832) promoted an idea that the government has a responsibility to ensure the greatest happiness (or welfare) of the greatest number of Reviews their citizens. Bentham usedthe term 'utility' (usefulness) to explain the concept of happiness or well-being. Based on the principle of utilitarianism that he developed before, Bentham argued that something can cause extra happiness is a good thing. Conversely, anything that causes pain is bad. According to him, government actions must always be directed to increase the happiness of many people as possible. Bentham ideas were about law reform, the role of constitutional and social studies for the development of social policy to make it known as the "father of the welfare state" (father of welfare states). The welfare state is closely related to social policy (social policy) is in the State Indonesia include strategies and the government's efforts in improving the welfare of its citizens as well as the ideals embodied in the preamble of the 1945 Constitution.The purpose of the Indonesian state established is to promote the well-being of the public one through public services which should be provided by the state in which the President.

In order to explain the Ultimate Public Service, the authors interpret as the Public Service without Borders. It is analogous to the sense of boundless sincerity, quoting from his book Quantum Ikhlaswriten by Erbe; understanding the law of attraction pull (Law of Attraction).[15]

This law explains that "Something is going to pull on him everything that one with nature". If someone in the feelings and thoughts has waves of fear then something terrible will interested him. Similarly, if he emitted happiness then the good things will interested him. (Flow utilitarian call it happiness) This explains why people who always feel unlucky (cursing) is often experienced bad luck, while those who always feel lucky and enjoyed (grateful) will often have luck. In short, we can create a reality of our own life, by regulating our feelings and thoughts.

The Government has not made use of law enforcement in the terminal. Location passenger terminal which was considered not representative, since it is located far away from the crowds, consequently emerged passenger terminal, so, no one wants to come to the terminal. People never used it, because the passenger terminal facilities located strategically if not in terms of traffic flow are also less worth. Terminal allowed stalled, damaged terminal building has not been maintained as if no man's land. The lack of government response to the aspirations of the people in this case is accommodated by NGO of Organda. The Organda does not take a part on responsible for terminalignorance, and even the impact of government policy becomes cause of death of a urban taxi. The lack of bus transportation route that goes to the passenger terminal resulted in many public transport users prefer freight offered travel. Travel vehicles not required to stop in because there are many agents terminal in each terminal, so that every day looks more comfortable using a travel. The community directly takestravel to their destination. Fast point service despite the community's dream to spend more. In this case the required service is a business service that sees the public it serves as customers and not as citizens is the obligation of government to provide services.

2. The current weaknesses implementation of policies of public service provision terminal

In the implementation of the passenger terminal facility providing administrative law and its apparatus public policy plays a very important role, because the state gives authority to serve his people in order to realize the people welfare. However the empirical fact is less than the maximum utilization of the terminal / not optimal in terms of (1) aspects of planning and designing, including location, site / footprint, accessibility and circulatory systems, as well as terminal facilities (system layout, ease of access, and the condition of the facility). (2) Management aspects including law enforcement, the implementation of the terminal are not the maximum both in terms of management, maintenance, and demolition. In this case, the public policy read in circumference state authorities, issues that arise during this time due to insufficient competence of personnel or also because the choice of a less precise agenda setting. (3) Operational Aspects, disciplinary driver / operator to use the terminal as a place to load and upload the

[15]Faried, Ahmad. 1993. *Menyucikan Jiwa Konsep Ulama Salaf*. Surabaya: RisalahGusti Ahmad Faried, *Menyucikan Jiwa Konsep Ulama Salaf*, 1993. Hlm. 26

passengers, with several indications including: the phenomenon of shadow terminal, the phenomenon of black plate vehicles that participated pick up passengers, and others. In detail the weaknesses mentioned, among others:

a. Terminal facilities are sorely lacking, for example the lack of comfortable waiting room, safe and easy to access leading to the dismissal of the public transportation. In fact waiting room provided had a little number of seats, has a seat that is less worthy condition, dirty, dusty, not maintained, and less ergonomically with the human body such as the lay-out terminals are not able to follow the needs of consumers both passenger and public transport.
b. People are thinking that they were in bad environment. Because of frequent crime and the inconvenience of passengers in the terminal. It can be denied that the condition of the main facility or supporting the terminal in general is very unfit and uncomfortable to visit.
c. The management terminal is not in accordance with existing regulations.
d. Human resources are less serious in serving the community work and too oriented to personal purposes.
e. Role of Government in order to implement the three basic values of law according to Gustav Radbruch include the value of certainty, justice and expediency. The value of certainty that the laws must have the assurance that bind to all the people, the values of justice means that the law should give a sense of justice to each person and the value of the benefit, the law should provide benefits for everyone, so that people feel helped, simplify people's lives, not just for the people. In order to complete the effective realization and success of enforcement depends on three elements of the legal system, the legal structure (structure of law), legal substance (substance of the law) and legal culture (legal culture).
f. The driver does not want to load and upload passengers at the terminal due to lack of transportation into the city and it is not integrated terminal and intermodal turnover in both inter-city passenger terminal, in the city through sea transport, land and air.
g. Less strategic location / position of the terminal.
h. The driver is more likely to load and upload the passenger outside the terminal.
i. The number of illegal and legal transports (travel) which picked among passengers from house to house so that the function of the terminal becomes weaker.
j. A number of public policy in a socio-political system that is more democratic than ever before, yet produces a responsive public policy, is merely a formal procedural and as if being in a socio-political system of governance still-authoritarian centralism. Most policies are made initiated by bureaucracy and are further discussed in the parliament, but sometimes it is possible draft policy made by the bureaucracy just to accommodate their own interests, and the unsynchronized or seizure occurs between the legislative and bureaucratic interests in policy formation.
k. Law has been made to organize society, people are required to obey the law and as a consequence of a violation of the law is punishment. It is very ineffective and it cause the increase of violence. It should be change, the law governing to the law that it serves, from human to human law to the law of, and of the laws governing the legal towards motivating.
l. Provincial and local government policies as long as is inefficient and does not ensure easy accessibility of the lower classes in conducting traveling across areas. Transport accessibility is as a public service in terms of aspects of social justice, has not focused on the development of public transport that is comfortable, safe, and inexpensive in order to optimize the accessibility community, especially the lower class of travel.
m. Serious problem that occurred with the government's policy in the construction of the terminal is the terminal location. This determination ignores the aspirations and desires of the public. The policy should be able to provide excellent service to the public, but the opposite happened. In fact, the policy is not the only cause resistance at community level, but the level of conflict has resulted in the transport regulator ranks among the three governments. Public service transportation sector is a mandate for the state to provide the best service to the community. There are three reasons why public services should be organized by the state. Firstly, the investment can only be conducted or regulated by the state, such as the development of transport infrastructure, the provision of public administration services, licensing, and others. Secondly, as an obligation of the state because the state's position as a recipient of the mandate. And third, the cost of public services financed from public money, either through taxes or public mandate to the state to manage the wealth of the country.
n. Six fundamental problems regarding the passenger terminal are;first, poor quality of products related to access services including terminal facilities and infrastructure. Second, poor quality of service delivery related to terminal services. Third, the lack of access to vulnerable groups, including people with disabilities. Fourth is the lack of a complaint mechanism relating to public dissatisfaction with the conduct and quality of terminal services. Fifth is the lack of public participation in the implementation of the service. And sixth, the lack of evaluation of the performance of public service providers.
o. Terminal development policies that do not function optimally in achieving great benefits for people are caused by several things, namely:

1. The problem of the low level of public services in the area is caused by many factors, not only about the span of control of public services between governments and communities are quite far away.
2. The existence of different perceptions of the implementers of development policy objectives policy. The government sees this policy to shorten the control range of public services to improve service to the community, but implementers see this policy as an opportunity to benefit himself or his group, which is important physical output terminal is available but the benefits are not taken into account.
3. The unclear rules of the principle of benefit to each product development policy passenger terminal, thus it makes possibility of implementing policies to make interpretations that are likely to differ from the policy objectives.
4. The high factor of interests of the parties involved in the policy of the passenger terminal building, so often occurs interest conflict while neglecting the interests of democracy and prosperity.

p. In general, public service provision of the passenger terminal still has many weaknesses, among others:

1. Less responsive. This condition occurs in almost all levels of the service element in the terminal, starting at the level of service personnel (front line) up to the level of responsible agencies. The response to various complaints, aspirations, and expectations of society are often slow or even ignored altogether.
2. Less informative. A variety of information should be conveyed to the community terminal.

3. Less accessible. Various technical unit passenger terminal is located far from the reach of the public, making it difficult for those who require such services.
4. Lack of coordination. Various passenger terminal service unit associated with one another such as police, municipal police, Public Works Department, the Department of Transportation is very lacking in coordination. As a result, often overlap or conflict between the policies of the service agencies to agencies other related services.
5. Bureaucratic. In connection with the completion of service problems in the passenger terminal, the front line staff unable to solve the problem, and on the other hand the community is hard to meet the responsible ministry, in order to resolve problems that occur when services are provided. As a result, a variety of service problems require a long time to be resolved.
6. Less want to hear complaints / suggestions / aspirations of the people. In general, ministry officials lacked the will to hear complaints / suggestions / aspiration and society. As a result, services in the terminals implemented as is, without any improvement over time.
7. Inefficient. Administrative matters would take precedence over the benefits to be achieved and often irrelevant to the service provided.

3. Reconstruction of public service policy passenger terminal providing value-based benefit is based on the reconstruction of the concept of the value of the benefit of the new passenger terminal.

Based on the principle of the reconstruction value of the benefit (utility) is based on the doctrine of ethics, known as utilitarianism or utilities point of view to create community benefit or happiness. Utility point of view incorporates practical moral to teach that according to its adherent's aims to provide benefit or happiness as possible for as many citizens. State andlawis created for thetruly benefit, that the majority of people realize the happiness of the greatest happiness of the greatest number (the greatest happiness, formostpeople). With accommodate international wisdomand influence of globalization characterized by punctuality, speed, accuracy and precision ofservice, courtesy and hospitality, availability of personnel and means of support,the availability of transparent information, order, tranquility which brings pleasure and happiness. So theneedof reconstructionof public services as follows;

a. The function of passenger terminal is not just for loading and uploading the passengers, but also added usefulness for users to obtain a secondary requirement and extra needs by providing a comfortable waiting room, orderly, fun, rest area capable of providing refreshing the image of the highest satisfaction for happiness for users with sincere service, fast, precise, rigid and integrated comprehensively with global services.
b. The existence of public service paradigm shift from the paradigm of the Old Public Administration (OPA) to New Public Management (NPM) and the New Public Service as well as the values of international wisdom, local wisdom Pancasila as the source of all sources of law in Indonesia requiring adjustments to public services.
c. Benefit Paradigm to the wider passenger terminal facilities and infrastructure require appropriate terminal.

D. Closing

1. The systems and the philosophy underlying the public service in Indonesia is not only outdated specifically concerns the fundamental principle of legal expediency (utilitarianism) in the passenger terminal of public service provision, but also produce sub-standard performance in a rapidly changing society in the international arena in the era globalization.
2. The provision of public services policy passenger terminal currently holds a strategic role in major components of the transportation system in which road, vehicle, operating system, a passenger terminal elements are interlinked in the national transportation system, locally and even internationally.
3. The passenger terminal has not been able to provide benefits to the region, especially in terms of revenue as a source of revenue for the budget expenditures annually. It is a negative impact on the government with the advent of bad public perception toward public servicesperformance by the state unaccountable, inefficient, poorly targeted and displaced citizens. Implementation of public service that is based on the general interest, legal certainty, equal rights, the balance of rights and obligations, professionalism, participation, equality or discriminatory treatment, transparency, simplicity and affordability was still pretty on paper but fails in Implementation.
4. Efforts to improve public services still tend to prioritize the substance and structure of the law but not touching the legal aspects of the culture or cultures.
5. A number of public policy born of a socio-political system that is more democratic in Indonesia has not been able to produce responsive public policies, especially in the service of the passenger terminal.

E. Recommendations

1. Public policy providing passenger terminal in Indonesia requires service reform to accommodate the sincere service which the authors call the Ultimate Public Service is based on universal standards in accordance with the demands of globalization.
2. The era of globalization characterized by increasingly open flow of information, communication and transportation, communication and transport between countries in the world, requires a State to adopt international wisdom that collaborated with national and local wisdom in providing services to the public.
3. The public services reformation was still lagging behind reforms in other areas. Thus the need to hasten the harmonization of all laws pertaining to public services, especially public services in the passenger terminal that collaboration among the institutional structure can be optimized

4. Public services need to be reformed in the context of democratization that puts good governance is defined as a government that gives space for the wide participation of actors and institutions outside the government so that there is a division of roles and the balance of power between the state, civil society and the market mechanism (private), so as to awaken checks and balances and generate synergy between them in realizing the common welfare (Welfare State).
5. In setting the minimum service standards in the passenger terminal by improving the planning and development guidelines in the form of a standard size, minimum requirements, and guidance on the design of the passenger terminal as well as the services required as a guarantee (assurance), responsiveness (responsiveness), performance (performance), aesthetic (esthetics), convenience (easy), reliability (reliability), endurance or durability (durability), frequency (frequency), pleasure and comfort (convenience and comfort), and availability (availability) which brings the greatest happiness for most people.

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ACTUALIZATION PANCASILA INDONESIA PERSEPCTIVE AS LEGAL REFORM LAW PROGRESSIVE

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ABSTRACT

This study aims to find out about the re-actualization of the values of Pancasila as the Indonesian Legal Reform First Step in the face of reality began waning understanding, appreciation, and practice the values of Pancasila in public life after the reform era. (i) what is the significance of re-actualization of the values of Pancasila in Indonesian law reform process? (i) The extent to which re-actualization of the noble values of Pancasila implemented in national life by the law of progressive? Results showed that there are two characteristics that purport to why law enforcement refers to the narrow and broad textual interpretation on textual interpretation refers to the contextual interpretation just basing in addition to the law also interpretation mentioned underlying text, while the meaning broad namely conditions surrounding the incident. This interpretation is referred to as a progressive interpretation, whereas first interpretationn called positivist interpretation. In the practice of law officers enforcement premises character posistivistik paradigm still dominates legal pressure. This study commending the importance of the presence of a progressive law enforcement in handling cases include construction law progressive way of thinking, methods and orientation panfsiran progressive law progressive legal enforcement ethic.

Keywords: Re-actualizing Pancasila, Law Enforcement, Legal Progressive

A. INTRODUCTION

My motivation in writing problem because Pancasila Pancasila as a way of life has been eroded by law is formalistic, so that the application of the law is not based only on legal certainty of justice. As one of the major agenda in the post-reform government of Indonesia is to make improvements in the field of law, both the substance of the law, the legal structure and legal culture. Legal reform is not only a means of reform legislation, but includes a reform of the legal system whole, namely reform of the material / substance of the law, the legal structure and legal culture.[1] Attempts were made in the improvement of the law, will not work with the greatest if not accompanied by improvements to the source of the law itself, namely Pancasila. Legal reform will approach the desired goal, if the values of the source of law is understood properly, to the substance, not just a mere formalistic, and is accompanied by a strong level of morality, a strong moral personality of all parties concerned with the law.

B. PROBLEMS

Based on the problematic question arises why the re-actualization of the values of Pancasila should be done. (i) what is the significance of the re-actualization of Pancasila values in the process of legal reform in Indonesia? (ii) The extent to which re-actualization of the noble values of Pancasila implemented in national life progressive legal perspective?

C. METHODS

This writing is using juridical approach to specification descriptive analytical research, selection normative legal research methods based on several reasons, among others: first, with the many problems of law faced in society, both with regard to the legal norms that until today yet progressive legal grounding. Secondary data were collected from the primary legal materials, either in the form of statutory provisions and their implementation; secondary law mauun tertiary conducted through literature study further processed and analyzed qualitative juridical.

D. RESULTS AND DISCUSSION DISCUSSION

Pancasila is the "wisdom / national genius (national wisdom / national genius) that contains within it the three main pillars, namely the pillars of divinity (religious), a pillar of humanity (humanistic), and the pillars of society (democratic, popular, and social justice). Understanding of the future generation associated with the values embodied in the four pillars of nation da state (Pancasila, the 1945 Constitution of 1945, the Homeland and Sesanti Unity in Diversity) increasingly degraded and eroded by the rush of new values that are inconsistent with national identity Ironically while new values are not yet fully understood and understandable, but the old values are already being replaced and forgotten, unnoticed generais nation's next move increasingly

[1] Hidayat, Arief. (2014). Pancasila merupakan ideologi terbuka sehingga prosesnya berkembang di masyarakat. Bahan Ajar, PDIH UNDIP Angkatan XIX. Semarang, hlm1-4.

away from Pancasila as the national identity that is characterized by mutual cooperation. The spirit of mutual cooperation which is the soul and spirit of Pancasila, ranging sidelined and ignored, a new value system is not yet fully understood and accepted by the nation of Indonesia has resulted in disharmony and horisotal vertical relationship between Indonesia's diverse society. Given the four pillars of national awareness is generated through a political decision, then the yanag revitalization efforts will be made to go through a political process that involves all elements within the Indonesian political system.

In accordance with the philosophy of Indonesia, Pancasila, Satjipto stated that state laws adopted should be based on Pancasila greater emphasis on substance, not procedure in the legislation alone. In the constitutional state Pancasila underdog is "if conscience" to achieve justice. Therefore Pancasila state characterized by the rule of law or rule of moral justice. We witnessed, law enforcement bureaucracy seems to be a robot, so mechanistic and black and white look at the legal issues are handled. Text and editorial rules as if so saktinya handcuff wisdom and common sense, there was virtually no courage to make the leap from the confines of the text and editorial rules. They (the bureaucracy of law) rules position as a destination in itself, as a result of empathy and fairness only be seen from a mere formal legal issues. That is why, the idea of a formal law (read, the state law) that are monolif comprehensive and completely as the system is not an empirical description, but many more are part of a historical ideology. Legal Positivism paradigm strong implications for modern legal saintifikasi which began to free themselves from the order of theology and metaphysics, including legal social phenomenon must be understood by the method of impersonal, neutral and objective, so that the law is promoting a rational thought. Soetandyo Wignjosoebroto, asserts: Positivisasi legal norms is a political process was crucial for the development of law as an applied art. This law teachings with descriptions-descriptions were developed as a doctrine (such as neutrality, objectivity and impartiality of the law) has become standard since the early 19th century that the effort to seek justice (searching for justice) can be failed just because knock infringement procedure. Consequences of legal positivism, in subsntasial bring legal ideology codification which is dominated by the principles of modern law, both the level of legislation, yudikasi and execution. Therefore, preferred in the construction of the law is centered how to make regulations rational, coherent and systematic so that it can be applied by jurists through bureaucratic mechanisms. In such a context, the optics of the systemic nature of law and logic, meaning that the rule of law should be used as a reference price of death and thorough hereinafter described logically according to formal methods dogmatic by legal red tape in the form of judicial decisions. Seeing the reality that exists today, can be observed the fact that law enforcement conditions linked to the behavior of judges. Opinion of the most popular in today's society that judges in making the decision more emphasis on formal juridical aspects of the rule of law rather than trying to develop things that have substantial significance in the process of making a decision.

The decision making process by the judge to be very important, because through the process that a person involved in the case / dispute will acquire rights who fought or even otherwise be disenfranchised. In the case of Prita Mulyasari, cohesiveness between positive law in terms of this Act and the material which is used as a formal foundation in examining judge and decide the case and the values of justice in society becomes a conditio sine qua non. In fact judges as the law enforcement and justice, in accordance with Article 28 paragraph (1) of Law Number 4 Year 2004 on Judicial Power is now Article 5 (1) of Law Number 48 Year 2009 concerning Judicial Authority, confirmed that: "Judges shall digging, follow and understand the values of law and justice in society ". For that he (the judge) must be willing and able to explore legal values that live in the community, so a judge must be able to act as a living interpretator that captures the spirit of justice and is not bound by the rigidity procedural positivistic contained in legislation , because the judge is not just mouth the legislation.

The symbolic meaning of the case mBok Minah, coins justice Prita Mulyasari indicate or reflect that way arbitrate in Indonesia tend poor and entered the stage of acute crisis, doctrines-doctrines such as: equality in law (equaity before the law), the court as the last bastion in finding justice, and so often only used as a myth that more lies.[2]

If we analyze the phenomenon arbitrate in indonesiateramat positivistic law is a replica 19th century model that thrives, and maintained a tradition in European society (Netherlands) when it is, that because of political concordance, then transplanted in the Indonesian legal system. Given the purpose of juridical positivism is the establishment of juridical systems (rules and doctrine) to be applied as positive law, then the law becomes the fruit creations experts in the field of law. Thus, in the juridical positivism cosmology, stylist orderly human life entrusted to lawyers and state authorities, legislation that comes from the state into a single measure of the legality of the order of human life.

In the development of objections to the juridical positivism understood above. Karl von Savigny with his theory deny the authenticity volkgeist law made by experts and state. For von Savigny, the true law is not made artificially by the state and legal experts, is the true law is a law that grows and develops from the womb of life of the people, that is the law of true life. Law between the true and the soul of the people there is an organic relationship. True law was not made, it (the law) must be found.

Next in the 20th century, the strategy shifted again. Humanization of life and social justice appear as a new power. In an atmosphere that's cosmology, orderly human life to be placed within the framework of social justice struggles. Law also addressed in cosmology, it is not a coincidence, if the majority of the theories that have sprung up in this era characterized by correction and struggle ranging from Neo-Kantian, Neo-Hegelian, Neo-Marxism, Neo-Positivism, Phenomenology, Existentialism to the Critical Legal Study (CLS). Diverse theories above, essentially containing criticism and struggle to bring

[2] Arief, Barda Nawawi. (2010). Masalah Penegakan Hukum dan Kebijakan Hukum Pidana dalam Penanggulangan Kejahatan. Jakarta. Kencana Prenada Media Group, hlm.23-25.

social justice and humanism life through a variety of ways, some are doing introduced the idea of justice as an ideal law of the entire system of law is positive, there is also a fight through pioneering judges, no through way dismantling the ideology of domination and hegemony in shackles and oppressive structures.

Each periodization development of the theory above, reflect on the human struggle in establishing an orderly life, according to the challenge and his era. Then the legal theory in the history of human beings is a paradigmatic development in lawless. Satjipto Rahardjo, said: "That the legal theory is a gigantic document human (a great Anthropological document) which contains the human struggle in building a legal order. Observing from the model arbitrate in Indonesia and the historical record of legal theory above, then it is necessary for a new paradigm of how to arbitrate a more pro-justice and pro-people according to the social base of Indonesian society. The idea of such a law, initiated by Satjipto Rahardjo with a term known as progressive law. In a progressive law, we are required to understand the law as a whole or a comprehensive, on ways of understanding.[3]

Given that the law is not a linear, even in exact science that supposedly is logical-mechanistic whose methods dominate jurisprudence, it turns out as it says Capra, that the structure of the physical world is no longer like a machine, but has become a reality that is non-mechanical. Cosmic web is understood as something that is interinsik is dynamic. Every description of natural phenomena must take into account the theory of relativity, there is stability but stability that are in dynamic equilibrium. In line with observations Capra, Charles Stamford states that the law should be built by the theories of legal disorder (irregularity of the law), so that it will develop into a non-systematic legal theory.

Observing the phenomenon, then the law must be changed development orientation towards the basic idea of progressive law, as a form of a new paradigm in the way arbitrate. The idea of a progressive law is to put the law as an institution that aims to deliver humans to life fair, prosperous, and make people happy or may be called the law of pro-people and pro-justice. In line with this, then the law needs to be changed the development paradigm of the paradigm of power into a moral paradigm that has a set value of egalitarian, democratic, pluralistic and professional to build civil society (civil society). The future development of the legal framework should be a new paradigm, which is based on mutual fairness, shared prosperity, emancipatory, participatory, local independence and vision of human rights. understanding, appreciation, loyalty, and the practice of the values of Pancasila In connection with efforts to reform the law, so that the result can be a maximum, then re-actualization of improvement within the legal source of Indonesia, Pancasila, a step or process that is very important.

E. CONCLUSION

Re-actualizing values of Pancasila is a step or process that is very important and absolutely necessary in the process of legal reform. This is because Pancasila Indonesia is a source of legal order, which means that the values of Pancasila is a guideline once the parameters for the rule of law throughout Indonesia. In order for law reform relatively easy to do and can approach the desired goal, the rule of law Indonesiapun sources needs to be seen, checked again, if correctly understood, whether it should be realized by the public. Such efforts can be reached by turning, repair and rejuvenate the values of Pancasila as the source of the rule of law in Indonesia. Optical Satjipto Raharjo that way still arbitrate dominance "rule by rule" rather than "rule by common sense is a minimalist way arbitrate is simply enforcing the law, what is written in the text. Approach progressive law enforcement in the concrete in the face of the rigidity of the law to create legal certainty, usefulness and fairness. Approach progressive law gives the criticism of law enforcement who are stuck in a monolithic view of perspective in law enforcement that are based on Pancasila arbitrate way to break the ice at the same time build a bridge over the ravine of law through legal discovery.

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PROSECUTIONS AFTER ARMED CONFLICTS

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Abstract

International peace and security ensure enjoyment of human rights and national development. The growing concern of international community regarding internal and regional conflicts among nations is not only a significant threat for humanity and international security but also causing tyrannical and brutal victimization for human society. The international community should play a responsible role to ensure and foster peace and security by making efforts to resolve such conflicts. However the mode of prosecutions may be an effective way in peacekeeping although every mechanism of peace leaves positive and negative impact for societies and transitional justice. Administration of justice through independent tribunal or court of justice and political settlement including imposition of sanctions may ensure the resolution of conflicts among nations.

Key words: international conflicts; human rights; peace and security; justice; internal tribunals.

1. Introduction

There is no doubt that the most serious events concerning human rights and international peace and security, particularly in the twentieth century, are armed conflicts. It has been estimated that internal conflicts during the twentieth century have resulted in more than 170 million deaths.[1] Since World War II, more than 250 conflicts of a non-international character, internal conflicts, and tyrannical regime victimization have occurred.[2] It is agreed that the international community's duty is to stop such conflicts and foster peace and security within those societies. However, the way that should be used to do so is still an open question. Some argue that prosecutions are the most effective way in peacekeeping in post-conflict societies, while others believe that this has a negative impact. In fact, whether prosecutions after an armed conflict play any role in fostering peace and security is one of the most controversial issues in the International Criminal Law.

On one hand, some argue that the international community should concentrate on building rights' protective state in the future rather than establishing tribunals. [3] They argue that the most important goal that should be considered in the post-conflict societies is fostering peace. If it is, in accordance to the situation, believed that establishing tribunals will result in continuing the conflict, then tribunals should be avoided. On the other hand, there is a growing international agreement, supported by international law, that gross human rights violations, genocide, war crimes and crimes against humanity must be investigated and punished.[4] Some believed that after gross violations of human rights, those who were involved should be prosecuted in international courts, or in hybrid or special courts, or in national courts.[5] They emphasized that the prosecution of individual perpetrators for committing crimes of genocide, crimes against humanity or war crimes is an essential part of transitional justice. This article will argue that although the international tribunals play a significant role in the implementation of international norms, they do not have a significant affect on fostering peace and security in post-conflict societies. This will be supported by critically examined trials and tribunals that have been established to prosecute individuals who have been involved in certain

[1] See Hassner, P, *Violence and Peace: From the Atomic Bomb to Ethnic Cleansing*, 1995, A Central European University Press and Rummel, R. J, *Death by Government*, 1994, New Brunswick, Transaction Publishers.
[2] Jongman. A. J. & Schmid, A. B, *Contemporary Conflicts: A Global Survey of High- and Lower Intensity Conflicts and Serious Disputes*, Winter 1995, 14, 7 PIOOM NEWSLETTER AND PROGRESS REPORT (Interdisciplinary Research Program on Causes of Human Rights Violations, Leiden, Netherlands), and Study, R1994, 17, 6 PIOOM NEWSLETTER.
[3] See Forsythe, P. D, *Human rights in international relations*, 2nd edition, 2006, Cambridge University Press. P: 91.
[4] Theissen, G, *Supporting Justice, Co-existence and Reconciliation after Armed Conflict: Strategies for Dealing with the Past*. From: http://www.berghof-handbook.net. P: 2. Retrieved April 26, 2015.
[5] Roberts, A, *The role of humanitarian issues in international politics in the 1990s*, 1999, 833 International Review of the Red Cross. PP: 19-43

crimes during civil wars. The experience of tribunals for Yugoslavia (ICTY)[6] and Rwanda (ICTR)[7] will be particularly focused on, since they have been established as measures for the restoration of peace and security under Chapter VII of the UN Charter.[8]

2. Prosecutions After Armed Conflicts

Despite the fact that the idea of prosecutions after armed conflicts by international tribunals gained hold, very few of them were established. Although there was some discussion about prosecuting German leaders after World War I,[9] it was only after World War II that criminal prosecution on an international level was recognized as having well-known defects.[10] Even after such war there have been so few instances of prosecution and other accountability mechanisms. In fact, since that time there have been only two internationally established ad *hoc* investigatory commissions and two ad *hoc* tribunals (ICTY) and (ICTR). Also, there has been one international truth commission for El Salvador,[11] and two national prosecution systems established as a result of the conflicts in Ethiopia and Rwanda. Moreover, there were few national prosecutions in Argentina[12] and Chile[13] where a national inquiry commission was also set up. Furthermore, there was The Truth and Reconciliation Commission in South Africa,[14] from which some prosecutions may be generated. [15] In 1993, after the atrocities committed in the war of the former Yugoslavia, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY),[16] under Chapter VII of the UN Charter to protect international peace and security.[17]

From a legal point of view, the reliance on Chapter VII was important in establishing such a tribunal. As the tribunal's orders are compulsory on UN members, they have an obligation to *"cooperate fully with the International Tribunal*."[18] One year later, as a result of the 1994 genocide in Rwanda, the International Criminal Tribunal for Rwanda (ICTR) was also established by the Security Council.[19] Both the ICTY and ICTR were established to try individuals suspected of committing war crimes; they have the same structure and they share the same appellate court. The establishment of the ICTY and ICTR tribunals had been shown as a marker in the history of the law of armed conflict,[20] since Nuremberg and Tokyo were not followed by other international tribunals for almost fifty years.[21] Moreover, unlike the Nuremberg and Tokyo tribunals which were established in response to a moral imperative of *"never again*," the ICTY and ICTR were established first and foremost as part of a peacekeeping strategy.
The establishment of such tribunals represented significant improvement in the interpretation and implementation of international law. Their practices ultimately became the foundation for the idea of the need to have a permanent international criminal institution. Thus, the International Criminal Court (ICC) was established in July of 2002.[22]
Furthermore, special courts were established in the aftermath of atrocities in Sierra Leone, East Timor, Kosovo, and Cambodia. A new court was created by the interim government of Iraq after the US invasion and occupation of 2003 to try Saddam Hussein and his lieutenants. [23] The questions that should be considered are whether these trials had significantly improved peace and security within post-conflict societies, whether they are practical ways of peacekeeping in those societies or whether they are just political tools that give certain states the ability to achieve their political goals.

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[6] The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY). On the establishment of the ICTY see, generally, Bergsmo, M, *the Establishment of the International Tribunal on War Crimes*, 1993, 373, 14 Human Rights Law Review.
[7] The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighboring states, between 1 January 1994 and 31 December 1994 (ICTR).
[8] For the ICTY, see SC Res. 827, UN SCOR, 48th Sess., Res. & Dec., at 29, UN Doc. S/INF/49 (1993), reprinted in 32 ILM 1203 (1993); for the ICTR, see SC Res. 955, UN SCOR, 49th Sess., Res. & Dec., at 15, UN Doc. S/INF/50 (1994), reprinted in 33 ILM 1602 (1994).
[9] Forsythe, Supra note 3. P: 90.
[10] For more details see Willis, F. J, *prologue to Nuremberg: the Politics and Diplomacy of Punishing War Criminals of the First World War* , 1989, Westport: Greenwood Press.
[11] See From *Madness to Hope: The 12-Year War in El Salvador*, Report of the United Nations Commotion the Truth of El Salvador, U.N. DOCS. /25500 (1993).
[12] See NUNCA MAS,INFORME DE LA COMISIOSNO BRE LA DESAPARICIODNE PERSONAS (1985).
[13] See Report of The Chilean National Commotion Truth and Reconciliation. Snyder, C. E, *The Dirty Legal War Human Rights and the Rule of Law in Chile*, 2 TULSAJ . COMP.& INT'L L. 253,279 (1995).
[14] Motala, Z, *The Promotion of National Unity and Reconciliation Act, the Constitution and International Law*, 1995, 28 COMP.& INT. L. J. S. AFRICA. P: 338.
[15] Bassiouni, C. M, *Searching for Peace and Achieving Justice: The Need for Accountability, Law and Contemporary Problems*, 1996, Vol. 59, 4 Peace and Justice Journal, pp. 9-28. P: 11.
[16] Security Council Resolution 955, 8 November 1994.
[17] S.C. Res. 808, UN SCOR, 48th Sess., UN Doc. S/RES/808 (1993); S.C. Res. 827, UN SCOR, 48th Sess., UN Doc. S/RES/827 (1993).
[18] S.C. S.C. Res. 827, UN SCOR, 48th Sess., UN Doc. S/RES/808 (1993); S.C. Res. 827, UN SCOR, 48th Sess., UN Doc. S/RES/827 (1993).
[19] In terms of Article 42 of the Charter.
[20] Roberts, Supra note 5.
[21] Forsythe, Supra note 3. P: 92.
[22] Barria, A. L, and Roper, D. S, *How effective are international criminal tribunals? An analysis of the ICTY and the ICTR*, September 2005, Vol. 9, 3 The International Journal of Human Rights, pp: 349 – 368. P: 349.
[23] Forsythe, Supra note 3. P: 89.

2.1. A Challenge to Foster Peace and Security

First of all, despite the fact that the duty to prosecute or extradite is covered by the Genocide Convention,[24] the Geneva Conventions of 1949,[25] and Protocol I of 1977,[26] it does not exist in conventional law with respect to crimes against humanity since there is no specialized convention for such crimes.[27] However, it can be argued that such obligations are covered implicitly. In fact, there is a significant weakness in the practice of states in the duty to prosecute or extradite and to cooperate with each other in the investigation, prosecution, and adjudication of those charged with such crimes and the punishment of those who are convicted of such crimes. Nevertheless, in 1971 the UN General Assembly adopted the Resolution on War Criminals[28] confirming that a State's refusal *"to cooperate in the arrest, extradition, trial, and punishment*" of persons accused or convicted of war crimes and crimes against humanity is contrary to the United Nations Charter and to generally recognized norms of international law.

In considering whether prosecutions after an armed conflict are essential, some important points should be known. Firstly, from a legal point of view, even though in the situations where prosecutions and trials have been established, they often do not provide the necessary guarantees for a due process of justice. In such prosecution, if they are decided to be established "*Justice must not only be fair, but must also be seen to be fair*."[29] One of the significant concerns about tribunals' procedures is that the trial proceedings take a very long time, as a result of taking into account the accused's right to a fair trial. This, as in the ICTY, causes the number of completed trials and convictions secured per year to be very low. Thus, the tribunals have been ineffective, since the high-level accused remain free and continue to exercise their power, which means the possibilities to foster peace will be limited.

Secondly, only certain individuals often prosecuted after an armed conflict if tribunals are established. For instance, Tokyo was limited in trying to prosecute war criminals representing the enemy powers for crimes committed by them during the conflict. Such a tribunal had no power to prosecute war crimes committed by any member of the related armed forces. Thus, it was criticized as representing more than "victor's justice." [30] Moreover, at Nuremberg, when the losing leaders were tried, only twenty two German leaders were prosecuted in the first round of trials, nineteen of them were convicted and twelve executed. However, Soviet military personnel committed perhaps 100,000 rapes in Berlin after the defeat of the Nazis. Raping was a systematic practice, yet no commanding officers, much less lower ranking soldiers, were ever held accountable.[31]
Thirdly, in such trials, it is common that politics plays a significant role. For example, in Tokyo, the US protected certain officials, especially scientists, from criminal prosecution and brought them to the US. [32] Also, it shielded the Emperor from prosecution, arguing him useful in democratic state building after the war.[33] So, even though tribunals are established, justice is not guaranteed.
It can be argued that what might happen in international tribunals may not happen in national prosecutions. However, prosecution on the national level has been considered more unjust than that of the international level, since such prosecution may reflect newly established power structures dominated by warlords or vigilante groups. Procedures and penalties are often incompatible with human rights standards.[34] The fresh example is the Iraqi Special Tribunal which was established to try nationals and residents of Iraq suspected of genocide, crimes against humanity and war crimes.[35] Such a tribunal was described as an inherent drama in accordance to the court's power and its independency, suspects' rights, criminal procedures and

[24] See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 1U.N. GAOR Res. 96 (Dec. 11,1946) 78 U.N.T.S. 277; see also Statute of the International Tribunal for
Rwanda, adopted at New York, Nov. 8, 1994, S.C.Res. 955, U.N.SCOR, 49th Sess., 3453d mtg., U.N.
Doc. SIRES1955 (1994), reprinted in 33 I.L.M. 1598; Statute of the International Tribunal for the Former
Yugoslavia, adopted at New York, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th
mtg., at 1-2, U.N. Doc. SIRES1827 (1993), reprinted in 32 I.L.M. 1159.
[25] See the Four Geneva Conventions of Aug. 12, 1949: Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field (Geneva Convention No. I),
Aug. 12, 1949, 6 U.S.T. 3114, 7.5 U.N.T.S. 31; Convention for the Amelioration of the Condition of
Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 8.5.
[26] Protocol I Additional to the Geneva Conventions of Aug. 12,1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, Art. 4, 1125
U.N.T.S. 3, reprinted in 16 I.L.M. 1391 [hereinafter Protocol I]. See especially arts. 11,85,86.
[27] See Bassiouni, C. M, Crimes against Humanity: The Need for a Specialized Convention, 1994,Vol. 457, 31 COLUM. J. TRANSNAT'LL.
[28] G.A. Res. 2840 (XXVI) 26 U.N. GAOR Supp. (No. 29), at 88, U.N. Doc. A/8429 (1971).
[29] The Role of International Criminal Prosecutions in Reconstructing Divided Communities, Public Lecture by Carla Del Ponte, Prosecutor, International Criminal Tribunal for the Former Yugoslavia, given at the London School of Economics, on 20 October 2003, Discussion Paper 24. P: 3. Available from: http://www.lse.ac.uk/Depts/global/Publications/DiscussionPapers. Retrieved April 24, 2015.
[30] Forsythe, Supra note 3. P: 91.
[31] Ibid.
[32] Ibid. P: 92.
[33] Akande, D, *International law immunities and the international criminal court*, July 2004, 3: 98 American Journal of International Law. P: 417.
[34] Theissen, Supra note 4. P: 3.
[35] The Iraqi Special Tribunal established on 10 December 2003 the Iraqi Governing Council adopted the Tribunal Statute.

punishments.[36] In fact, prosecuting the leaders who are involved in the conflict may result in the resumption of the fight, since these leaders have their values, expectations, personal ambitions, positioning for power, and the public support.[37] In the case of Iraq, no one can argue that prosecuting Saddam Hussein for his crimes is injustice, but if it is believed that by convicting him thousands of lives will be at risk, then justice for a peaceful approach is more acceptable. By prosecuting him, many doors that may lead to peace will be closed.

3. Conclusion

The international tribunals play a significant role in the implementation of international norms that may ensure peace and security for humanity and international community. The examples of critically examined trials and tribunals that have been established to prosecute individuals who have been involved in certain crimes during civil wars, for instance, tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) that restored peace and security under Chapter VII of the UN Charter. Although what might happen in international tribunals may not happen in national prosecutions. However, prosecution on the national level has been considered more unjust than that of the international level, since such prosecution may reflect newly established power structures dominated by warlords or vigilante groups. Procedures and penalties are often incompatible with human rights standards.

[36] Amnesty International, Iraqi Special Tribunal-Fair trials not guaranteed, May 13, 2005. from: http://www.globalpolicy.org. Retrieved May 4, 2015.
[37] Bassiouni, Supra note 15. P: 29.