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EDITORIAL

Penal Policy and the Complexity of Criminal Law Enforcement: Introducing JILS 4(1) May 2019 Edition

Dani Muhtada¹, Ridwan Arifin

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AFTER the previous edition of JILS raised the theme of “Crimes and Society: General Issues on Criminal Law in Indonesia”, in this edition JILS wanted to explore various cases and developments in criminal law enforcement. The complexity of criminal law enforcement in many conditions presents a variety of debates, ranging from legality and non-retroactive principles of law which in certain cases find discrepancies between facts and existing theories. In addition, criminal law which is considered *ultimum remedium* and has the character of a double-edged sword, on the one hand protects the interests of victims and the public but on the other hand injures the rights of the accused, becomes very complex because of its relation to the protection of human rights.

In order to provide the most up-to-date discourse in the development of criminal law enforcement, in this edition we take the theme “Penal Policy and The Development of Criminal Law”. This theme provides a different perspective for readers relating to criminal law policy and formulation of

criminal law enforcement. In this edition, we received a large number of articles sent to the editorial desk, therefore it requires considerable time in choosing, reviewing and giving our best feedback and comments to the authors. To highlight the development of criminal law enforcement, this Journal volume is dedicated to discuss several issues related to the penal policy and development of criminal law enforcement. Ningsih, for example, discuss the idea of criminal responsibility as well as the relationship between criminal law and technology is malware product. The liability and negligence on this issue examined on two different kind of laws: criminal law and private commercial law. She emphasized that the digital transaction is run by an information system and is provided with special software that runs it. Damage to computer devices and software can cause all kinds of damage. This damage can cause someone to experience damage or loss due to damaged hardware or software, one or more of the following legal areas can provide recovery, such as: contract law, technology law, consumer protection, and product liability.

Another article written by Adegbite analyzes the *Law Enforcement, Military Discipline, and the Notion of Military Justice: Building a Case for the Constitutional Rights of Service Personnel in Nigeria*. He brought interesting issues to be studied relating to law enforcement and human rights in relation to military law in Nigeria. The police and military have an important role in law enforcement, but according to him in many cases constitutional rights and basic rights are violated. He provides different discourses in the study of law, especially for the study of law in Indonesia and can be compared with Nigeria.

Sugeng Wahyudi discusses about *Penal Policy on Assets Recovery on Corruption Cases in Indonesia* as one of contemporary and controversial issues in Indonesia. Corruption and criminal law enforcement often face many problems even more so with the shifting of the motive of corruption towards the international that crosses national borders. Even in some international meetings, the international community supports the inclusion of corruption as an extraordinary crime. On his paper, Wahyudi emphasize that Criminal Law in the Framework of Returning State Losses due to Corruption in Indonesia was not maximal, as evidenced by the lack of maximum or no maximum return on state losses for corruption, therefore recommendations on simplifying regulations in terms of early prevention or since In the beginning of corruption cases which caused a lot of damage to the state's financial need, there was a special formulation so that the handling could be maximized to restore state losses in corruption.

In fact, in the same study, anti-corruption, Damaitu considered that corruption cases had become cases that needed special attention and treatment. He discusses about *Progress and Decline of Legal Thought: Ex-Corruptor as a Legislative Candidate (Analysis of General Election Commission Regulation (PKPU) No. 20/2018)*. He argued that restrictions for ex-corruptors to become legislative candidate can trigger various human rights violations.

Wikan Sinatrio in the development of law enforcement provides a discourse on the protection of children through restorative justice. Through his article entitled *The Implementation of Diversion and Restorative Justice in the Juvenile Criminal Justice System in Indonesia* he proposed an alternative punishment for children who have problems with the law. He studied the implementation of restorative justice in cases relating to juvenile law in Pati, Central Java, Indonesia. He found that basically, PERMA RI Number 4 of 2014 serves to fill the void and law enforcement for the practice of governance and the system of legislation referring to the consideration of letter b of PERMA RI Number 4 of 2014 stated that Law Number 11 of 2012 on System The Child Criminal Court has not yet clearly set out the procedures and the stage of diversion. Therefore, there are some things that have not been regulated in the SPPA Act and then regulated in PERMA No. 4 of 2014, as a function of fulfilling legal vacuum and law enforcement.

In line with Wikan, Ratri Novita Erdianti, Sholahuddin Al-Fatih also studied concerning to alternative sanction for child in the context of juvenile criminal law and restorative justice. Erdianti and Al-Fatih propose fostering or guidance for child as an alternative sanction. Through their paper entitled *Fostering as an Alternative Sanction for Juveniles in the Perspective of Child Protection in Indonesia* confirmed that as *ultimum remedium*, criminal law must not be used in criminal cases relating to children. They argued that institutions that are used as a means of criminal guidance can be a type of social institution or educational institution that is adapted to the pattern of child development. Thus, the effect of deterrence and development of children's competencies will be obtained at the same time.

Gerry Mario Paulus, Jimmy Pello, and Aksi Sinurat with their paper entitled *The Completion Pattern of Adultery Case Based on the Customary Law of Sabunese* seek another perspective on criminal law enforcement especially on customary criminal law on adultery cases. They compared the Sabunese value

on completion the adultery case. Criminal law policy in traditional criminal values in the Sabu people can be an alternative for the formation of national criminal law.

Law Enforcement Policy on Violation of Illegal Cigarette Circulation in Indonesia (Study on Indonesian Customs Directorate General) written by Cahyo Baksoro Indra Maulana reveals many things about criminal acts in the excise sector, especially in the distribution of illegal cigarettes. His study at the Semarang Excise Directorate showed that the implementation of law enforcement in eradicating the circulation of illegal cigarettes was still diverse and was strongly influenced by the role of the function and capacity of PPNS.

JILS this edition also provide one article of general topic, entitled *Promoting the Right to Education through A Card: A Paradox of Indonesia's Educational Policy?* by Muhammad Bahrul Ulum and Dina Tsalist Wildana. They explore and examine the policy of rights to education on Indonesia's educational policy. Ulum and Wildana emphasized that there is a paradox in the government's educational policy on the fulfillment of human rights to education in dealing with the PIP program. While educational complexities faced in remote areas cannot be hindered and it is granted not solely to students from vulnerable families. Such discrepancies in programs circumstantially affirm that the government ignores the root of Indonesia's educational problems, including providing free education as its obligation to human rights.

We think it is important to convey that by this year (2019) our Journal, *Journal of Indonesian Legal Studies* has been accredited by Ministry of Research, Technology and Higher Education (Kemenristekdikti). JILS also has been indexed by several leading indexers, both national and international such as HeinOnline, DOAJ, IPI Garuda, SINTA, Microsoft Academic Search, Directory of Research Journal Indexing, Google Scholars and many more. This achievement is quite a happy achievement for the development of our journal, and this is inseparable from the participation of many parties, including writers and reviewers who provide many suggestions on the development of our journal.

We would like to express our great thankfulness to: Sudjino Satroatmodjo (Faculty of Law UNNES), Rodiyah (Faculty of Law UNNES), Topo Santoso (Universitas Indonesia), Jhon Aycock (Peking University School of Transnational Law) for very valuable comments and feedbacks to our journal.

We would also like to extend my sincere gratitude to the board of editors as well as editorial team and administrative staffs of JILS Journal. We also express our thankfulness to APJHI (Association of Law Journal Managers in Indonesia, Asosiasi Pengelola Jurnal Hukum se-Indonesia) who have provided a lot of information and assistance in the quality of our journals.

Finally, we wish this Journal edition provides you some new insights and another perspective on legal development issues.

Law Quote

“Every society gets the kind of criminal it deserves. What is equally true is that every community gets the kind of law enforcement it insists on”

—

Robert Kennedy

Source: https://www.brainyquote.com/topics/law_enforcement

The Doctrine of Product Liability and Negligence Cannot Be Applied to Malware-Embedded Software

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Abstract

Today, the development of technology is remarkable; the world has faced the industrial era 4.0 where people are now more popular to carry out various financial transactions, both the process of buying and selling and other financial transactions through digital transactions. This digital transaction is run by an information system and is provided with special software that runs it. Damage to computer devices and software can cause all kinds of damage. This damage can cause someone to experience damage or loss due to damaged hardware or software, one or more of the following legal areas can provide recovery; such as contract law; technology law; consumer protection; and product liability. This article is to examine the doctrine of product liability and negligence cannot be applied to malware-embedded software. The approach of the research method used in this article is normative juridical. The normative juridical approach is an approach carried out based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to this research.

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INTRODUCTION

SOFTWARE is undoubtedly the driving force of the information society. There have been occasions when defects in software have had very serious consequences. The term 'safety-critical' is applied to software (and hardware) which is used in situations involving risk to life and limb. Defect in computer equipment and software can cause all manner of damage. The failure of flight control systems, nuclear power station systems and defense systems could result in major loss of life. If a person suffers loss or damage as a result of defective hardware or software, one or more of the following areas of law might provide a remedy: contract; law of negligence; negligent misstatement; or product liability (Bainbridge 2008). Liability laws designed to compensate

for harms caused by defective products may also affect innovation incentives (Galasso & Luo 2018).

Defects in software controlling financial transactions may result in economic loss and as shown above there is clearly capacity for physical damage resulting in such defects. Predictably enough, those in the software industry are concerned as to the likelihood of personal and corporate liability when undetected faults in software precipitate such events. From the point of view of potential plaintiffs, it is more a question of whether there will be recourse to any remedy if they are injured as a result of such incidents when the cause of the problem might have been neither reasonably foreseeable nor even detectable.

Liability law with respect to computer software has important implications. Potential lawsuits act as both a deterrent to software development as well as an incentive for the creation of reliable software. While other areas of tort law have been present for generations, tort law with respect to computer software is a new area of law. It is important for computer scientist to play a role in the policy-making process of this field as new laws and precedents are developed. This article is to examine the doctrine of product liability and negligence cannot be applied to malware-embedded software.

The approach of the research method used in this article is normative juridical. The normative juridical approach is carried out by analyzing and interpreting theoretical matters concerning principles, conceptions, doctrines and legal norms relating to information technology law. The normative juridical approach is an approach carried out based on the main legal material by examining theories, concepts, legal principles and laws and regulations related to this research. This approach is also known as the literature approach, which is by studying books, regulations and other documents related to this research (Irianto & Shidarta 2011).

THE CONCEPT OF PRODUCT LIABILITY

TORT law regards software as a product, rather than a service, will also play a role in determining the application of product liability to software defects. A “product” is defined under Products Liability as a “tangible personal property distributed commercially for use or consumption” (Sunghyo 2017). Unlike other component parts of a vehicle, because software is not a tangible “manufactured product,” a court might find that manufacturing defect theory is not applicable for software or algorithmic errors. While many courts have applied contract law in software related cases under the Uniform Commercial Code, software manufacturers have not been found strictly liable for software defects based on tort product liability theories.

Products liability refers to the liability of any or all parties along the chain of manufacture of any product for damage caused by that product. This includes the manufacturer of component parts (at the top of the chain), an assembling manufacturer, the wholesaler, and the retail store owner (at the bottom of the chain).

Products containing inherent defects that cause harm to a consumer (or someone to whom the product was loaned, given, etc.) of the product would be the subjects of products liability suits. While products are generally thought of as tangible personal property, products liability has stretched that definition to include intangibles (for example gas), naturals (for example pets), real estate (for example house), and writings (for example navigational charts). Products liability is derived mainly from torts law.

Types of Products Liability Claims

Products liability claims can be based on negligence, strict liability, or breach of warranty of fitness. This will typically depend on the jurisdiction within which the claim is based, due to the fact that there is no federal products liability law.

Defects That Create Liability

There are three types of product defects that incur liability in manufacturers and suppliers:

a. Design Defects

Design defects are inherent, as they exist before the product is manufactured. While, the item might serve its purpose well, it can be unreasonably dangerous to use due to a design flaw.

b. Manufacturing Defects

Manufacturing defects occur during the construction or production of the item. Only a few out of many products of the same type are flawed in this case.

c. Defects in marketing

Defects in marketing deal with improper instructions and failures to warn consumers of latent dangers in the product.

d. Strict Liability

Products Liability is generally considered a strict liability offense. With regard to products liability, a defendant is liable when the plaintiff proves that the product is defective, regardless of the defendant's intent. It is irrelevant whether the manufacturer or supplier exercised great care; if there is a defect in the product that causes harm, he or she will be liable for it.

ANALYSIS OF THE DOCTRINE OF PRODUCT LIABILITY AND NEGLIGENCE CANNOT BE APPLIED TO MALWARE-EMBEDDED SOFTWARE

1. Is Software a Product or Service?

Software is defined as a device that is part of a computer that is not in the form of hardware, which can specifically be interpreted as a computer program. In Article 1 number 14 of Law Number 11 of 2008 concerning Electronic Information and Transactions (ITE Law), computers are defined as "tools for processing electronic, magnetic, optical, or system data that carry out functions of logic, arithmetic, and storage." This software was built with the aim of running an electronic system. Electronic systems are defined in Article 1 number 5 of the ITE Law as a series of electronic devices and procedures that function to prepare, collect, process, analyze, store, display, announce, transmit, and/or distribute Electronic Information. While the definition of electronic information is given in article 1 number 1 of the ITE Law as follows:

"Electronic Information is one or a set of electronic data, including but not limited to writing, sound, images, maps, designs, and photos, electronic data interchange (EDI), electronic mail (electronic mail), telegram, telex, telecopy or the like, letters, signs, numbers, codes, processed access, symbols, or perforations that have meaning or can be understood by people who are able to understand them."

Some of the problems surrounding the categorization of software from a legal point of view have already surfaced, usually in the commercial field and relating to whether supply of software can be properly classified as supply of goods or supply of services. Computer programs frustrate the law's traditional categories; they exhibit characteristics of both concrete property and abstract knowledge (Rowland 1991). Based on Section 2(1) Consumer Protection Act 1987 requires that:

...where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the damage.

The people referred to in subsection (2) are a producer, an own-brander or an importer. Product is defined in section (1) as:

Any goods or electricity and (subject to subsection (3) below) includes a product which is comprised in another product,

whether by virtue of being a component part or raw material or otherwise.

In other words, the components comprising a product are also treated as products in their own right. It is well known these days that computers consist of both hardware and software and so in broad terms these could be termed the components of the computer system. Such a naive analysis would suggest that software would attract the application of the Consumer Protection Act in the same way as any other component of a product. The simplicity of this approach may be challenged by the unique nature of software.

It is the dichotomy between the tangible and intangible nature of software which lies at the heart of the problem of applying the existing legal provisions. In relation to product liability this has become of paramount importance only relatively recently, not only because of the Consumer Protection Act, but also because it is only within this time scale that computer-controlled systems have really begun to impinge on the life of the man in the street.

If software can be classified as a product, then there will be liability if there is a defect in the software and that defect causes damage. All software errors may not give rise to defects in this sense; only the ones which could lead to damage.

Furthermore, it is also should be distinguished some different types of software. Software performs many functions and there have been attempts to distinguish certain types primarily as to whether they constitute goods or services but this discussion has also spilled over into the debate as to whether software can be regarded as a product. Software can basically be divided in to two classes; embedded software and applications software.

Embedded software is the software which is supplied with the system by the manufacturer, it is available as soon as the system is switched on and is very difficult for anyone other than the producer to change. Embedded software is nearly always firmware, a generic term for software in ROM (read only memory); it is always in the computer's memory and starts executing the program immediately. Consider a lift control system for example. It is required that the moment the system is on the program is executed and remains in operation until the system is switched off again. This is achieved by means of embedded software or firmware supplied as an integral part of the lift system.

Applications software on the other hand causes a system to perform a particular function, thus a general purpose PC can be loaded with different software packages to provide spread sheet, word processor, database functions etc. In such a general purpose computer, the amount of embedded software is minimal, just sufficient to allow the computer to read in the information supplied by the applications software. Such software is frequently 'off-the shelf' but may also be specially written to enable a general system to carry out a specific task (Rowland 1991).

2. The Nature of Software Defects

Prior to considering issues of legal liability, it might be helpful to attempt a brief analysis of the nature of the differences which exist between software and the tangible product with which society and the law are more familiar. Defects in a traditional product such as a motor car may originate in one of two ways. Design defects in a traditional product such as a motor car may originate in one of two ways. Design defects relate to some failure at the design stage, with the consequence that the failure node will be exhibited in every species of the product. A more commonplace form of defect is introduced during the production stage (Lloyd 2011).

Where software is concerned, the nature of the digital copying process is such that there can be a high degree of confidence that every copy of software will be identical. If particular copies are corrupted, the likelihood is that they will not work at all, so that any defect becomes apparent before any damage is caused. If customer should wish to establish that a copy of a word processing program which has been purchased is not of satisfactory quality, argument will have to proceed by reference to word processing programs produced by other producers and to general standards. Although the task can be accomplished, it is a significantly more onerous burden than that faced by a person claiming the existence of a production defect (Lloyd 2011).

3. Basis of Liability

Yusuf et.al (2016) emphasized that liability can arise in four basic ways, as follows:

- a. Direct
 - 1) A defective software program causes a radiology machine to malfunction, burning a patient.
 - 2) Hardware malfunction, e.g. computer catches fire
- b. Indirect
 - 1) A software produces incorrect information which feeds directly into a physical process, for example ATM dispenses notes
 - 2) Software produces incorrect information which is relied on by a human mind, for example computer-controlled traffic signals, reliance on spreadsheet calculations to build a bridge or calculate tax liability
 - 3) A bug cause a cardiology machine to produce inaccurate information. The physician relies upon the machine as being correct, and administers the wrong treatment.
- c. Negligence

Negligence is an arrangement in which liability is established only after it is shown that a producer failed to take a given level of care in producing the product. Software functions normally, but a technician uses the machine improperly, administers the wrong treatment, or misinterprets results.

Under the negligence interpretation of liability, the victim would need to prove that the manufacturer of the software failed to develop and test its product well enough to the point where it was reasonably confident that the product was safe to operate, or that the operator of the software failed to use the software correctly or grossly failed to interpret the software's finding correctly.

d. No-fault

Software functions properly and medical personnel act appropriately. However, injury occurs because of imperfections of the test or the test is not designed to find the patient's specific abnormality.

4. What is Malware?

Malicious software (malware) is any software that gives partial to full control of your computer to do whatever the malware creator wants. Malware can be a virus, worm, trojan, adware, spyware, root kit, etc. The damage done can vary from something slight as changing the author's name on a document to full control of your machine without your ability to easily find out. Most malware requires the user to initiate its operation. Some vectors of attack include attachments in e-mails, browsing a malicious website that installs software after the user clicks ok on a pop-up, and from vulnerabilities in the operating system or programs. Malware is not limited to one operating system. Malware types can be categorized as follows: viruses, worms, trojans, and backdoors seek to infect and spread themselves to create more havoc. Adware and spyware seek to embed themselves to watch what the user does and act upon that data. Root kits seek to give full access of your machine to the attacker to do what they want ([Anonym, UCLA 2014](#)).

5. Negligence

Negligence is part of an area of law known as tort. Basically, a tort is a civil wrong, independent of contract. It imposes legal liabilities on a person who has acted carelessly or unreasonably omits to do something. Under certain circumstances a person will be liable to another for failing to exercise a required duty of care. A claim in negligence does not depend on the presence of a contract, so if the person injured is someone other than the buyer, that person can still sue. The buyer also should be able to sue, but on the basis of breach of contract if the item is defective and fails to comply with implied terms such as those concerning satisfactory quality and fitness for purpose. To be able to sue in negligence, three essential ingredients must be present ([Hermana & Silfianti 2011](#)):

- a. A duty of care owed to the injured party;
- b. A breach of that duty of care; and
- c. Consequential loss (loss which is a direct and natural result of the breach of duty of care)

Negligence can be thought of as an early form of product liability and has developed over the years to its present wide scope, although this is

tempered to some extent by the growth of insurance. It is also limited, to some extent, by police considerations. This is particularly so where the loss is purely economic or the claim is in respect of nervous shock or if a professional would be exposed to an unlimited number of claims from persons other than those for whom he performed his duties.

In the other conditions, when negligence and computers analyzed, stated that computers and computer software could kill or cause serious injury; however, negligent liability does not stop at personal injury but extends to damage to property. Computer software has the potential to cause serious loss of life as well as causing economic losses. It is possible that the software developer was negligent in writing and testing of the software. The fact that an action in negligence lies without the need for a contract is important both for computer program writers and manufactures of computer equipment. If a program is licensed by a publisher, the program author could be liable in negligence even though he is not a party to the license agreement (Setiadi, Sucahyo and Hasibuan 2012).

There are limitations, however, to the scope of the law of negligence. A person writing a computer program, or company manufacturing computer equipment, will not necessarily is potentially liable to the world at large in negligence. The person/company will be liable, however, to those whom they could contemplate being adversely affected by any negligent act or omission by them. A future limiting factor is that the claimant bears the burden of proof; he has to show that the defendant was negligent and this is not always easy to do.

6. Product Liability and Software

Transactions carried out electronically are basically engagements or legal relationships carried out electronically by combining computer-based electronic system networks with communication systems, which are further facilitated by the existence of a global computer network or internet (vide Article 1 number 2 of the ITE Law).

A legal relation is a relationship between two or more parties (legal subjects) that have legal consequences (giving rise to rights and obligations) and are regulated by law. In this case the right is the authority or role that is in someone (the holder) to act on something that is the object of that right to another person. Whereas, the obligation is something that must be fulfilled or carried out by a person to obtain his rights or because he has already obtained his rights in a legal relationship.

The object of law is something that is useful, valuable, and valuable to the legal subject and can be used as the subject of legal relations. While, the legal subject is anything that can be a supporter of their rights and obligations or has legal authority (*rechtsbevoegdheid*).

In the private sphere, the legal relationship will include relations between individuals, while in the public sphere, the legal relationship will include relations between citizens and the government and relations between

fellow members of the community that are not intended for commercial purposes, which include public services and information transactions between Government organizations.

In commercial activities, transactions have a very important role. In general, the meaning of transactions is often reduced as a sale and purchase agreement between the parties that agree to it, even though in a juridical perspective, the terminology of the transaction is basically the existence of an agreement or legal relationship that occurs between the parties. The juridical meaning of transactions is basically emphasized in the material aspects of the legal relationship agreed upon by the parties, not formally legal actions. Therefore, the existence of legal provisions regarding the engagement remains binding even though there are changes in the media and changes in procedures for transactions. This is of course an exception in the context of legal relations involving immovable objects, because in that context the actions have been determined by law, that is, they must be carried out in "light" and "cash".

In the scope of civilization, especially the engagement aspect, the meaning of the transaction will refer to civilization, especially the engagement aspect, the meaning of electronic legal transactions itself will include buying and selling, licenses, insurance, leasing and other agreements born in accordance with the development of trade mechanisms in the community. In the public sphere, the legal relationship will include relations between citizens and the government and relations between fellow members of the community that are not intended for commercial purposes.

Product liability is direct civil liability (strict liability) from the business actor for losses suffered by consumers due to using the products they produce. This responsibility is applied in the event that there is no agreement (no private of contract) between business actors and consumers.

This condition as what happened in United Kingdom, that the entry into force of the product liability provisions of the Consumer Protection Act 1987 has brought about major changes in the non-contractual liability regime in the United Kingdom. The Act, which was introduced pursuant to the requirements of an EC Directive on the Approximation of the laws, regulations and administrative provisions of the member states concerning liability for defective products, serves principally to introduce a system of no fault liability in respect of certain forms of injury and damage.

A producer will incur liability only when a product is defective. To date, there has been almost no litigation concerned directly with the non-contractual liability of software producers or suppliers. It seems unlikely that this can continue. Whilst the requirement that a claimant establish negligence may be a barrier to claims based in negligence, there appears steadily increasing recognition that software is to be regarded as a product and hence will be subject to the product liability regime. Although the limitation to situations where software causes injury or damage to non-commercial property is a significant one, the ever-expanding range of software

applications must make a similar expansion in litigation a not unreasonable prospect.

7. Misrepresentation

Misrepresentation claims that the vendor fraudulently misrepresented the capabilities of the software. In order to prevail under this theory, the plaintiff must show that it was damaged because:

- a. The vendor misrepresented a material fact concerning the software, and
- b. The plaintiff justifiably relied on this misrepresentation

A fraudulent misrepresentation claim is especially threatening to software vendors because under this theory, a plaintiff may sue when it suffers damages solely to its intangible economic interest (such as business reputation), rather than personal injuries or damage to tangible personal property (Rowland & Macdonald 2005).

Section 3 of the Misrepresentation Act 1967 provides that a clause in a contract which purports to exclude or restrict liability for misrepresentation will only be effective if it satisfies the requirement of reasonableness. The burden of proof is on the person seeking to rely on the clause. If a computer salesperson claims that the computer she is selling will run a particular software package and this claim turns out to be untrue, it will be for the company selling the computer to show that any exemption clause it hopes to rely on passes the test of reasonableness. The test is laid out in section 11 of the Unfair Contract Terms Act 1977.

In a subsequent appeal to the House of Lords, the Court of Appeal's decision was affirmed. It should be noted that, by section 7 of the Unfair Contract Terms Act 1977, liability for defective products under Part I of the Consumer Protection Act 1987 cannot be excluded or limited by any contract term.

8. Professional Malpractice

In this variation on the negligence action, the software vendor is characterized as a professional and therefore is held to owe to the plaintiff not merely a duty to act reasonably, but a higher duty to use a professional standard of care, analogous to the duty required of a physician or lawyer. This theory could apply only if the provision of software is characterized as a service, rather than as a sale of product.

9. Strict Liability

If programs are viewed as a product, then strict liability may be applicable and a plaintiff would not need to prove the "absence of due care" element needed in proving negligence cases. Under strict liability claims, consumers only need to prove that there was a defect in the product under the tort law.

Strict liability is an arrangement in which a producer is held liable regardless of how much care the producer took to make the product reliable.

Under a strict liability interpretation, a person who is harmed in some way by a software failure would have the right to obtain damages either from the manufacturer of the software or the institution operating the software when the error occurred. Under current law, strict liability principles are not applicable to doctors and hospital, although strict liability is being applied more frequently these days to manufacturers of medical software.

In a modern society such as ours, where technology rapidly advances and changes and computer software is being used in more innovative situations, the “chilling” effect on technology as a result of imposing strict liability would be too great. Furthermore, the protection afforded under a warranty theory, negligence theory, and computer malpractice theory can adequately protect and compensate the consumer without preventing the innovation that is so desirable in our complex and technologically growing society. If strict liability were imposed upon computer software manufactures, society could lose out on very important and potentially lifesaving computer software (Miyaki 1992).

For strict liability to apply to the manufacturer of software, the user must have used the product in a reasonable fashion and the product must have reached the user without substantial change. If the user is injured while using the product, the user need show only that the product caused the injury, and that the product was sold in a defective or unreasonably dangerous condition. The alleged defect could be a defect in the design or manufacturing of the software, or it could simply be a failure to warn of hazards.

An important feature of the strict liability theory is that it renders legally irrelevant the issue of whether the vendor acted reasonably. By preventing the vendor from presenting exculpatory arguments, this theory in effect forces software manufacturers to guarantee the safety of their products.

The strict liability theory also has an effect on recoverable damages. If it is applied, everyone in the chain of distribution of the product may be liable for the plaintiff's damages. However, users are not generally compensated for economic loss under a strict liability theory, but only for personal injury or property damage.

As product liability and reputation may achieve in isolation the same outcomes in terms of incentives, it is clear, and in fact it seems to be widely shared idea, that they are substitutes as instruments to induce adequate behaviour.

The complementarity between product liability and reputation: product liability reduces the cost of reputational sanctions. This becomes particularly obvious when one considers the range of parameters for which trade between company and consumers can be sustained. Product liability makes it possible that market reputation allows cooperation to happen for a larger set of parameter values than market reputation alone would be able to induce to equilibrium. In other words legal, liability makes reputation more successful in ensuring trade in markets (Ganuza, Gomez, and Robles 2016).

CONCLUSION

THE DOCTRINE of product liability and negligence cannot be applied to malware-embedded software. Based on the analyses above and many theories regarding the product liability and negligence, the doctrine of product liability and negligence cannot be applied to malware-embedded software. Product liability applies to defective products though not software. The law of negligence can apply to defective hardware and software (original software by producers) but it is not easy to apply. There are many terms and conditions and also test to prove the negligence of defective software. Malware-embedded software usually is not original software by producer. If a consumer want to install a software, they should accept the terms and conditions but many consumers did not read the terms and conditions. Because of that it is hard to apply product liability and negligence to producer for malware-embedded software.

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Law Enforcement, Military Discipline, and the Notion of Military Justice: Building a Case for the Constitutional Rights of Service Personnel in Nigeria

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Law enforcement is the pivot on which every society and institution stands and essentially survives on. An institution where enforcement of the law is in abeyance will surely not endure, as whatever goals are set is condemned to smoulder in total indiscipline. Without doubt, no institution would want to set off on that footing. However, where law enforcement takes place in a special institution like the Military, its deployment is bound to raise deep questions regarding the Constitutional rights of the accused persons. Over the years, the Nigerian Military appear to have been caught in this miasma in which the Constitutional rights of its service men has remained trapped in the notion of upholding Military discipline. It is to this end that this paper appraises the question of law enforcement in the Nigerian Military, querying its attitude towards the safeguards of these rights, and accordingly building a case for a new and better regime, in which Constitutional rights of Service personnel are not only guaranteed, but regarded as pre-eminent.

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INTRODUCTION

WITHIN the context of the general society, the responsibility of Law enforcement lies in the hands of the Police ([The Police Act, Nigeria 2004](#)), and other relevant State Security Agencies¹. The Police and these other bodies act as agents of the State in the maintenance of law and order, and in

¹ Notable amongst these include specialized institutions such as the Nigerian Customs Service, The Nigerian Prisons Service, Nigeria Security and Civil Defence Corps (NSCDC), Economic and Financial Crimes Commission (EFCC), Independent Corrupt Practices and other related Offences Commission (ICPC), National Drug Law Enforcement Agency (NDLEA), National Agency for Food Drug Administration and Control (NAFDAC), Federal Road Safety Commission (FRSC), Standards Organization of Nigeria (SON), e.t.c.

extension regulate the conduct of human affairs. However, aside from the Civilian type of law enforcement, there also exists another type more *sui generis* in nature. Servicemen just like other members of the Society are subject to the general laws of the land and bound by the jurisdiction of the conventional courts. Additionally, they are also, more specifically this time, subject to a regime of special laws which strictly regulates their profession, conduct, behavior, duties, obligations, rights, and other areas of their job as Soldiers. This refers to law enforcement within the province of Military law².

The Status of the Soldier/Service personnel within a democratic cum constitutional framework is a complicated one. On the one hand, upon his enlistment into the Armed Forces it is deemed that there now exist a change in his legal status which compels that he is subject to the terms of the 'Military contract' as well as the provisions of relevant Military laws, which serves the dual purpose of regimenting him to military discipline, as well as preparing him as a ready asset for the overall fighting force. On the other hand, given that such soldier still remains a citizen of the State, it is equally deemed that he is not only subject to the same liabilities as other citizens, but more importantly that he is still assured of his constitutionally guaranteed rights that Military service does not attenuate. It is within this complicated web that the punishment of service personnel for Offences comes into scholarly focus.

We hear of the term "Court Martial" all the time, but not many have a clear insight into what goes into the final determination of matters in this special court. Can we say that the rules in Military books ensure that justice is done at all times, or is it just a question of justice their own way? What about the question of the Serviceman's Constitutional rights? Does the spirit and letters of Military compacts signals the death of the Soldier's rights, or is there a mutually beneficial co-existence of the two? Striking the right balance between these important, but unequal streams of law, requires a deep understanding of where they meet and where they part. These are current issues at the core of the intellectual ferment surrounding the Constitutional rights of service personal in Military law enforcement.

THE MILITARY LIFE AND THE NOTION OF MILITARY DISCIPLINE

THERE is no gainsaying that Soldiers are creatures of discipline, with nearly all aspects of their professional lives governed by orders (ICRC 2011). While on the one hand Military justice and discipline appears to operate independently of each another, on the other hand both are not mutually exclusive, as they interconnect and serve as the legal pedestal on which law

² Generally, Military Law is defined as "the body of laws, rules, and regulations that have been developed to meet the needs of the military. It encompasses service in the military, the constitutional rights of service members, the military criminal justice system, and the international law of armed conflicts".

enforcement is applied in the Military (Ghiotto 2014). The historical premise of Military discipline and the concept of punishing Soldiers for unlawful conducts, as well as illegal acts has its roots in ancient practices of the Roman Military establishment (Brand 1968). Under the old Roman Military justice system, soldiers of Rome's legion when accused of violations of extant military laws were made to undergo summary trials with the result that the punishment was always brutal in nature (Brand 1968). Appearing to illuminate the brutality involved in early forms of military discipline, a leading Military law Scholar Joseph Bishop once opined that the popular legal doctrine which states that it is better that ninety-nine guilty men go scot-free, than for one man to be innocently convicted, has no basis in the notion of Military discipline (Bishop 1964). In making this assertion, Bishop was of the view that if a soldier who deserts and manages to run away is eventually shot, the heartening effect is greatly reduced if not obliterated where correspondingly ninety-nine out of a hundred deserters also get away (Bishop 1964). Bishop's postulation appears to sum up the state of mind regarding law enforcement in the Military.

Under the Roman system, offences deemed legally impermissible could be classified as atrocities, even where such were carried out relying on lawful orders (Green 1985)³, a framework that was further developed under canon law, and has since been sustained through the middle ages up to contemporary times (Dawson, D & Dawson, James D. 1996). This today forms the crux of what is known as the Doctrine of Obedience to lawful superior orders, a doctrine firmly at the core of law enforcement in the Military⁴ (Lippman 2001; King 2002; Insko 2003; Bilsky 2004; Moghalu

³ For example, the Roman Digest is known to have excluded certain acts regarded as "heinous" from the defense of obedience to lawful orders. See IV The Digest of Justinian, Law 157, tit. XVII, Lib. L, Theodore Mommsen & Paul Krueger (eds.) (University of Pennsylvania Press, 1985). This Roman rule appear to have greatly inspired most modern Military laws, which today have provisions excluding from the defense of 'lawful orders', all forms of crime and criminality particularly those that are regarded as clearly "gross, indisputable, outrageous, universal, and without any doubt".

⁴ The doctrine of superior orders is a defense a Soldier pleads to a charge for crimes committed in the course of a war, on the ground that the acts so referred to, were carried out based on lawful superior orders. The superior order plea is deemed also deemed as a corollary of the complementary to the command responsibility defense which seeks to help a Soldier escape personal liability for executing superior orders. The superior orders defense is rooted in more than four centuries of pre-modern historical practice, starting with the 1484 trial of Peter Von Hagenbach who claimed that all the atrocities that were alleged of him were not of his personal decision. Its significance in contemporary times however came to the fore during the Nuremberg trials where some of the accused persons tried to raise it in defense, but its applicability for such an Ad hoc prosecutorial process was struck down following the promulgation of the London Charter of the International Military Tribunal which stated clearly that the defense of superior orders was invalid when it comes to allegations of War Crimes. This position appears to have been inspired by the earlier position under Roman law in which acts considered as very atrocious and impermissible did not come under the superior orders rule. Specifically, Nuremberg Principle IV provided that, "The fact that a person acted pursuant to order of

2006). Under the current rule, the leading position is one that excuses only non-atrocious misdeeds by soldiers, while criminalizing all acts deemed as egregious. This rule is also a subset of the established military doctrine of *respondeat superior*⁵ (Shakespeare, Collins (ed) 1995), a rule that holds that the superior officer alone would be held liable for any unlawful conduct commanded of subordinates. The key behind this rule is that it helps institutionalize a system of total obedience to orders, so Military discipline is maintained always. In an obedience to superior orders regime, Military discipline flourishes and respect for Military authority remains at an all times high. This is exemplified in the works of William Westmoreland, who speaking of Military discipline opined as follows:

Discipline is an attitude of respect for authority which is developed by leadership, precept, and training. It is a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task that is to be performed. Discipline conditions the soldier to perform his military duty even if it requires him to act in a way that is highly in-consistent with his basic instinct for self-preservation (Westmoreland 1971).

Thus, the military life is one in which the Soldier in a proper understanding of the delicateness of his assignment, is expected to display peculiar virtues of character and general moral principles of an uncommon nature, all within a highly regimented framework that is followed through

his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him". However, the doctrine was to later resurface on the international scene during the trial of the notorious Nazi War Criminal, Adolf Eichmann. Over the years, the doctrine has evolved in a rather chequered manner, such that its application in international criminal prosecution has been greatly narrowed. For instance, the Rome Statute of the International Criminal Court under Article 33 referred to as "Superior orders and prescription of law", provides that; "The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful". The doctrine has remained a most controversial item in most scholarly works.

⁵ Shakespeare captures the idea of *respondeat superior* perfectly, in his dramatic account in one of his works Henry V, where an infantryman had hailed the King's cause as 'just and honorable'. The conversation then went thus—"That's more than we know", replies a second infantryman; then add a third, "Ay, or more than we should seek after, for we know enough if we know we are the King's subjects. If his cause be wrong, our obedience to the King wipes the crime of it out of us".

consistently⁶ (Clausewitz, Rapoport (ed.) 1968; Huntington 1957; Miller 1996). For instance, matters such as the Soldier's daily regime of different strata of rigorous exercises, difficult tasks, and hard labor, as well as a form of seclusion from the society which is signified by the 'barrack life' (Boane, 1990), are things carefully designed to disconnect him from unwarranted behaviors and a corresponding capacity not to contemplate any.

In the Military, discipline is a fundamental hallmark of military service. This tradition evolved from certain historical objectives separating the Soldier from other members of the society. First is the fact that the work of the military which involves defending the nation from external aggression and territorial integrity is a hard one that requires troop's preparedness, and a high level of morale from the rank and file, as well as the Officers corps. Second, the principal job of the military is about fighting wars and most often, particularly when the call out of troops is based on an emergency, the military objective is not always entirely clear both to the Commanding Officer as well as his troops, as such there is a measure of discipline required so as not to lose focus, and to be able to switch strategy at the slightest call. These apparently uncommon characteristics make the service personnel's work a unique one in which control must be activated at all times. Where a Commanding Officer loses control of his troops, or where the Military High Command loses authority of its forces, it is as good as saying that all is lost. It is within this context that Offences are viewed quite seriously in Military circles.

OFFENCES IN THE MILITARY

GENERALLY, any act of service personnel which brings disgrace or contempt to the Military as an Institution is subject to the penalties of military law (Monroe 1942). In the Nigerian context, offences punishable in Military circles range from minor infractions related to military discipline, to very serious offences occasioning death. Under Nigerian Military law, Offences are specifically defined with corresponding sanctions or punishments as the case

⁶ This unique life of the Serviceman appears to be the theme of the renowned Military strategy theorist Carl Clausewitz, when he said, "every special calling in life, if it is to be followed with success, requires peculiar qualifications of understanding and soul". Clausewitz was equally of the opinion that "at the heart of any army, there would always be a cadre of professionals who would fight, not out of patriotism but...from sheer professional pride". According to him, the professional army, "is mindful of all these duties and qualities by virtue of the single powerful idea of the honor of its arms-such an army is imbued with the true military spirit". Adding to this understanding, Samuel Huntington on his part postulates on a kind of Military Ethics that speaks of "the permanence, irrationality, weakness and evil in human nature... the supremacy of society over the individual and his rights", including, "the importance of order, hierarchy, and division of functions". The same idea is further reflected in the works of Richard Miller who in expanding this thought, spoke about the Excellency of character and this finds expression in individual personal identity.

may be.⁷ For military personnel, offences are broadly of two types, there are: (1) Military Offences, and (2) Civil Offences.

1. Military Offences

MILITARY Offences are simply contraventions of the rules laid down for the enforcement of military discipline. These regulations are contained in Nigeria's principal military law, the Armed Forces Act⁸ (Hereinafter referred to as 'The Act'). Persons to be tried under this Act must be subject to what is known in Military circle as Service Laws. Section 168 and 169 of the Act provides grounds for bringing offenders who have ceased to be subject to Service Laws for trial under the Decree. These offences are peculiar to Service Personnel and Civilians who come under Section 272 of the Act. It will be noted that a few civil offences are reflected in what constitutes Military offences. Under the Act, Military offences includes the following - Aiding the Enemy ([The Armed Forces Act, Section 45\(1\)\(2\)\(3\) Nigeria 2004](#)), Communication with the Enemy ([Section 46\(1\)\(2\)\(3\)](#)), Cowardly Behavior ([Section 47\(1\)\(2\)\(3\)](#)), Offences against morale ([Section 48](#)), Becoming a Prisoner of war through disobedience or willful neglect and failure to rejoin Armed forces ([Section 49\(1\)\(2\)\(3\)](#)), Offences by or in relation to sentries ([Section 50\(1\)\(2\)\(3\)\(4\)\(5\)\(6\)](#)), Looting ([Section 51](#)), Mutiny ([Section 52\(1\)\(2\)\(3\)](#)), Failure to suppress mutiny ([Section 53\(1\)\(2\)](#)), Insubordinate behavior ([Section 54\(1\)\(2\)\(3\)](#)), Fighting, quarrelling and disorderly behavior ([Section 55](#)), Disobedience to particular orders ([Section 56\(1\)\(2\)](#)), Disobedience to Standing orders ([Section 57\(1\)\(2\)](#)), Obstruction of Provost Officers ([Section 58](#)), Absence without leave ([Section 59](#)), Desertion ([Section 60\(1\)\(2\)\(3\)\(4\)](#)), Assisting and concealing desertion and absence without leave ([Section 61](#)), Failure to perform Military duties ([Section 62](#)), Malingering ([Section 63\(1\)\(2\)\(3\)](#)), Drunkenness ([Section 64\(1\)\(2\)](#)), Drug: Wrongful use, possession, e.t.c of uncontrolled substance ([Section 65\(1\)\(2\)](#)), Offences in relation to property ([Section 66](#)), Offences in relation to properties of members of the Armed Forces ([Section 67](#)), Miscellaneous Offences relating to property ([Section 68 \(1\)\(2\)](#)), Loss or hazarding vehicle, Ship, or Aircraft ([Section 69](#)), Dangerous Flying ([Section 70](#)), Low flying ([Section 71](#)), Annoyance by Navigation or flying ([Section 72](#)), Other offences in respect of Ships and Aircrafts ([Section 73 & 74](#)), Prize Offences ([Section 75 & 76](#)),

⁷ Emphasis here is laid on the written aspects of the Constitution of the Federal Republic of Nigeria, 1999(as amended) especially in Section 36(12), which provides that, "Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law."

⁸ CAP A20, Laws of Federation of Nigeria (LFN), 2004 (1993 No.105), which came into force 6th July, 1994, and which is a review of the Nigerian Army Act, 1960, enacted by the legislature of the Federal Republic of Nigeria in 1960.

Sexual Offences ([Section 77-81](#)), Billeting Offences ([Section 82](#)), Offences in relation to requisitioning of vehicles ([Section 83](#)), Offences relating to and by persons in custody ([Section 84-87](#)), Miscellaneous Offences ([Section 88-99](#)), Offences in relation to Court Martial ([Section 100-113](#)), Other civil offences ([Section 114](#)).

The above represent what constitute offences under the Act. It should be noted that in the course of investigating an offence that has been committed, or to prevent the commission of an offence it might become imperative to apprehend and detain the alleged offender. Where arrest becomes necessary it must be done by a person who has legal powers to do so.

2. Civil Offences

UNDER the Act, there is another class of offences called civil offences. The position under the general Law is that if an offence is one for which the punishment is either a fine, or term of imprisonment or both, it is referred to as a crime. Distinctively, if it is an infraction in which the tort-feasor makes reparations to the victim or his estate in form of damages for the injury caused, then it is a civil wrong and not a criminal offence. However, in the Military where a crime is provided for by the civil authorities as contained for instance in the Criminal Code, or other criminal legislations, it is referred to as a Civil Offence. Service personnel are subject to both Military and Civil Laws, and in extension Courts Martial have jurisdiction over both Military and Civil Offences. The Act provides for Civil Offences ([The Armed Force Act, Section 114, Nigeria 2004](#)). In a Court-martial or any military trial, it is important that the appropriate section of the law providing for the civil offence be entered on the charge sheet, and must be explained by quoting the section or the civil enactment contravened, and the act constituting the contravention.

PROCEDURE FOR ENFORCEMENT OF OFFENCES IN THE NIGERIAN MILITARY

ARRESTING the Offender is the first step in the prosecutorial process. A suspected offender may be placed under arrest to prevent him from damaging evidence, escaping, or prevent further illegal acts, or ensure the personal safety of the offender himself. A person subject to service laws under the decree may be arrested if found committing an offence, alleged to have committed an offence, or reasonably suspected of having committed the offence ([The Armed Force Act, Section 121, Nigeria 2004](#)). It is important to note, that an officer may be arrested only by an officer of superior rank, however if he is found

engaging in quarrel or disorder of any kind, he may be arrested by an officer of any rank.⁹

If for any reason, a service personnel under arrest is to remain in custody for a longer period than eight days without release, a special report should be made on the necessity for his continued detention. This report will be made every eight days until a court martial is assembled or the offence is dealt with summarily or the person is released from arrest. An Offender may be detained in the following circumstances – (a) The seriousness of the allegation or accusation, for example murder or treason; (b) The need to establish the identity of the person under arrest; (c) The need to secure or preserve evidence relating to the allegation or accusation; (d) The need to prevent the continuation or repetition of the offence or any other offence; (e) The necessity to secure the safety of the person, other persons or property; (f) The need to forestall the actual or likelihood of interference with investigation, for example threatening, intimidating, incriminating or suborning of witnesses; (g) The need to prevent escape of the accused; (h) The fact that the accused has not surrendered but has been apprehended as an illegal absentee or has habitually absented himself.

Disciplinary Powers of Commanding Officers

AS EARLIER observed, a key objective of Military Law is the maintenance of discipline and good order among troops. Under the Act, a variety of channels have been provided through which military discipline is applied and one is the authority of the commanding officer in the command and law enforcement chain. The Commanding Officers at various levels as executors of military discipline are given extended powers to investigate charges, and deal with offenders summarily, or through the avenue of a court-martial¹⁰ ([The Armed Forces Act, Sections 115-118, Nigeria 2004](#)).

When an offence has been committed, the allegation shall be reported to the Commanding Officer of the accused in the form of a charge. The Commanding Officer shall investigate the charge in the prescribed manner

⁹ However, a soldier may be arrested by an officer, warrant, or petty officer or a non-commissioned officer subject to service laws. In this case, the person executing the arrest must be of superior rank to the offender. A provost or any officer, warrant, or petty officer, non-commissioned officer, or soldier, rating or air craftsman lawfully exercising authority under a Provost Officer or on his behalf may arrest any person subject to service law. A person authorized to effect arrest may use force as is reasonably necessary. Power of arrest may be exercised either personally or by ordering into arrest the person to be arrested or by giving orders for that person's arrest. Generally, arrest consists of actual seizure or touching a person's body with a view to detaining that person. It is imperative that before a person is arrested, he must be told by the person carrying out the arrest that he is being arrested, and the circumstances, or reason for such arrest be clearly stated.

¹⁰ Exercise of these powers especially in the disposal of charges against accused persons vary according to the instruments of powers they possess. There are instances where a Commanding Officer may be appointed mainly for disciplinary purpose only.

(Rule of Procedure, No.8, Fundamental Rights (Enforcement Procedure) Rules, Nigeria 2009). The accused may be attached to another unit for the purpose of the investigation¹¹. This however applies only in cases where the Commanding Officer is the only material witness. After investigating an offence, its nature and the rank of the accused determines the action to be taken in order to dispose of it. Subject to the provisions of the Act the Commanding Officer shall summarily deal with the charge (The Armed Forces Act, Section 105, Nigeria 2004). Where he is convinced that the charge cannot be summarily dealt with, he has the powers to refer the case to the Appropriate Superior Authority (ASA), or take steps to have the charge tried by a Court-martial. The ASA may deal with a charge referred to him summarily, remand for trial by court-martial, or refer it back to the Commanding officer advising a retrial or dismissal of the charge. Summary dealing with a charge according to the Act refers to the Commanding Officer or Appropriate Superior Authority taking the following actions – (a) Dismissing the charge; (b) Determining whether the accused is guilty; (c) Where the accused is guilty recording a finding of guilty and awarding punishment; (d) Condoning the offence. Note that the Act expressly provides that a Commanding Officer shall not deal summarily with a charge under certain sections of the Act.¹²

PROCEDURE FOR TRIAL AND TYPES OF COURT MARTIAL

1. Classification of Courts-Martial

SENIOR Military officers play an important role in all aspects of Nigeria's military justice system. They are the ones empowered to adjudicate in the court-martial system and in carrying out their duties, they often function in roles similar to that of judges and other judicial authorities in the Civilian criminal justice system. The Court-martial is the military court-system where the accused person makes his/her case for a judicial determination. Under the Act, there are two (2) types of Courts Martial; a General Court Martial and a Special Court Martial (The Armed Forces Act, Section 129, Nigeria 2004). The main differences between the 2 types of court martial are – (a) The level at which they are convened including ranks of the membership; (b) The rank of the accused; (c) The nature of offence including the nature of punishment

¹¹ This is based on the Doctrine of Natural Justice i.e. the Commanding Officer, cannot be a Judge in his own case, as enshrined in the Latin *maxim, nemo judex in causa sua*, meaning, "No one shall be a Judge in his own cause".

¹² These sections include 45, 46, 47, 48, 50, 51, 52, 53, 60, 65, 66, 67, 71, 72, 73, 75, 76, 83, 88, 91, 93, 95 and 98. See Section 124(6)(a) of the Armed Forces Act 1999, Laws of the Federation of Nigeria (LFN)2004.

prescribed for the offence; (d) Their composition especially the size and rank of the membership.

2. A General Court Martial

A GENERAL Court Martial may be convened by - (1) The President (as C-In-C); (2) The Chief of Defense Staff; (3) The Respective Service Chiefs; (4) GOCs of Corresponding Commanders; (5) Brigade of Corresponding Commanders (Section 131 (2)). Also, the Composition of a General Court martial consists of at least 8 persons as follows - (1) A President; (2) Four Members (not less, may be more); (3) A waiting Member; (4) A Liaison Officer; (5) A Judge Advocate who must be a lawyer.

3. A Special Court Martial

THE power to convene a Special court martial is defined as follows - (1) A Special court martial may be convened by any of the person who may convene a General court martial; (2) The Commanding Officer of a Battalion or a corresponding unit (Sections 131(3)). Also a CO or corresponding Commander can convene; (3) Commander of detached sub-unit who would otherwise not qualify under paragraph 1 above.

A Special Court Martial when eventually convened is usually composed of (1) A President; (2) Two members (not less, may be more); (3) A waiting member; (4) Liaison Officer; (5) Judge Advocate.

4. Jurisdiction of Court-Martials

THE Act provides as follows:

- (1) A General court-martial shall, subject to the provisions of this Act try a person subject to service law under this Act for an offence which, under this Act is tri-able by a court-martial and award for the offence a punishment authorized by this Act for that offence, except that where the court-martial consists of less than seven members it shall not impose a sentence of death.
- (2) A General court-martial shall also have power to try a person subject to service law under this Act, who by law of war is subject to trial by a military tribunal and may adjudge a punishment authorized by law of war or armed conflict.
- (3) A Special court-martial shall have the powers of a general court-martial, except that where the court-martial consists of only two members, it shall not impose a sentence that exceeds imprisonment for a term of one year or of death ([Sections 130](#)).

5. Constitution of a Court Martial

A COURT-MARTIAL shall be duly constituted if it consists of the President of the court-martial, not less than two other officers, and a waiting member (Section 133 (1)). The President of a court-martial shall be appointed by order of the convening officer and shall not be under the rank of major or corresponding rank, unless in the opinion of the convening officer, a major or an officer of corresponding rank having suitable qualifications is not, with due regard to the public service, available, so however that - (a) The president of a court-martial shall not be under the rank of a captain or a corresponding rank; and (b) Where an officer is to be tried, the President shall be above or of the same or equivalent rank and seniority of the accused and the members thereof shall be of the same but not below the rank and seniority of the accused (Section 133 (3)). The Act also states that the members of a court-martial, other than the President, shall be appointed by order of the convening officer or in such other manner as may be prescribed (Section 133 (4)), and that a Judge Advocate shall be a commissioned officer who is qualified as a legal practitioner in Nigeria with at least three years post-call experience, or failing that he shall on request by the convening officer be nominated by the Directorate of Legal Services of the respective services of the Armed Forces (Section 133 (6)).

6. Arraignment of the Accused Person

WHEN a court-martial is sworn, an accused is arraigned on the charge contained in the charge sheet. Arraignment consists of – (a) The reading of the commencement of the charge and the person named, “the accused”; (b) The reading of each charge separately to the accused and called upon him to plead to it. The arraignment is conducted by the President and the Judge Advocate. Where two or more accused persons are being tried jointly, one accused may apply to be tried separately on the grounds that unless so tried, he will be prejudiced in his defense. Where there are several charges in a charge sheet the accused may, before pleading to the charge, apply for separate trial on any charge on the ground that unless so tried he will be prejudiced in his defense. It is instructive to state that Courts Martial are required to observe and apply the rule of admissibility of evidence as is observed in the civil courts. Both the investigation by Commanding Officer (taking of Summary and Abstract of Evidence) and the evidence at the trial must be done in accordance with the rule of evidence (Section 143). In addition, the Council¹³ has the power to hold disciplinary proceedings against an Officer, concurrently with Criminal proceedings in Court on the same matter¹⁴ (Section 1 of the Armed Forces

¹³ The Council in this event would be the Army Council, Naval Council, or Air Force Council.

¹⁴ It provides that, “Notwithstanding anything contrary in any law, the appropriate Council or Board of each force of the Armed Forces of the Federation (in this Act referred to as the Council), may institute, and where instituted, may continue disciplinary proceedings

(Disciplinary Proceedings) (Special Provisions) Act, Nigeria 2004), and even punish after an acquittal¹⁵ (Section 2 of the Armed Forces (Disciplinary Proceedings) (Special Provisions) Act, Nigeria 2004).

LAW ENFORCEMENT AND THE CONSTITUTIONAL RIGHTS OF SERVICE PERSONNEL: THE NIGERIAN EXPERIENCE

OVER the course of history, there has remained an ongoing tension between certain aspects of Military law and the Constitution, particularly as it relates to the Constitutional rights of Service personnel. This is significant because the balance between military discipline and the notion of individual rights was not always so carefully calibrated. In Nigeria, Courts-martial as Military courts derive their validity from the authority of the Act and are therefore 'special' in nature and appear separate from the courts listed under the Constitution (Section 6 Constitution of the Federal Republic of Nigeria, (As amended to 2010), Nigeria 1999), except that they can be classified under the heading of, "*such other courts as may be authorized by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws*" (Section 6(5)(j) Nigeria 1999). As their jurisdiction is primarily statutory, the exercise thereof is expressly circumscribed by the Acts creating the courts, except that where the court in its operation conflict with the Constitution, the latter clearly overrides¹⁶ (Section 1(3), Nigeria 1999).

The current understanding within the framework of Military Courts as gatekeepers of law enforcement, is one that is founded on the notion that the entire Military justice system must from the start of the trial proceedings to the end, safeguard the constitutional rights of the accused service personnel. The Nigerian Constitution as the nation's principal legal document under Chapter

against any person subject to military law(hereinafter referred to as an "Officer") whether or not (a) Criminal proceedings have been instituted with respect to such a person in any Court of law in Nigeria or elsewhere or are about to be instituted or are contemplated; or The grounds upon which any criminal charge is based or is to be based is substantially the same as that upon which the disciplinary proceedings were or are to be instituted".

¹⁵ Here the law provides that; An Officer acquitted on a criminal charge for an offence or given a discharge, whether amounting to an acquittal or not, in any court of law may be dismissed or otherwise punished in accordance with any disciplinary provisions on any charge arising out of his conduct in the matter if the Council is satisfied" (a) That his conduct in the matter has been in any respect blameworthy; or that it is in the interest of the force where he is deployed and generally in the interest of the Armed Forces as a whole that he be so punished".

¹⁶ The constitution provides thus, "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of its inconsistency, be void"

IV provides for a long-list of such rights¹⁷. These rights are not only protected, but are deemed enforceable whenever they are violated, have been violated, or likely to be violated¹⁸. While all of these rights remain totally inalienable, and are held in permanence by the Service personnel notwithstanding his/her being subject to service laws, two of these rights critically stand out in terms of their application, protection, and safeguard within military law enforcement framework. These are the Right to personal liberty as guaranteed under Section 35 of the Constitution, and the Right to Fair hearing which is also to be found in Section 36 of the same document. Both rights are essentially key in any trial proceeding involving the Service personnel and must be seen to be upheld at all times.

As regards the right to personal liberty it is a cardinal rule that upon arrest, the accused person may choose not to utter a word or make any statement. In upholding this rule the Constitution clearly provides that, “*Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice*” (Section 35(2) Nigeria 1999). This constitutional guarantee is also further reinforced under the Administration of Criminal Justice Act, 2015¹⁹. This powerful doctrine has remained a long-standing cornerstone in several forward-thinking decisions of Constitutional courts in

¹⁷ The rights includes – Right to Life (Section 33); Right to Dignity of the Human person (Section 34); Right to personal liberty (Section 35); Right to Fair Hearing (Section 36); Right to privacy (Section 37); Right to Freedom of Thought, Conscience and Religion (Section 38); Right to Freedom of Expression and the Press (Section 39); Right to Peaceful Assembly & Association (Section 40); Right to Freedom of Movement (Section 41); Right to Freedom from Discrimination (Section 42); Right to Property and family Life (Section 43 & 44).

¹⁸ Section 46(1) provides that, “Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress”. 46(2) then additionally provides that, “Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcement or securing the enforcing within that State of any right to which the person who makes the application may be entitled under this Chapter”.

¹⁹ Section 6 of the ACJA provides that, “(1) Except when the suspect is in the actual course of the commission of an offence or is pursued immediately after the commission of an offence or has escaped from lawful custody, the police officer or other persons making the arrest shall inform the suspect immediately of the reason for the arrest. (2) The police officer or the person making the arrest or the police officer in charge of a police station shall inform the suspect of his rights to: (a) remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice; (b) consult a legal practitioner of his choice before making, endorsing or writing any statement or answering any question put to him after arrest; and Notification of cause of arrest and rights of suspect. (c) free legal representation by the Legal Aid Council of Nigeria where applicable: Provided the authority having custody of the suspect shall have the responsibility of notifying the next of kin or relative of the suspect of the arrest at no cost to the suspect”.

leading jurisdictions seeking to re-affirm the fundamental protections a suspect under interrogation is guaranteed within the fullness of his/her rights. The historical origin of this doctrine remains an ongoing contest²⁰ (Langbein, Hemholz et al (eds) 1997), however its modern application was laid in the groundbreaking decision of the US Supreme Court in *Miranda v. Arizona*²¹, where the court established the right of the accused person to remain silent at all times²². Of course, the basis of *Miranda* is to be found under US

²⁰ Scholars remain divided on the origin of the right to silent doctrine. A leading position however is that which subscribes to the view that the foundations of 21st century privileges as it relates to the right to remain silent is connected to the rivalry between the Common law courts preferred independently gathered evidence as valid, and the ecclesiastical courts which tilted more toward the use of confessional statements. Both courts where of the old English order.

²¹ 384 U.S. 436 (1966). In this case, Ernesto Arturo Miranda was in 1963 arrested by the Phoenix Police Department and charged with the crime of kidnapping and raping an eighteen-year-old lady. In the course of his interrogation, he was made to sign a confession in which he owned up to the rape charge, however at the commencement of trial, when prosecutors tried to tender Miranda's confession in evidence, his attorney objected saying the confession was in no way voluntary and should be rejected. The court disagreed with the position of Miranda's lawyer and he was subsequently convicted and sentenced to 20 years on each of the charges. On appeal to the Arizona Supreme Court, the Court affirmed Miranda's conviction saying it saw no involuntariness in Miranda's confession particularly give that Miranda did not specifically request an attorney at the time of making his confessional statement. Miranda finally appealed to the US Supreme Court, where the apex court reversed the two courts below.

The Court held that in light of the manner and type of coercion by which Miranda's purported confession to the Phoenix Police department had been procured, it could not be said to be voluntary and was therefore inadmissible under the fifth amendment to the US Constitution which provides for the right against self-incrimination, as well as the sixth amendment which entitles all accused person a right to an attorney. Delivering the opinion of the Court, Chief Justice Earl Warren went ahead to establish the landmark right that is now a major cornerstone of constitutional law i.e. 'The Right to remain silent'. He doing so he powerfully opined as follows; "The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he/she is indigent, an attorney will be provided at no cost to represent him/her". The Warren court further went on to say that: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning".

Following this landmark judgement, Miranda's conviction was accordingly overturned. Miranda is today a fundamental doctrine particularly as it relates to a judicial determination of guilt and has been applied meritoriously in a plethora of cases. See *Berkemer v. McCarty*, 468 U.S. 420 (1984). See also *Berghuis v. Thompkins*, 560 U.S. 370 (2010), where a suspect decides not to either invoke or waive his Miranda rights.

²² This rule is today the most important pillar of the interrogation process as a prelude to criminal prosecution. The ratio of the Court's decision is captured in the popular Miranda Rights which is mandated to be read to every person upon arrest, with the words, "You

Constitutional framework, where the privilege against self-incrimination as a product of the Fifth Amendment²³, allows a person to refuse to testify against himself in a criminal proceeding, as well as to answer official questions, particularly “*where the answers might incriminate him in future criminal proceedings*” (Hapner 2015).

In addition to the right to remain silent, the Nigerian Constitution provides for other rights such as the right to be informed promptly in the language that one understands as well as the details/nature of the offence in question, the right to defend oneself in person or by a legal practitioner of one’s choice, the right to be given adequate time to prepare one’s defense, the right to have an interpreter free of charge, the right to be presumed innocent until one is proven guilty, the right not to be charged for an unwritten offence or a retroactive offence, the right to have record of the proceeding kept, and the right to have copies of this within seven days of the conclusion of the case (Section 35 & 36, The Constitution, Nigeria 1999).

It is however a sad commentary that notwithstanding this explicit guarantee of the Nigerian serviceman’s constitutional right to remain silent, often times in the interrogation process preceding Court martial proceedings, service personnel alleged to have committed one offence or the other are coerced into making statements, usually with the goal that such can be used as confessional tool forming part of the prosecution’s basket of proof of evidence. Such acts are clearly in violation of the Service personnel’s constitutional rights and are certain to render the entire proceeding a complete nullity, whether at the trial court or upon appeal. It clearly delegitimizes whatever the entire outcome of the court-martial proceeding may be and reflects more of military illegality as against military justice.

Quite instructively also the *Miranda decision* dealt extensively with the military’s practice of providing the accused person with lawyers as free defense counsel. This requirement is firstly a part of the right to personal liberty under Section 35 and the right to fair hearing under Section 36. The clause, “*until after consultation with a legal practitioner or any other person of his own choice*” clearly lends credence to the accused person’s right of have a legal practitioner organize his defense to the charge. Not only is the Service personnel entitled to a Legal Practitioner, it must be free so as to excuse him of the financial burden of a criminal defense and it must be one that he consents to.

The first reasoning behind the rule that the legal practitioner be free of charge rest on the need to manifestly secure the course of justice, which is a course itself rooted in the principle of fair hearing. The Constitution clearly takes the issue of fair hearing very seriously, hence it provides that:

have the right to remain silent, as anything you say can and would be used against you in a Court of law”.

²³ The Fifth Amendment provides that, “no person shall be compelled in any criminal case to be a witness against himself”.

In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality (Section 36(1), The Constitution, Nigeria 1999).

The principle that in determining the guilt or otherwise of any individual, such must be accorded fair hearing is as old as the common law. This principle is espoused in the twin maxim “*audi alteram partem*”²⁴ and “*nemo judex in causa sua*”²⁵, and clearly underpins the pivotal nature of this right. Therefore, in line with the *audi alpartem* rule, the logic of justice is that both sides in a matter have an opportunity to be heard without any impediment. In this regard the boundaries of this rule is quite elastic, and all matters tilts more towards affording the accused person every opportunity of being heard. Where there is a prevailing financial encumbrance on the accused service personnel depriving him/her of legal representation, this clearly does not paint a picture of both sides been heard.

The second reasoning is based on the fact that it is the State that has instituted criminal proceeding against the accused service personnel, and not the other way round. Again, the Constitution is clear in this regard and it provides, “*Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty*” (Section 36(5), The Constitution, Nigeria 1999). Part of the demonstration that the accused person is innocent, is founded on the rule that he is not duty bound to prove his commission of the offence. This is a cardinal principle of law expressed in the Latin maxim, “*Affirmati Non Neganti Incumbit Probatio*”²⁶. The accused is therefore entitled to simply do nothing all through the trial proceeding, except when called upon to enter his defense after the prosecution may have closed its case. In line with this position, it would therefore be akin to double jeopardy, to impose the twin burden of not only putting in an appearance, but one of financing an expensive defense on the accused, all for a charge which he may eventually be pronounced innocent. Thus, the right of the accused service personnel to have a counsel freely provided for him by the State remains cast in stone. The Nigerian Military justice system must therefore rise to this task. It is important that the provisions of the Act and other military regulations and court martial procedure rules, be made to reflect this all-important right.

²⁴ This is translated to mean, “Listen to the other side”.

²⁵ This also means, “No one should be a Judge in his own cause”

²⁶ This is translated to mean, “The burden of proof is upon him who affirms and not on him who denies”.

THE DEVELOPMENT OF SERVICE PERSONNEL CONSTITUTIONAL RIGHTS UNDER THE AMERICAN MILITARY JUSTICE SYSTEM: ANY LESSONS FOR NIGERIA?

IN THE United States, the civil and constitutional rights of the serviceman and the civilian in the context of criminal prosecutions are implemented in two distinct legal settings, i.e. a civil system of state and federal courts including the United States Supreme Court, and a military system composed of courts martial, boards of review, and the United States Court of Military Appeals (Ulmer 2015). Under American law, service personnel generally are issued a honorable discharge from Military service upon a satisfaction of acceptable military conduct and performance of duty. Notwithstanding this position, a member of the force cannot be denied a honorable discharge without due process of the law.²⁷ The former position under US Military law was that Servicemen generally enjoyed a level of constitutional protection that was inferior to that of Civilians (Hirschhorn 1984). For years, there remained an intense debate among scholars on the full applicability of Constitutional right to the service personnel in the United States Armed Forces (Henderson 1957; Wiener 1985a; Wiener 1985b). However following developments through statutes and judicial decisions, the constitutional divide on matters of right to due process for civilians and for service personnel has been significantly reduced such that today, any serviceman accused of an offence, enjoys nearly all constitutional due process rights accorded to civilians (McCoy 1969). A relevant example is the decision in *United States v. Stuckey* (10 M.J. (347) 1981), where the U.S. Court of Appeals for the Armed Forces held that, “the bill of rights applies with full force to men and women in military service”²⁸. This jurisprudence was later significantly advanced by the

²⁷ The United States ex rel. Roberson v. Keating, 121 F. Supp. 477 (N.D. Ill. 1949). See also the Fourteenth Amendment to the US Constitution, Section 1 which provides that, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”.

²⁸ There are however few exceptions. Key amongst them include the right to indictment by US Grand Jury and trial by petty jury, the right to be confronted in certain cases with adverse witnesses and right to bail. A reference to the US Constitution reveals that the Fifth Amendment clearly states that the grand jury provision does not apply to, “cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger.” In this respect also, the US Supreme Court has held that the Sixth Amendment’s right to trial by jury is similarly inapplicable to courts-martial. The Court has advanced the current jurisprudence by reaffirming the fact that some portions of the Bill of Rights is applicable to the military justice system, except that such application must be viewed differently against that of the Civilians.

same court in *United States v. Easton* (71 M.J. 168, 174-75, C.A.A.F. 2012), which now recognizes the general application of Constitutional rights to the military justice system.²⁹

In addition, under the American system the concept of military justice is not foreign to the Constitution. Rather, just like every other aspect of public life that comes within the purview of Congressional powers, the Constitution provides that the US Congress shall have the power, “to make Rules for the Government and Regulation of the land and naval Forces” ([The US Constitution, Art. 1, Sec. 8](#)). One way in which the US Congress has brilliantly deployed its powers above, is as regards its enactment of the Uniform Code of Military Justice (UCMJ) in 1950, which immediately revolutionized the notion of Military Justice in the United States³⁰. Following its first draft, the UCMJ has since been amended several times to bring it up to speed with complex matters of American military life. It is however instructive to say that one of the landmark achievements of the UCMJ has been in the area of giving further expression to matters of constitutional rights as it applies to servicemen, such that today the Code amongst other things provides for the right to counsel, right to a speedy trial, the right to a trial of the facts, the right to protection against double jeopardy, and the right against self-incrimination. This is certainly a framework that seeks to ensure that all matters regarding the Military are not conducted outside the supreme authority of the Constitution.

Interestingly, the Nigerian Constitution has a provision very similar to its American counterpart where it says, “The National Assembly shall have power to make laws for the regulation of - (a) the powers exercisable by the President as Commander-in-Chief of the Armed Forces of the Federation; and (b) the appointment, promotion and disciplinary control of members of the armed forces of the Federation” ([Section 218 \(4\), The Constitution, Nigeria 1999](#)). Sadly, as it has become self-evident this constitutional provision has operated as nothing more than a paper tiger, as the proper custodian of this all-important power i.e. the National Assembly has failed abysmally in deploying it to good use, carrying on in total indifference, and preferring to

²⁹ The opinion of the court in re-entrenching this rule is quite instructive. It stated as follows; “Constitutional rights identified by the Supreme Court generally apply to members of the military, unless by text or scope they are plainly inapplicable. In general, the Bill of Rights applies to members of the military absent a specific exemption or certain overriding demands of discipline and duty. Though we have consistently applied the Bill of Rights to members of the Armed Forces, except in cases where the express terms of the Constitution make such application inapposite, these constitutional rights may apply differently to members of the armed forces than they do to civilians. The burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule”.

³⁰ The UCMJ made up of about 150 statutory sections also provides for a system of court martial and other parts of the adjudicatory process such as pre-trial conferences, trial proceedings and post-trial procedures. The Code also provided for the establishment of the Court of Military Appeals which is now known as the Court of Appeals for the Armed Forces.

dump the matter on the laps of the Executive branch. It is suggested therefore that now is time to reverse this unsavory trend. In addition to the provisions of Chapter IV, the National Assembly is called upon to proceed without favor or ill will towards anyone and give the needed teeth to the serviceman's rights and begin a new order of mandating the Military to be constitutionally guided in its law enforcement procedures. With this sort of framework, matters of law enforcement and military discipline necessarily become subject to overriding constitutional provisions, as it is the case under the American Military justice system, which is one that Nigeria can gain a bit of insight from.

CONCLUSION

THE MILITARY is one Institution that takes the question of enforcement of its laws very seriously. That accounts for why it is about the most disciplined institution to be found anywhere in the world. The sustenance of this tradition of enforcement is what has made discipline the hallmark of the Military. However, the current understanding is one that leans in one direction only i.e. that every Constitution contains components of a moral imperative demanding that every member of the society be treated as human, having an intrinsic value in themselves, and that the principal duty of a constitutional society is to protect this idea of humanity (Hirschhorn 1984), with courts positioned as the beacon to translate these rights³¹. Under the prevailing understanding, it is now the norm that servicemen do not abandon their rights when enlisting into the Military³².

There is no gainsaying that the recognition of Constitutional rights within the framework of Military law enforcement is still a developing area of the law in Nigeria, and it is on this basis that a case is being made to ensure that a similar framework as what obtains in other jurisdictions is not only adopted here, but consistently improved upon. One must commend some stakeholders in this sector such as the Nigerian Army and the National Human Rights Commission, who have already seized the gauntlet and are

³¹ Major pillars of this doctrine is the same that upholds the standards of "compelling interest", and "strict scrutiny" which the US Supreme Court's current approach to is assessing questions surrounding Citizen's Constitutional rights.

³² Weiss v. United States, 510 U.S. 163 (1994), where a current Justice of the US Supreme Court, Justice Ruth Bader Ginsburg spoke saying, "Men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service. Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history...". Justice Ginsburg's position is in consonance with an earlier dictum of Justice Douglas who said, "A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander, but as written in the Constitution..." See Winters v. United States, 89 S.Ct. 57, 59-60, 21 L.Ed.2d 80, 84 (1968).

leading the way³³ (Fapohunda 2016). We ask that they do not rest on their oars, even as others are called upon to toe the same line. More than ever before, it is now vitally of utmost necessity that every criminal proceeding under Nigeria's Military's law enforcement mechanism, is not just a satisfactory vehicle of constitutional rights of the accused servicemen, but more manifestly one which is so programmed to resolve constitutional rights grey areas, whenever such arises, in favor of such personnel. Though the desired destination may appear a long way from where we are at the moment, but if we continue with the current measured steps, it is certain that in a few years from now, there would be no trace between our Military justice system and where it used to be.

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³³ In a major move in this regard, there was of recent a special session of the Nigerian Military Human Rights Dialogue held on 27th September 2016, with the support of the Chief of Army Staff and the National Human Rights Commission (NHRC), where far-reaching consensus on safeguarding the Constitutional rights of Nigerian Service personnel consensus was reached.

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Law Quote

**“On the battlefield, the
military pledges to**

**leave no soldier behind.
As a nation, let it be our
pledge that when they
return home, we leave
no veteran behind”.**

—

Dan Lipinski

Source: <https://www.brainyquote.com/topics/military>.

Penal Policy on Assets Recovery on Corruption Cases in Indonesia

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Abstract

Corruption is an extraordinary crime whose impact on actions can undermine a country, corruption is increasingly becoming increasingly common. Even though not a few of the former state officials or state officials until all the villages have felt how fierce the law enforcers, especially the KPK arrested them all, either hand-grabbing operations or the development of public reporting, impressed by them all were endless corruptors kept appearing, Law enforcement in this modern era is not only concerned with prosecution and prevention, in this case corruption is regulated by the return of state losses as asset recovery, which in turn will maximize the return of state losses from corruptors. As for the problems of this study are: 1. Why is the politics of criminal law (strafrechtspolitik) in the framework of restoring state losses not significant with the real State losses due to criminal acts of corruption? 2. How is the politics of criminal law ideally (strafrechtspolitik) implemented so that the maximum return on state losses due to corruption? The benefits of research consist of theoretical benefits and practical benefits. Theoretical benefits are expected to contribute to theoretical thinking in criminal law, especially concerning the politics of criminal law in the context of eradicating criminal acts of corruption. Practical benefits are expected to be able to provide information scientifically to the public both in general and specifically. This study uses a descriptive legal approach that is supported by primary, secondary and tertiary data obtained from documentation and literature studies then analysed using qualitative descriptive analysis methods. The results showed that the Politics of Criminal Law in the Framework of Returning State Losses due to Corruption in Indonesia was not maximal, as evidenced by the lack of maximum or no maximum return on state losses for corruption, therefore recommendations on simplifying regulations in terms of early prevention or since In the beginning of corruption cases which caused a lot of damage to the state's financial need, there was a special formulation so that the handling could be maximized to restore state losses in corruption.

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INTRODUCTION

CORRUPTION is an extraordinary crime whose impact on actions can undermine a country, corruption is increasingly becoming increasingly common. Even though not a few of the former state officials or state officials until all the villages have felt how fierce the law enforcers, especially the KPK arrested them all, either hand-grabbing operations or the development of public reporting, impressed by them all were endless corruptors kept appearing . Law enforcement in this modern era is not only concerned with prosecuting prevention as well as in prevention, in this case corruption is regulated as a return on state losses as asset recovery, which in turn will maximize the return of state losses from corruptors (Nashriana 2010).

The politics of criminal law in the framework of returning state losses due to criminal acts of corruption needs to be stressed so as not to get out of its main goal, namely to save state money from criminal acts of corruption, Article 18 of Law No. 31 of 1999 has explained all that, the article is still relevant to the reality that exists today.

Article 18 of Law Number 31 of 1999 concerning Eradication of Corruption Crime states:

- (1) In addition to additional criminal offenses as referred to in the Criminal Code, as additional crimes are:
 1. Seizure of tangible or intangible movable or immovable property used for or obtained from criminal acts of corruption, including convicted companies where corruption is committed, as well as from goods replacing these items;
 2. Payment of as much as possible substitute money with property obtained from criminal acts of corruption.
 3. Closure of the whole or part of the company for a maximum of 1 (one) year;
 4. Revocation of all or part of certain rights or the elimination of all or part of certain benefits, which have been or can be given by the Government to the convicted person.
- (2) If the convict does not pay the replacement money as referred to in paragraph (1) letter b no later than 1 (one) month after the court decision has obtained permanent legal force, then the prosecutor can confiscate his property and be auctioned to cover the replacement money.

- (3) In the event that the convict does not have sufficient assets to pay the replacement money as referred to in paragraph (1) letter b, then the sentence of imprisonment that does not exceed the maximum threat of the principal is in accordance with the provisions in this Law and the duration of the sentence has been determined in court decisions.

State losses due to corruption are a consideration mainly from the existence of the Law on the Eradication of criminal acts of corruption. In considering the letter (a) and letter (b) of Law No. 31 of 1999 concerning Eradication of Corruption Crime, affirmed:

- a. that corruption is very detrimental to state finances or the country's economy and hampers national development, so it must be eradicated in order to create a just and prosperous society based on Pancasila and the 1945 Constitution.
- b. that the consequences of criminal acts of corruption that have occurred so far in addition to harming the state's finances or the country's economy, also hamper the growth and sustainability of national development which demands high efficiency.

The Law on Eradicating Corruption Crime implies 2 (two) things. First, that the presence of the law to eradicate corruption is in the context of safeguarding it in the state financial management, there is no loss of state money due to corruption. Second, if there is a criminal act of corruption that is detrimental to state finances, then in order not to have an effect on economic growth and the continuity of national development, the state (through the criminal justice system) is given the authority to claim state losses from perpetrators of corruption.

In accordance with the predicate given to corruption as an extraordinary crime, achieving the goal (political) of criminal law so that there is no state loss if corruption occurs, it is not easy. Since corruption was regulated separately as a special offense outside the Criminal Code in 1957 (1957 was recorded as the era of enactment of the Military Regulations from 1957 to 1958. Initially corruption was regulated in the Criminal Code, with the development of the situation corruption was specifically regulated in Law its own law), following Law No.24/Prp/1960 concerning Investigation, Prosecution and Corruption Criminal Investigation, Law No. 3 of 1971 concerning the Eradication of Corruption Crime, and finally Law No. 31 of 1999 concerning Eradication of Corruption Crimes amended by Law No. 20

of 2001 concerning changes to Law No. 31 of 1999 which is still valid; the return of state losses due to corruption has never been maximized.

Changes after changes to the regulation of criminal acts of corruption in addition to marking the sincerity and determination of the Indonesian people to eradicate corruption is not a crime, also marking efforts to improve the substance of the regulation against corruption in order to be empowered to save a qualified state finances, for example, regarding interpretations or terminology of corruption, elements against the law and types of criminal sanctions. Law No. 31 of 1999 concerning Eradication of Corruption Crime formulates the terminology of corruption as: ... actions enriching oneself or others or corporations against the law (*wederrechtelijkeheid*) in formal terms (*formale wederrechtelijkeheid*) and material (*materiel wederrechtelijkeheid*).

The meaning of resisting formal or material law is that even if the act is not regulated in the laws and regulations, but if it is deemed despicable because it is not in accordance with the sense of justice or norms of social life in society, then it can be punished. In this provision the word "can" before the phrase "detrimental to state finances or the economy of the country" indicates that the crime of corruption is a formal offense, namely the existence of corruption is enough to fulfill the elements of action that have been formulated not with the emergence of consequences (Prayudi 2007). For the types of criminal sanctions the Law on Eradicating Corruption Crime is considered to be preparing very heavy criminal sanctions, ranging from capital punishment, additional criminal penalties as referred to in the Criminal Procedure Code and article 18 of Law No. 31 of 1999.

In practice, the application of Article 18 of Law No. 31 of 1999 is still very rare. Social facts around the return of state finances through the application of additional criminal penalties are fairly minimal. Therefore it is also quite understandable if the return of state losses is not/has not been directly proportional to the amount of state losses caused by criminal acts of corruption.

In addition to these social facts, there are quite a number of empirical facts and legal facts related to the maximum returns on state finances in practice so far. An example of the 2014 corruption eradication trend, the total state loss for 2014 for alleged corruption cases which were under investigation was Rp. 5.29 trillion, while the return on state finances for the first semester of 2015 is only 9% (nine percent). Furthermore, Indonesian Corruption Watch (ICW) released the refund of state losses for the first semester of 2015 as follows:

The total state loss during the first semester of 2015 due to corruption was Rp. 691,772 billion out of 161 cases, but those who were decided to pay for replacement money were only Rp. 63,175 billion, Out of 161 cases found in the value of state losses, only 99 cases were decided to pay substitute money. Of the 193 cases and

230 defendants who were tried in the Corruption Court, at least 185 defendants were required to pay a fine with varying amounts.

In addition to the state losses, Indonesia Corruption Watch also indicated that arrears in alleged corruption cases at the High Prosecutor's Office and Regional Police with an accumulative state loss of at least Rp. 5.16 trillion during 2010-2014. ICW also emphasized the condition of corruption cases in Indonesia, as follows:

ICW found that at least ten High Prosecutor's Office (*Kejaksaan Tinggi*, Kejati) which also oversee the District Attorney General's Office and have dozens of cases of alleged corruption that are stagnant at the investigation level and with state losses of tens to hundreds of billions. The area is East Java (64 cases, Rp. 269 billion); South Sulawesi (56 cases, Rp. 97 billion); North Sumatra (51 cases, Rp. 1.28 trillion); West Java (46 cases, Rp. 325 billion); NAD (46 cases, Rp. 338 billion), Riau (45 cases, Rp. 1.5 trillion); NTT (40 cases, Rp. 609 billion); Jambi (39 cases, Rp. 64 billion); Maluku (34 cases, Rp. 36 billion); and Central Java (29 cases, Rp. 111 billion).

While the Regional Police, which also oversees the Resort Police, has at least ten areas that are stagnant in handling cases of alleged corruption with state losses from tens to hundreds of billions. The area includes North Sumatra (30 cases, Rp. 94 billion); East Java (22 cases, Rp. 14.8 billion); NAD (21 cases, Rp. 133 billion); South Sulawesi (18 cases, Rp. 34 billion); Central Java (16 cases, Rp. 22 billion); Bengkulu (15 cases, Rp. 15 billion); West Java (15 cases, Rp. 15 billion); East Kalimantan (11 cases, Rp. 122 billion); NTT (11 cases, Rp. 7.5 billion) and North Sulawesi (11 cases, Rp. 42 billion).

Regarding the success of returning state losses, for example in the period of 2014, the state money saved by the KPK reached Rp 2.8 trillion. This figure far surpasses that saved by the Indonesian Police, which is only Rp. 67.7 billion and the Attorney General's Office is Rp. 792 billion.

When compared to the mode of corruption in Indonesia, the success of the return on state finances mentioned above is not significant. As shown in table 1 the mode of corruption which ranks first (80.63%) is a mode of harming state finances and / or misusing authority, following bribes (15.63%) and embezzlement in positions and gratuities of 1.25% respectively.

The above figures show that politics or the objectives to be achieved by criminal law (especially the Law on the Eradication of Corruption Crime) has not been significant enough, if not wanted to be said to fail to restore state finances. The ratio between the real losses of the country and those that were successfully returned is still very far away. The condition is further exacerbated by the performance of KPK corruption investigations which have been declining lately. In the period of 2010-2014, the KPK on average investigated 15 corruption cases with a state loss of Rp. 1.1 trillion. But in the first semester of 2015, the KPK only investigated 10 corruption cases with state losses and bribes of Rp. 106.4 billion (Makawimbang 2014).

The decline in the performance of KPK investigations in the first semester of 2015 occurred because this institution experienced a very strong counter-attack this semester. The attacks included the criminalization of leaders and investigators, pretrial, terror and revision of the KPK Law. This counterattack has changed the constellation, psychology and motivation of all levels of the KPK so that it has an impact on the ability of the investigation.

LONG HISTORY OF COMMITMENT ON ERADICATING CORRUPTION IN INDONESIA

THE LONG History of the commitment to eradicating corruption is an important milestone in the governance of a country. In Indonesia, almost every election of the head of state does not escape the seriousness of looking at what commitments are given by prospective heads of state to eradicate corruption. Inevitably this happens because corruption continues to erode people's rights to state wealth. Abundant state wealth, almost nothing left for people's welfare.

Commitment to eradicating corruption is indeed hard to do. Various efforts to eradicate corruption are proclaimed in each period of the country's administration. Some references state that juridical corruption eradication only began in 1957, with the issuance of Military Rulers Regulation Number PRT/PM/06/1957. The regulation known as the Regulation on Eradicating Corruption was made by the military authorities at that time, namely the Army and Navy Military Rulers.

The government issued Presidential Decree No.28 of 1967 concerning the Establishment of the Corruption Eradication Team. In its implementation, the team cannot eradicate corruption to the maximum, it can even be said to be almost non-functioning. This regulation even triggered various forms of protest and demonstration starting in 1969 and its peak in 1970 which was then marked by the establishment of Commission IV which was tasked with analyzing problems in the bureaucracy and issuing recommendations to overcome them.

The new order was arguably the most issued regulation because the New Order period was quite long. But unfortunately there are not many regulations made that are effective and make corruption slightly reduced from the Indonesian earth. Continuing his speech on Indonesian Independence Day on August 17, 1970, the Soeharto government issued Law No.3 of 1971 concerning the Eradication of Corruption Crimes. This rule imposes maximum life imprisonment and a maximum fine of Rp. 30 million for all offenses categorized as corruption.

Complementing the law, the state documents of the General Guidelines for State Policy (GBHN) which contain one of them are the willingness of the people to eradicate corruption. However, the implementation of the GBHN was leaked because the state management was characterized by a lot of state budget fraud and leakage in all sectors without any control at all.

State organs such as parliament which have a supervisory function are weakened. The DPR's budget is determined by the government so there is no oversight function. The judiciary was made similar by the New Order regime, so that there was no power left to be able to prosecute corruption cases independently. The strength of civil society was spelled out, the New Order authorities slowly limited the movement of society and intervened to maintain their power.

The following are some of the regulations that were issued in the New Order era relating to eradicating corruption:

1. 1973 GBHN concerning Development of Authority and Clean Apparatus in State Management;
2. The 1978 GBHN concerning Policies and Measures in Order to Control State Apparatuses from Problems in Corruption, Abuse of Authority, Leakage and Waste of State's Wealth and Finance, Illegal Levies and Various Other Types of Misappropriation that Inhibit Development Implementation;
3. Law No.3 of 1971 concerning Corruption Crime;
4. Presidential Decree No. 52 of 1971 concerning Tax Reporting of Officials and Civil Servants;
5. Presidential Instruction Number 9 of 1977 concerning Operation of Control; and
6. Law Number 11 of 1980 concerning Bribery Crimes.

The long journey to eradicate corruption is like getting a fresh breeze when a state institution emerges that has clear duties and authority to eradicate corruption. Although previously, this was said to have been missed from the agenda mandated by the provisions of Article 43 of Law Number 31 Year 1999 as amended by Law Number 20 Year 2001, the discussion of the KPK Bill could be said to be a form of government seriousness in eradicating corruption. The delay in the discussion of the bill was motivated by many reasons. First, changes in the constitution of money implicate in changes to the constitutional map. Second, legislative heavy tendencies in the DPR.

Third, the tyrannical tendency of the DPR. The delay in the discussion of the KPK Bill was also caused by an internal problem that hit the political system in Indonesia in the reform era.

POLITICS OF LAW ON ERADICATING CORRUPTION

Law is a very complex entity, including a pluralistic reality of society, has many aspects, dimensions, and phases (Sidharta 1999). When likened to an object it is like a gem, which each slice and angle will give a different impression to everyone who sees or looks at it.

Departing from the complexity of the law, since ancient Greece, law has always attracted attention and become a discourse that is constantly debated among scholars. The complexity of the law causes the law to be learned from various perspectives (Rahardjo 1991). The birth of various legal disciplines in addition to legal philosophy (Philosophy of Law) and legal science (Science of Law), such as legal theory (Theory of Law), legal history (History of Law), legal sociology (Sociology of Law), legal anthropology (Anthropology of Law), comparative law (Comparative of Law), legal logic (Logic of Law), legal psychology (Psychology of Law), and now growing legal politics (Politic of Law), are irrefutable proof of the truth of statements in above (Machmudin 2001).

The history of the emergence of legal politics, inevitably, we will talk about the background, when, where, and who initiated this discipline for the first time. To answer that question is not easy because the supporting literature is very minimal, we might say there is nothing (Rahardjo 1991). Even if there is one, it is very limited and only seems to be explained at a glance, so that at a certain level, our knowledge of the historical aspects of legal political discipline is very limited.

Satjipto Rahardjo explained, in the 19th century in Europe and America (Rahardjo 1985), individuals were the center of legal regulation, while the highly developed legal field was civil law (material rights, contracts, illegal acts). Legal expertise is determined by technical skills or craftsmanship (legal craftsmanship) (Ali 2002).

People also feel that by treating the law above, by assuming law as an institution and an independent force in society, then the attitude that all can be fulfilled by themselves is complete. Law, legal discipline, legal analysis methods, all do not need help and cooperation with other disciplines.

Normative and dogmatic analysis is the only way that is considered to be the most adequate and no other method and approach is needed to assist with legal assessment. Such normative and dogmatic methods are considered self-sufficient, while law is increasingly becoming an esoteric field (Rahardjo 2000). Such circumstances and developments, of course, relate to the increasingly important role of the law in supporting and securing the progress of society as mentioned above, as well as greater trust in the law.

The atmosphere immediately becomes different, when the ways of looking at and working on such a law are faced with changes that occur in society due to the success of modernization and industrialization. The individual's position now begins to be rivaled by the appearance of other subjects, such as community, collectivity, and country. The fields which later became more prominent were public law, administrative law, socio-economic law. A new understanding emerged which essentially sued the establishment of the technical skills mentioned above, and replaced it with “planning”, “legal experts as social architects”, and so on. Now law is no longer seen as an autonomous and independent matter, but is understood functionally and seen as always interdependent in relation to other fields in society (Rahardjo 2009).

It is necessary to be fully aware of the legal reviewers in Indonesia that the various legal terms currently used in legal literature in Indonesia are adopted from various legal terms contained in the tradition of Dutch law, such as constitutional law (*staatrecht*), civil law (*privaatrecht*), criminal law (*strafrecht*), and administrative law (*administratiefrecht*) (Wignjosobroto 2014; Thalib 1987; Soehino 1984; Kansil 1992). The same thing applies to the term legal politics.

Etymologically, the term legal politics is an Indonesian translation of the Dutch legal term *rechtitolek*, which is a form of the word *recht* and *politiek*. This term should not be confused with terms that appear behind, *politiekrecht* or political law, which was proposed by Hence van Maarseveen because both have different connotations. The latter term relates to another term offered by Hence van Maarseveen to replace the terms of constitutional law. For this purpose he wrote an essay entitled “*Politiekrecht, als Opvolger van het Staatrecht*”.

The term *rechtspolitiek*, in Indonesian the word *recht* means law. The law itself comes from Arabic *hukm* (plural words *ahkam*), which means judgment (judgment, verdict, decision), provision, command, government, power (authority, power), punishment (sentence), and others (Wehr 1980).

The verb comes from the Arabic *hakama-yahkumu*, meaning to decide, judge, establish, order, govern, punish, control, and so on. The origin of the word *hakama* means controlling with one control (Mas'ud 1992). In connection with this term, until now, there has been no unity of opinion among the legal theorists about what the actual legal boundaries are.

The etymological explanation above is certainly not satisfying because it is still so simple, that in many ways it can confuse our understanding of what constitutes legal politics. Some definition of legal politics is formulated by several legal experts who have so far been sufficient to observe the development of these disciplines. Wahjono (1986) emphasized that political law (or politics of law) is a policy of state administration that is fundamental in determining the direction, form and content of the law to be formed and about what is used as a criterion to punish something. Thus according to Padmo Wahjono, legal politics is related to applicable law in the future (*ius conctituandem*).

Tueku Mohammad Radhie, stated that political law is a statement of the will of the state authorities regarding the laws that apply in their territory, and concerning the direction of legal development built (Radhie 1973). The definition of legal politics formulated by Radhie seems to have two interrelated and continuous face, *ius constituendum* and *ius contitutum*. Meanwhile, Soedarto (1986) considered that political law is the policy of the state through state agencies that are authorized to determine the desired regulations, which are expected to be used to express what is contained in society and to achieve what is aspired (Soedarto 1979). In another book, it is explained that legal politics is an attempt to realize rules that are good with circumstances and situations at a time (Soedarto 1986).

The complexity of politics of law as described by Rahardjo (1991), and for instance, emphasized that politics of law as an activity to choose and the way to be used to achieve a certain social and legal goals in society (Rahardjo 1991). According to Satjipto Rahardjo, there are several fundamental questions that arise in the study of legal politics, namely:

- a. what goals are to be achieved with the existing legal system;
- b. ways and which ones, which are considered the best for being able to achieve these goals;
- c. when the law needs to be changed and through the ways in which the change should be carried out; and
- d. can a standard and established pattern be formulated, which can help us decide on the process of selecting goals and ways to achieve these goals well (Rahardjo 1991).

Sunaryati Hartono recognized that legal politics as a tool or means and steps that can be used by the government to create the desired national legal system and with the national legal system the ideals of the Indonesian people will be realized (Hartono 1991). The statement “*creating the desired national legal system*” implies that the legal political framework according to Sunaryati Hartono is more focused on the legal dimension that applies in the future or *ius constituendum*. The same thing was stated by Garuda Nusantara (1985) that politics of national law can literally be interpreted as a legal policy (*legal policy*) that would be applied or implemented nationally by a certain state government.

POLITICS OF CRIMINAL LAW OR PENAL POLICY

THE TERM “*Politics of Criminal Law*” in this paper is taken from the term Policy (UK) or *Politiek* (Netherlands). Therefore, the term “Criminal Law Politics” can also be referred to as “Criminal Law Policy” or “Penal Policy”. In many literatures, the political term of criminal law is often known by various terms, including political reasoning, criminal policy or *strafrechtspolitiek*. Many legal scholars emphasized and described some

definition and limitation of politics of criminal law or penal policy (Marpaung 2005)

Marcx Ancel stated that penal policy is a science as well as art which in the end has a practical purpose to enable positive law regulations to be better formulated and to provide guidance not only to legislators, but also to courts that apply laws and also to organizers or implementers court decision (Nawawi Arief 2011). Meanwhile, Mulder (1980) as quoted by Nawawi Arief (2011) emphasized that *strafrechtspolitik* is a policy line to determine: (1) how far the applicable criminal provisions need to be amended or updated; (2) what can be done to prevent criminal acts; and (3) the way in which investigations, prosecutions, trials and implementation of criminal acts must be carried out.

Soerjono Soekanto stated that the politics of criminal law basically includes the act of choosing values and applying those values in reality. Politics to prevent delinquency and crime: in other words, the politics of criminal law is an attempt to rationally organize rational social reactions to organize social reactions to delinquency and crime (Nawawi Arief 1991).

Besides some of the meanings stated above, the notion of political criminal law can also be expressed based on the notion of criminal politics. Criminal politics is a rational effort to overcome crime. The politics of criminal law manifests in the form of Penal (criminal law) and Non-penal (without criminal law). Thus, as part of criminal politics, criminal law politics can be interpreted as “*a rational effort to combat crime by using criminal law*”.

Starting from several descriptions of the political understanding of criminal law stated above, it can generally be stated, that the politics of criminal law is “*an attempt to overcome crime through rational criminal law enforcement, which is to fulfill a sense of justice and usability*”.

As stated above, the politics of criminal law is one of the efforts to overcome crime, manifesting it in the form of rational criminal law enforcement. There are three stages in criminal law enforcement, namely:

1. *Formulation Stage*

The formulation stage is the stage of enforcement of *in abstracto* criminal law by the legislature. In this stage, lawmakers carry out activities to select values that are in accordance with the current situation and situation that is to come. Then formulate it in the form of criminal legislation to achieve the results of criminal legislation which is best in the sense of meeting the requirements of justice and usability. This stage can also be called the Legislative Policy Stage.

2. *Application Stage*

The application stage is the stage of criminal law enforcement (the stage of applying criminal law) by law enforcement officials from the police to the Court. In this stage law enforcement officers have the duty to uphold and implement criminal laws that have been made by law makers. In carrying out this task, law enforcement officers must cling to the values

of justice and usability. This second stage can also be referred to as the Judicial Policy Stage.

3. *Execution Stage*

Execution stage is the stage of enforcement (implementation) of criminal law in a concrete manner by officers implementing criminal law. In this stage the criminal implementing apparatus is tasked with upholding criminal legislation that has been made by law makers through the application of the criminal stipulated in the court ruling. In carrying out the punishment that has been determined in the court decision, the executing officers of this criminal conduct in carrying out their duties must be guided by criminal legislation made by legislators and values of justice and usability.

The three stages of enforcement of criminal law, seen as a rational effort or process that is intentionally planned to achieve a certain goal, clearly must be a chain of unbroken activities that derive from values and lead to criminal and criminal punishment.

Starting from the description above, it can be stated that the enforcement of a rational criminal law as a manifestation of the politics of criminal law involves at least three interrelated factors, namely the enforcement of criminal law, criminal values and laws (legislation). The division of these three factors can be attributed to the division of the three components of the legal system, namely legal substance, legal structure, and legal culture (Friedman 2009).

THEORY OF LEGAL PURPOSE: ANAYLSIS OF CRIMINAL LAW PURPOSES

GUSTAV Radbruch is a legal philosopher and a prominent legal scholar from Germany who teaches the concept of three basic legal elements. He stated these three basic concepts during the World War II era. The legal objectives stated by various experts are also identified as legal objectives. The three objectives of the law are justice, certainty, and benefit (Is Sadi 2017).

1. Justice

IN JUSTICE there are philosophical aspects namely legal norms, values, justice, morals, and ethics. Law as the bearer of the value of justice, the value of justice is also the basis of the law as law. Justice has a normative and constitutive nature for the law. Justice is a legal moral basis and at the same time a benchmark for a positive legal system and without justice, a rule does not deserve to be a law. Furthermore, Nigel Walker (1969) emphasized that the concept of justice—retributive justice, especially in Criminal Law—, divided into two types, namely: (1) pure retributive theory, which argues that

the criminal must be suitable or commensurate with the mistakes of the maker and (2) adherents retributive theory is not pure (with modification) which is divided into two types, namely: (1) limited retributive theory (the limiting retributivist) which argues that the criminal does not have to match / match the error, except that it should not exceed the appropriate / equal limit with the defendant's fault, and (2) distributive (retribution in-distribution) retributive theory, abbreviated as the "distributive" theory which argues that the criminal should not be imposed on innocent people, but the criminal does not have to be matched and limited by mistakes. The principle of "geen straf zonder schuld", no criminal without error, is respected, but it is possible for an exception for example in terms of *strict liability*.

Muchsin (2004) explains that justice is one of the objectives of the law apart from the certainty of the law itself and also the benefits of the law, while the meaning of justice itself is still a debate. But justice is related to the equitable distribution of rights and obligations. Thus the central and dominant position and role of the value of justice for the law, so Gustav Radbruch stated "*rechct ist wille zur gerechtigkeit*" (law is the will for justice) (Sisworo on Putra 2016)

Whereas Soeyono Koesoemo Sisworo as quoted by Putra (2016) defines justice as an inner and outward balance that gives possibility and protection to the presence and development of truth that has a climate of tolerance and freedom. Furthermore, the law does not exist for self and its own needs but for humans, especially human happiness.

The law has no purpose in itself. Law is a tool to uphold justice and create social welfare. Without justice as its ultimate goal, the law will fall into a means of justifying the arbitrariness of the majority or the authorities against the minority or the controlled party. That is why the main function of the law is ultimately to uphold justice.

Justice is one of the most discussed purposes of law throughout the course of the history of legal philosophy. The purpose of the law is not only justice, but also legal certainty and the benefit of the law. Ideally, the law does have to accommodate all three. Judges' decisions, for example, are as much as possible the result of all three. Even so, there are still those who argue that among the three objectives of the law, justice is the most important legal goal, and some even argue that justice is the only legal goal. In relation to this, Plato (428-348 BC) as quoted by Schmandt, et.al (2005) once stated that the ideal state if it is based on justice and justice for him is balance and harmony. Harmony here means that the community lives in line and harmonizes with the goals of the country (policy), where each citizen lives well according to their nature and social position. But on the other hand, critical thinking views justice as nothing but a mirage, like people seeing a sky that seems to be visible, but never reaching it, even never approaching it. However, it must be acknowledged that arbitrariness will occur without justice. Actually justice and truth are the most important virtues, so these values cannot be exchanged for any value. In terms of this ethical theory, legal justice is prioritized by

reducing the legal certainty and benefit of the law, such as a pendulum (pendulum) hour. Prioritizing legal justice, it will have an impact on the lack of legal certainty and benefit of the law, and vice versa.

2. Certainty

LEGAL certainty is the certainty of laws or regulations, all kinds of methods, methods, etc. must be based on laws or regulations. In legal certainty there is a positive law and written law. Written law written by an authorized institution, has strict sanctions, is legitimately marked by the announcement in State Institutions. Legal certainty is a question that can only be answered in a normative, not sociological manner. Normative legal certainty is when a rule is made and promulgated with certainty because it regulates clearly and logically.

Obviously in the sense that it does not cause doubt (multi-interpretation) and is logical in the sense that it becomes a norm system with other norms so that it does not clash or cause norm conflicts. The norm conflict caused by uncertainty in rules can be in the form of norm contestation, norm reduction or norm distortion. Mainstream thinking assumes that legal certainty is a condition where human behavior, both individuals, groups, and organizations, is bound and within the corridor that has been outlined by the rule of law. Ethically, this view is born of concern that Thomas Hobbes once said that humans are wolves for other humans (*homo homini lupus*). Humans are violent beings who are a threat. For this reason, birth law is a guideline to avoid falling victims. Then the influence of Francis Bacon's thinking in Europe on law in the nineteenth century appeared in the law and order approach. One view in this law likens that between normative laws (regulations) can be filled with order which means sociological. Since then, humans have become a component of machine-shaped laws that are rational and quantitatively measured from the punishments that occur because of their violations. So, it can be understood that legal certainty is the certainty of the rule of law, not the certainty of actions against or actions that are in accordance with the rule of law. Because the sense of legal certainty is not able to truly describe the certainty of behavior towards the law.

3. Benefits

THE work of law in the community is effective or not. In the value of benefits, the law serves as a tool for photographing community phenomena or social reality. Law also should provide benefits or utility for the community. The followers of the utility community consider that the purpose of the law is solely to provide the maximum benefit or happiness for as many people as possible. The handling is based on social philosophy stated that every citizen seeks happiness, and law is one of his tools. One of the most radical figures of

utility flow was Jeremy Bentham (1748-1832), a philosopher, economist, jurist, and legal reformer, who had the ability to formulate the principle of usability (utility) into an ethical doctrine, known as utilitarianism or utilitarian (Ohoitumur 1997).

The principle of utility was stated by Bentham in his monumental work *Introduction to the Principles of Morals and Legislation* (1789), Bentham (1960) defines it as the nature of all objects tend to produce pleasure, goodness, or happiness, or to prevent damage, suffering, or crime, and unhappiness to those whose interests are considered. The flow of utilities considers that in principle the purpose of the law is only to create community benefit or happiness. The flow of utilities includes practical moral teachings which according to its adherents aim to provide the maximum benefit or happiness for as many citizens as possible. Bentham argues that the State and law exist solely for the true benefit, namely the happiness of the majority of the people. However, the concept of utility also gets sharp points as experienced by the first value above, so that with the criticism of the principle of the usefulness of the law, John Rawls develops a new theory that avoids many problems that are not answered by utilitarianism. The theory of criticism of utilities is called the Rawls or Justice as Fairness theory (justice as honesty) (Rawls 2009).

CORRUPTION IN THE CONTEXT OF CRIMINAL LAW ENFORCEMENT

IN VARIOUS parts of the world, corruption always gets more attention than other criminal acts. This phenomenon is understandable given the negative impact caused by this crime. The impact can touch various fields of life. Corruption is a serious problem. These crimes can endanger the stability and security of the community, endanger socio-economic development, and also politics, and can damage the values of democracy and morality because gradually these actions seem to be a culture (Hartanti 2008; Hatta 2010).

The increasing pattern of corruption in this country is a picture of the fragility of the government undermined by corruption. As the saying goes: fish rot from its head; corruption is mostly carried out by elite political parties and government. The Interior Ministry noted that from 2004 to July 2012, there were thousands of regional officials involved in corruption, starting from governors, mayors, regents to members of regional and central legislatures (Januar 2013).

Etymologically, criminal acts are juridical technical terms originating from the Dutch language *Strafbaarfeit* (Sударsono 2007), and there are two word-forming elements, namely *strafbaar* and *feit*. *Feit* words in Dutch are

interpreted in part from reality, while *strafbaar* means punishable, so that literally *Strafbaarfeit's* words mean part of the reality that can be punished.

According to Moeljatno in [Sudarto \(2007\)](#) as quoted by Prayudi said that the term *Strafbaarfeit* is translated as a criminal act, the act is a condition made by someone or something done. This action refers to the consequences or consequences. So it has an abstract meaning that shows two concrete circumstances, namely the existence of certain events and the people who act, which caused the incident ([Prayudi 2010](#)). This *strafbaarfeit* become more complicated in the enforcement process especially in criminal law, because not only concerning to the criminal act and criminal responsibility, but also the concrete condition when the crimes happened.

In terminology, corruption comes from *corruptie* or *corruptus* latin languages. It is from this Latin language that it falls into various languages such as English: corruption, corrupt; French: corruption, and *corruptive*; Dutch: *Korruptie* ([Hamzah & Dahlan 2007](#)). Furthermore, it is stated that corruption itself also originates from the original word *corrumpere*, an older Latin word which means damage or depravity, other than that it is also used to indicate bad conditions or actions ([Campbell 1979](#))

According to the Indonesian Dictionary (KBBI), corruption comes from the word corrupt, which means bad, damaged, rotten, likes to use goods (money) entrusted to it; can be bribed (use his power for personal gain). Corruption according to the terminology is fraud or misuse of state money (companies, organizations, foundations and so on) for personal or other people's benefits ([BPPB 2016](#)). [Hamzah & Dahlan \(2007\)](#) also said that literally, the meaning of corruption can be:

- a. Crime, decay, can be bribed, immoral, depravity and dishonesty.
- b. Bad actions such as embezzlement of money, receipt of bribes and so on.
- c. Acts that creates a situation that is bad, evil and despicable behavior, or moral depravity, bribery and forms of dishonesty.

Definition of corruption in accordance with Law Number 20 of 2001 concerning Amendment to Law Number 31 of 1999 concerning Eradication of Corruption Crime (Law No. 20 of 2001), namely: "*anyone who illegally commits acts of self-enrichment or other people or a corporation that can harm the State's or the country's economy*".

Corruption, in addition to being an extraordinary crime, has also become an international crime. Corruption crimes have a correlation with other forms of crime, especially organized crime and economic crime, including money laundering crimes. Corruption has also become systematic and entrenched behavior ([Mardani 2009](#); [Naning 1983](#)).

There are so many definitions from experts who try to explain the meaning of corruption in their respective perspectives, both from a moral, religious, socio-cultural and legal perspective. From any perspective, corruption with all its forms and modus operandi is interpreted as a disgraceful act that is contrary to moral, social, cultural, religious and legal values. There is no place for corruption ([Syamsuddin 2012](#)).

The 2003 United Nations Convention against Corruption (UNCAC) Convention, describing the problem of corruption is a serious threat to the security stability of national and international communities, has weakened the values of democracy and justice and endangered sustainable development and law enforcement.

The impact of the crime of corruption itself causes the country's development process to be hampered towards a better one, namely increasing welfare and alleviating people's poverty. In addition, powerlessness before the law in the sense of financial aspects, position or closeness with officials plus the lack of commitment from the government elite is a factor why corruption still thrives in Indonesia. That all happened because the law is not the same as justice, the law comes from the human brain of the ruler, while justice comes from the heart of the people (Ayudo 2012).

Recognizing the complexity of corruption problems in the midst of multi-dimensional crises and the obvious real threats that will occur, the crime of corruption can be categorized as a national problem that must be dealt with seriously through the balance of decisive and clear steps involving all potential exists in the community, especially the government and disciplinary officials.

Corruption is an extraordinary crime, because excess corruption can damage public trust in the State, disrupt economic growth, hinder efforts to alleviate poverty, cripple investment, both foreign and local, destroy foreign trust in Indonesia, undermine APBN/APBD can threaten political stability and sustainable development.

According to international views, corruption has also become an international crime (International Crime). This is in accordance with the United Nations Convention against Corruption (UNCAC). Indonesia itself has had Law Number 1 of 2006 concerning Reciprocal Assistance for Criminal Problems and has ratified the UNCAC on April 18, 2006 with Law Number 7 of 2006 concerning Ratification of the United Nations Convention Against Corruption, 2003 (United Nations Convention Anti-Corruption, 2003).

Corruption crimes correlate with other forms of crime, especially organized crime and economic crime, including money laundering crimes. Corruption in Indonesia has become systematic and entrenched behavior.

As complex as the problem of corruption, Indonesia has had several regulations concerning eradicating corruption and regulations relating to corruption crimes, such as Law Number 28 of 1999 concerning the Implementation of Clean and Free of Corruption, Collusion and Nepotism, Law No. 31 of 1999 which was later amended by Law No. 20 of 2001, Law Number 30 of 2002 concerning the Corruption Eradication Commission, Law No. 7 of 2006, Law Number 15 of 2002 *jo.* Law Number 15 of 2003 concerning Money Laundering, Presidential Instruction Number 5 of 2004 concerning the Acceleration of Corruption Eradication, and Presidential Decree Number 11 of 2005 concerning the Coordination Team for the Eradication of Corruption Crimes.

The causes of the emergence of corruption are internal and external. Internally the drive for corruption is caused by: encouragement of need (inadequate salary), encouragement of greed (greed), lack of moral strength, consumptive lifestyle, laziness (wanting a lot without effort), weak faith (not practicing the teachings religion); while the external causes of corruption are the environment (corruption has become a culture or system), opportunities (weak supervision), inadequate systems of accountability, weak legislation and law enforcement agencies, leaders who do not set an example, no right organizational culture, and others.

Some previous research stated that corruption have various modes (Ibrahim, Yusoff, and Koling 2018; Arifin, Utari, and Subondo 2016; Arifin 2016; Arifin 2014a; Arifin 2014b; Ash-shidiqqi & Wibisono 2018; Wibowo 2018) such as:

- a. Extortive corruption is corruption in bribery or bribery mode carried out by employers to officials to obtain certain facilities;
- b. Manipulative corruption means a person's request to a legislative or executive official to make certain regulations or regulations that can benefit the person even if it has a negative impact on the wider community;
- c. Nepotistic corruption is corruption that is caused by family ties, such as having a family that is given excessive facilities or is accepted as a civil servant without any consideration or matters worthy of holding the position; and
- d. Subversive corruption is the arbitrary robbery of state wealth to be transferred to foreign parties for personal gain.

The elements of criminal acts of corruption can actually be seen from the definition of corruption or offense formulation contained in the provisions of applicable laws and regulations, and some understanding and formulation of offenses for corruption as stated above. The elements of criminal acts of corruption that are inventoried in Law No. 20 of 2001 are:

- a. The actions of a person or legal entity against the law;
- b. This action abuses authority;
- c. With the intention to enrich yourself or others;
- d. Such actions are detrimental to the state or economy of the country or should be suspected of harming the country's finances and economy;
- e. Giving or promising something to a civil servant or state administrator with the intention that the civil servant or the organizer of the country acts or does not do something in his position, which is contrary to his obligations;
- f. Giving something to a civil servant or state administrator because or relating to something that is contrary to the obligation, carried out or not done in his position;
- g. Giving or promising something to the judge with the intention to influence the case decision handed over to him to be tried;

- h. Giving or promising something to someone who, according to the provisions of legislation, is determined to be an advocate to attend a court hearing with the intention of influencing the advice or opinion to be given in connection with a case submitted to the court for trial;
- i. The existence of fraudulent acts or deliberately allowing the occurrence of fraudulent acts;
- j. Civil servants or people other than civil servants who are assigned to run a public office continuously or for a while, intentionally embezzling or securities held for their position or allowing the money or securities to be taken or embezzled by others or assisting in conducting the deed;
- k. By intentionally darkening, destroying, destroying, or not being able to use goods, deeds, letters, or lists that are used to convince or prove in advance the competent authorities, who are controlled because of their position and allow others to eliminate, destroy, destroy or register and help other people eliminate, destroy, destroy, or make unused items, deeds, letters or lists;
- 1. A civil servant or organizer who receives a gift or promise even though it is known or reasonably suspected, that the gift or promise is given because of the power or authority related to his position, or that in the mind of the person giving the gift or promise is related to his position.

With the existence of elements of corruption committed in the laws and regulations, then every act of a person or corporation that meets the criteria or formulation of the above offense, then he is subject to sanctions in accordance with the applicable provisions. It must be remembered and understood that the elements of criminal acts are very important to know because by not fulfilling the element of a crime, the perpetrator of crime can be free from all lawsuits and in fact causes so that a defendant of corruption is free from the fulfillment of elements that is.

STRAFRECHT POLITIEK ON THE ASSETS RECOVERY OF CORRUPTION IN INDONESIA: PROBLEMS AND CHALLENGES

CORRUPTION, Collusion and Nepotism for developing countries, is like a disease that is difficult to avoid and seek a cure. Despite being the determination of all nations in the world to eliminate or reduce the level of intensity, quality and quantity in an effort to create clean governance and good governance, corruption is difficult to eradicate. All parties continue to aim to be able to realize a just and prosperous society, prosper in justice, and justice in prosperity in a Law State and the Welfare State that is aspired. (Sulistia & Zurnetti 2012)

Corruption is also a door for the flourishing of terrorism and violence because social inequality and injustice still continue or take place, while a small proportion of the community can live better, more prosperous, luxurious in the midst of poverty and limited society in general. The emergence of acts of terror is caused by the widening gap and injustice in society. What the perpetrators of corruption often do not realize is that corruption is a complex crime and has social implications for others because it involves the right of other people to get the same welfare. Even corruption can be called a social sin where a sin or crime is committed and affects many people and the value of sin is far greater than the personal sin (Mujiran 2004).

Commitment to eradicating corruption is an important milestone in the governance of a country. In Indonesia, almost every election of the head of state does not escape the seriousness of looking at what commitments are given by prospective heads of state to eradicate corruption. Inevitably this happens because corruption continues to erode people's rights to state wealth. Abundant state wealth, almost nothing left for people's welfare.

Some references state that juridical corruption eradication only began in 1957, with the issuance of Military Rulers Regulation Number PRT/PM/06/1957. The regulation known as the Regulation on Eradicating Corruption was made by the military authorities at that time, namely the Army and Navy Military Rulers.

Presidential Decree No.28 of 1967 concerning the Establishment of the Corruption Eradication Team. In its implementation, the team cannot eradicate corruption to the maximum, it can even be said to be almost non-functioning. This regulation even triggered various forms of protest and demonstration starting in 1969 and its peak in 1970 which was then marked by the establishment of Commission IV which was tasked with analyzing problems in the bureaucracy and issuing recommendations to overcome them.

The state document outline of the Big State Policy (GBHN) which contains one of them is the willingness of the people to eradicate corruption. However, the implementation of the GBHN was leaked because the state management was characterized by a lot of state budget fraud and leakage in all sectors without any control at all.

State organs such as parliament which have a supervisory function are weakened. The DPR's budget is determined by the government so there is no oversight function. The judiciary was made similar by the New Order regime, so there was no strength left to be able to prosecute corruption cases independently. The strength of civil society was spelled out, the New Order authorities slowly limited the movement of society and intervened to maintain their power.

The politics of criminal law in the framework of returning state losses due to criminal acts of corruption needs to be stressed so as not to get out of its main goal, namely to save state money from criminal acts of corruption, Article 18 of Law No. 31 of 1999 has explained all that, the article is still relevant to the reality that exists today. State losses due to corruption are a

consideration mainly from the existence of the Law on the Eradication of criminal acts of corruption. In considering the letter (a) and letter (b) of Law No. 31 of 1999 concerning Eradication of Corruption Crime, affirmed:

- a. that corruption is very detrimental to state finances or the country's economy and hampers national development, so it must be eradicated in order to create a just and prosperous society based on Pancasila and the 1945 Constitution.
- b. that the consequences of criminal acts of corruption that have occurred so far in addition to harming the state's finances or the country's economy, also hamper the growth and sustainability of national development which demands high efficiency.

The Law on Eradicating Corruption Crime implies 2 (two) things. First, that the presence of the law to eradicate corruption is in the context of safeguarding it in the state financial management, there is no loss of state money due to corruption. Second, if there is a criminal act of corruption that is detrimental to state finances, then in order not to have an effect on economic growth and the continuity of national development, the state (through the criminal justice system) is given the authority to claim state losses from perpetrators of corruption.

In accordance with the predicate given to corruption as an extraordinary crime, achieving the goal (political) of criminal law so that there is no state loss if corruption occurs, it is not easy. Since corruption was regulated separately as a special offense outside the Criminal Code in 1957 (1957 was recorded as the era of enactment of the Military Regulations from 1957 to 1958. Initially corruption was regulated in the Criminal Code, with the development of the situation corruption was specifically regulated in Law its own law), following Law No.24/Prp/1960 concerning Investigation, Prosecution and Corruption Criminal Investigation, Law No. 3 of 1971 concerning the Eradication of Corruption Crime, and finally Law No. 31 of 1999 concerning Eradication of Corruption Crimes amended by Law No. 20 of 2001 concerning changes to Law No. 31 of 1999 which is still valid; the return of state losses due to corruption has never been maximized.

Changes after changes to the regulation of criminal acts of corruption in addition to marking the sincerity and determination of the Indonesian people to eradicate corruption is not a crime, also marking efforts to improve the substance of the regulation against corruption in order to be empowered to save a qualified state finances, for example, regarding the interpretations or terminology of corruption, elements against the law and types of criminal sanctions. Law No. 31 of 1999 concerning Eradication of Corruption Crime formulates the terminology of corruption as: ... *actions enriching oneself or others or corporations against the law (wederrechtelijkeheid) in formal terms (formale*

wederrechtelijkeheid) and *material* (materiel wederrechtelijkeheid). Meaning against the law formal or material, even though the act is not regulated in the laws and regulations, but if it is deemed despicable because it is not in accordance with the sense of justice or norms of social life in the community, then it can be punished. In this provision the word “*can*” before the phrase “*detrimental to state finances or the economy of the country*” indicates that the crime of corruption is a formal offense, namely the existence of corruption is enough to fulfill the elements of action that have been formulated not with the emergence of consequences (Prayudi 2007). For the types of criminal sanctions the Law on Eradicating Corruption Crime is considered to be preparing very heavy criminal sanctions, ranging from capital punishment, additional criminal penalties as referred to in the Criminal Procedure Code and article 18 of Law No. 31 of 1999 (Muladi 1995; Muladi & Nawawi Arief 2010)

One of the objectives of the enactment of the Law on the Eradication of Corruption Crimes (Law No. 31 of 1999 in conjunction with Law No. 20 of 2001) is to restore state losses. Therefore, the enforcement of the criminal law prioritizes returning the loss of state money from the perpetrators of corruption. Efforts to repay losses of state money from perpetrators of corruption will be successful if there is cooperation between law enforcement officials (Police, Prosecutors, KPK) to uncover criminal acts of corruption, especially in efforts to recover state losses. Without such cooperation, it will be difficult for a state financial/economic loss to be returned. Because, there is no corruption actor who wants to return the state money but he is still put in prison. Corruption actors are willing to return state money if the criminal case is abolished.

Application of Article 18 of Law No. 31 of 1999 is still very rare. Social facts around the return of state finances through the application of additional criminal penalties are fairly minimal. Therefore it is also quite understandable if the return of state losses is not/has not been directly proportional to the amount of state losses caused by criminal acts of corruption.

CONCLUSION

FINALLY, it is emphasized and this paper underlined that, the implementation and spirit of returning state losses in criminal acts of corruption is not optimal because of the many political interests and far from the political objectives of criminal law. The politics of criminal law in the context of returning state losses due to criminal acts of corruption needs to be emphasized so as not to get out of its main purpose, namely to save state money from criminal acts of corruption, Article 18 of Law No. 31 of 1999 has explained all that, the article is still relevant to the reality that exists today.

State losses due to corruption are a consideration mainly from the existence of the Law on the Eradication of criminal acts of corruption.

In considering the Law on the Eradication of Corruption Crime, it implies 2 (two) things. *First*, that the presence of the law to eradicate corruption is in the context of safeguarding it in the state financial management, there is no loss of state money due to corruption. *Second*, if there is a criminal act of corruption that is detrimental to state finances, then in order not to have an effect on economic growth and the continuity of national development, the state (through the criminal justice system) is given the authority to claim state losses from perpetrators of corruption.

The purpose of the enactment of the Law on the Eradication of Corruption Crime (Law No. 31 of 1999 in conjunction with Law No. 20 of 2001) is to restore state losses. Therefore, the enforcement of the criminal law prioritizes returning the loss of state money from the perpetrators of corruption. Application of Article 18 of Law No. 31 of 1999 is still very rare. Social facts around the return of state finances through the application of additional criminal penalties are fairly minimal. Therefore it is also quite understandable if the return of state losses is not/has not been directly proportional to the amount of state losses caused by criminal acts of corruption.

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Law Quote

**“Corrupt
politicians make
the other ten
percent look bad”**

—

**Henry Alfred Kissinger,
Nobel Peace Prize**

Source: <https://www.goodreads.com/quotes/tag/corruption>

The Implementation of Diversion and Restorative Justice in the Juvenile Criminal Justice System in Indonesia

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Article Info**Abstract**

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Diversion, Restorative Justice, Children in Conflict with the Law

Children are a younger generation successor to the nation that must be protected. In some cases children can do a mischief that fall into the categories of offenses and called as children in conflict with the law. Children in conflict with the law have different in terms of handling the criminal offenses committed by adults. Currently with Law Number 11 of 2012 on the Criminal Justice System of Children (SPPA) which has sought diversion and restorative justice in terms of handling child conflict with the law. From the results of this study concluded that the policy formulation the concept of diversion and restorative justice pursuant to Law Number 11 of 2012 on the Criminal Justice System of Children (SPPA) and its implementation rules have been set regarding policy concept of diversion and restorative justice with the aim that children who commit acts the criminal is no longer confronted in the judicial process but through an alternative solution, namely the completion of which is the restoration to its original state (restorative justice) will but of formulating the policy is still not perfect because it found some weakness. While in the implementation of diversion and restorative justice in the settlement of children in conflict with the law in Pati District Court already sought remedies which reflect restorative justice approach by implementing law enforcement diversion and restorative justice but there are still many obstacles occurred in the settlement of children in conflict with the law in Pati District Court.

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INTRODUCTION

ONE of the main elements of a lawful state is equality before the law. Article 27 Paragraph (1) of The 1945 Constitution of the Republic of Indonesia states that: All citizens shall have equal positions in law and government and shall uphold such law and government with no exception. Given the equal status before the law and government, every citizen who is found to be in violation of applicable law will get sanction according to the deed done. It can be said that the law does not see who it is officials, civilians or the military. If it violates the law will get sanction according to the deeds done. But the law provides a special view in the application of law to children. There are special approaches that are conducted solely for the child's own interests and welfare (Djamil 2013; Bouffard, Cooper, and Bergseth 2016; Hirschi 2017).

Children are part of the young generation and as one of the human resources that is the bud, the potential and successor ideals of the struggle of the nation in the future, and has a strategic role. Furthermore, it has special characteristics that guarantee the continuity of the existence of nation and state in the future. Every child will be able to assume the responsibility. Therefore, children need to get the widest opportunity to grow and develop optimally both physically, mentally and socially, and morals. Protection needs to be done as well as to realize the welfare of children by providing guarantees to the fulfillment of all rights and recognition without discrimination (Djamil 2013; May, Osmond, and Billick 2014). Childhood is the period of seed sowing, the establishment of piles, making the foundation that can be called as well as the period of character formation, personality and character of a human self. Aiming that they will have the strength and ability, and stand tall in life (Gultom 2008; Arifin 2018; Burfeind & Bartusch 2015).

One of the prevention and prevention efforts of children facing the law today through the implementation of the Juvenile Criminal Justice System (*Sistem Peradilan Pidana Anak*, SPPA). The purpose of organizing the criminal justice system is not only to impose criminal sanctions, but to focus more on the accountability of perpetrators of victims of crime, commonly referred to as the restorative justice approach. The purpose of restorative justice is for the welfare of the child concerned, without prejudice to the interests of the victims and the community.

In Indonesian context, Law Number 11 of 2012 on SPPA which entered into force in July 2014 has had permanent legal force to be implemented after it was ratified. In the law referred to in Article 6 to Article 15 there is a diversion provision which is a renewal in the child criminal justice system. Diversion is an act or treatment transferring a case from formal to informal process, or placing out child offender from SPPA (Marlina 2009; Hardjaloka 2015; Davies & Robson 2016). This means that not all child matters in conflict with the law must be resolved through the formal justice system and provide alternative solutions by using restorative justice

approaches for the best interests of the child and considering justice for the victims and the community (Friedlander 2013; Siegel & Welsh 2014; Wahyudi 2009; Maskur 2012).

Currently, one of the efforts to prevent and overcome children in conflict with law is through the criminal justice system of children. This is expected to give maximum protection for the interest of children who should live as the best interests for the survival of mankind (Wahyudi 2010; Shoemaker 2017; Petrisono et.al 2013). The purpose of organizing the juvenile justice system is not only to impose criminal sanctions on the perpetrators. However, more focused on the premise that the imposition of sanctions as a means of supporting and realizing the welfare of children of criminals. Therefore, handling of cases of children in conflict with the law (ABH) must be distinguished from handling to adults. There should be special approaches in solving child cases against the law, and mainly using a restorative-based or recovery approach.

THE POLICY OF DIVERSION AND RESTORATIVE JUSTICE FORMULATION IN THE PERSPECTIVE OF LAW NUMBER 11 OF 2012 ON THE JUVENILE CRIMINAL JUSTICE SYSTEM

WITH the existence of Law Number 11 of 2012, the concept of diversion and restorative justice has been regulated in this law that is in Chapter II which specifically regulates the provision of diversion based on the approach of restorative justice from Article 6 to Article 15 means that there are 10 articles regulates the diversion provisions at all stages of examination from investigation, prosecution and trial in a court of law in the settlement of cases of children in conflict with the law.

A formal criminal law, also called a criminal procedural law, is a law governing how a country with its equipment intermediaries exercises its right to impose criminal sanctions (Sudarto 2009). Thus the procedural law of child criminal justice is a regulation that arranges for abstract child criminal law applied in concrete (Djamil 2013). In Law Number 11 of 2012 regarding the criminal justice of children in Chapter III from Article 16 to Article 62 means there are 47 articles regulating the Juvenile Criminal Procedural Law, and there are diversion arrangements at every level of investigation, at the level of investigation, prosecution and examination in court.

Basically, Law Number 11 of 2012 on Child Criminal Justice System has regulated the efforts of diversion and restorative justice approach in settling cases of children in conflict with the law. However, in the law also found some weaknesses in its implementation are:

- 1) Regarding the provision of diversion in Article 7 paragraph (2) subparagraph a of Law Number 11 of 2012 regarding the Criminal Justice System of the Child which determines the requirement that a diversion process be conducted in the event of a criminal offense is punishable by imprisonment under 7 (seven) years. This provision automatically precludes attempts of child-diverting in cases where a criminal offense is punishable by imprisonment of 7 (seven) years or more. This article is a reflection of the concept of the concept of the SPPA law in understanding the protection of the child in which the philosophical foundation of the protection of the child is to remember that the child has a lack of physical and cyclical power so that to be criminally liable for the deed done, a child has not been able because his lack of mental stability to understand the deeds he performed. So in the case of handling children in conflict with the law must be handled specifically. The tendency in child-handling practices in conflict with the law is often seen as a miniature of adults so that the application of transfer efforts through the outer court through diversion and restorative justice still uses an indicator of the severity of the criminal threat perpetrated by the offending child. This has led to discrimination in handling the settlement of cases of children in conflict with the law by applying different treatment in the case of children subject to imprisonment under 7 (seven) years and children who are punishable by imprisonment of 7 (seven) years or more. This provision does not reflect the approach of restorative justice in the settlement of children in conflict with the law.
- 2) Referring to Article 108 of Law No. 11 of 2012 on the Criminal Justice System of the Child that this law is valid after 2 (two) years as from the date of promulgation. Therefore, the obligation as regulated in Article 105 of Law Number 11 of 2012 on Child Criminal Justice System is in the case of preparing facilities and infrastructure and human resources of special law enforcers of children, it can be implemented at the latest 5 (five) years after the law, this law is in force. However, the absence of clear regulation on the obligations of the government to prepare and build facilities and infrastructure of law enforcement supporters for children committing crimes during this transitional period. For example, there is no National Prisons (BAPAS) in every regency or city, there is not yet the availability of supporting infrastructure for the implementation of diversion such as special room for diversion, and the limited human resources of law enforcers who specifically handle, have the interest and ability to resolve cases of children in conflict with the law in every the level of the criminal justice system.

DIVERSION AND RESTORATIVE JUSTICE FORMULATION IN THE PERSPECTIVE OF SUPREME COURT REGULATION NUMBER 4 OF 2014 ON GUIDELINES FOR THE IMPLEMENTATION OF DIVERSITY IN THE CRIMINAL JUSTICE SYSTEM OF CHILDREN

JUDGING from the perspective of constitutional law especially in the practice of governing the government and the system of laws and regulations, the position of the Supreme Court Regulation of the Republic of Indonesia (PERMA RI) has several functions. *Firstly*, as a filler of legal vacuum, supplementing the lack of law and legal discovery, where the provisions of legislation are not or have not been regulated so that PERMA RI can be complementary to the laws and regulations. *Secondly*, as law enforcement and legal source because PERMA RI is a concretization of judicial practice with aim for legal certainty, justice and expediency (Mulyadi 2014).

PERMA RI Number 4 of 2014 on Guidelines for Implementation of Diversity in the Child Criminal Justice System, was born to fulfill vacuum and law enforcement in the context of the practice of organizing the regulatory system (Mulyadi 2014). Furthermore, substantially PERMA RI Number 4 of 2014 consists of V (five) Chapters regulating General Provisions, Diversion Duties in Courts, Transitional Provisions and Closing Provisions.

Basically, PERMA RI Number 4 of 2014 serves to fill the void and law enforcement for the practice of governance and the system of legislation referring to the consideration of letter b of PERMA RI Number 4 of 2014 stated that Law Number 11 of 2012 on System The Child Criminal Court has not yet clearly set out the procedures and the stage of diversion. Therefore, there are some things that have not been regulated in the SPPA Act and then regulated in PERMA No. 4 of 2014, as a function of fulfilling legal vacuum and law enforcement, which is described as follows:

- 1) Pursuant to Article 1 of the General Provisions of the definition of deliberative deliberation as a consensus between the parties involving the child and the parent/guardian, the victim and/or parent/guardian, the social guidance counselor, the professional social worker, the community representative and other parties involved to reaching a diversified agreement through a restorative justice approach. The diversion facilitator is a judge appointed by the chief judge to handle the child's case. In addition, the provision of 'Caucus' is a separate meeting between the Facilitator of Diversion with one of the parties known by the other party. A diversion deal is a consensus of the result of a diversity deliberation process that is set forth in the form of a document and signed by the parties involved in the diversionary deliberation, in which the day is a working day.
- 2) Subject to the provisions of Article 3 it is stipulated that:

“A Child Judge shall seek diversion in the case of a child charged with a criminal offense punishable with imprisonment under 7 (seven) years and shall also be charged with a criminal offense punishable by imprisonment of 7 (seven) years or more in the form of subsidiary, alternative, cumulative or combined indictments”.

The provisions of Article 3 PERMA, especially the sentence editorial, "A criminal offense punishable with imprisonment of 7 (seven) years or more in the form of subsidiary, alternative, cumulative or combined indictment". Thus PERMA concerning the specifically specific versions of the sentence, "Is punishable by imprisonment of 7 (seven) years or more", this substance is broader than the provision of Article 7 paragraph (2) letter a of the SPPA Law because the diversion is made against, *“the offense committed is threatened with imprisonment under 7 (seven) years”.*

- 3) With this PERMA regulates the standard format of the letter of determination of deliberative deliberation meetings, the report of the event of either failed versions of the beginning or the unsuccessful version, the diversion agreement and the letter of appointment of the Chairman of the District Court if the verdict succeeded in court. The format is contained in attachment PERMA No. 4 of 2014 on Guidelines for Implementation of Diversion in the Criminal Justice System of Children.

Diversity in Perspective of PERMA RI Number 4 of 2014 as a function of fulfilling legal vacuum, law enforcement for justice and expediency Article 3 PERMA has expanded and flexed the diversion provisions that are normatively regulated in SPPA Law and accommodate in cases where the parties in the child's case agree to diversify against a child subject to a criminal offense of 7 (seven) years or more so that it is possible to be diverted under the terms, *“The child is charged in the form of a subsidiary, alternate, cumulative or combined indictment”*, although on the other hand the provisions of Article 7 paragraph (2) The SPPA Act is not possible.

DIVERSION AND RESTORATIVE JUSTICE FORMULATION POLICY IN THE PERSPECTIVES OF GOVERNMENT REGULATION NUMBER 65 OF 2015 ON GUIDELINES FOR THE IMPLEMENTATION OF DIVERSITY AND HANDLING OF CHILDREN UNDER TWELVE

GOVERNMENT Regulation of the Republic of Indonesia Number 65 of 2015 on Guidelines for the Implementation of Diversity and Handling of Children Under 12 (twelve) Years, was born as a technical guidance of law enforcement officers in the implementation of the diversion process previously set in Law Number 11 of 2012 on System Child Criminal Court. Subsequently, the Government Regulation of the Republic of Indonesia

Number 65 of 2015 consists of VII (seven) Chapter regulates General Provisions, Guidelines for the Implementation of Diversity Process, Procedures and Coordination of Diversity Implementation, Handling of 12-Years Old Child, Funding, Transitional Provisions and Closing Terms.

In essence, the Government Regulation of the Republic of Indonesia Number 65 of 2015 serves to provide technical guidance on the implementation of the diversion process in the regulatory system which refers to the consideration to implement the provisions of Article 15 and Article 21 paragraph (6) of Law Number 11 of 2012 regarding the System Child Criminal Court, it is necessary to stipulate a Government Regulation on Guidelines for the Implementation of Diversity and Handling of Children Under 12 (twelve) Years. So from the provisions of Government Regulation No. 65 of 2015 it can be seen that the implementation guidelines and coordination procedures between law enforcement agencies such as Police, Attorney and Courts as implementers in the implementation of diversion is clearly described in Government Regulation No. 65 of 2015. Whereas the provisions on terms and procedures for the diversion and handling of cases of children not yet 12 (twelve) years in line with Law Number 11 of 2012 on the Criminal Justice System of the Child.

IMPLEMENTATION OF THE CONCEPT OF DIVERSION AND RESTORATIVE JUSTICE APPROACHES IN HANDLING CHILDREN'S CASES IN CONFLICT WITH THE LAW AT PATI DISTRICT COURT

DIVERSION shall be strived at the level of investigation, prosecution and examination of children's cases in the District Court. Implementation of the concept of diversion in the examination of cases of children in the District Court in the form of settlement of cases outside the juvenile criminal justice system or non-litigation path in the form of dispute resolution in the family (restorative justice). This provision is provided for in Article 7, Article 14 and Article 52 of the SPPA Law which may be detailed, the diversion shall be made at the examination level in the ordinary children's court in practice carried out through the following steps:

- 1) Upon receipt of the case file from the public prosecutor, the District Court Chairman shall determine the child's judge or the judge of the child to handle the child's case no later than 3 (three) days after receiving the file of the case.
- 2) The Judge shall endeavor to be a maximum of 7 (seven) days after being stipulated by the President of the District Court. In judicial practice, a diverging judge is referred to as a diversion facilitator of a child judge appointed by the chief judge to handle the child's case. Diversion is conducted through deliberation by involving related parties and done to reach the diversion agreement through restorative justice approach.

- 3) If the perpetrator or the victim agrees to be diverted then the child's judge, social guardian, and professional social worker begin the process of conversion of the case by involving the relevant parties. The diversion process shall be carried out no later than 30 (thirty) days, beginning with the establishment of a judge of the child or judge of the child on the determination of the day of diversion and the diversion process may be carried out in the mediation court of the District Court after it has been made of the proceedings of the diversion process, either successful or failing as the format of the minutes is attached in Attachment I, II, III and IV of PERMA Number 4 of 2014.
- 4) If the successful conversion where the parties reach an agreement, then the agreement is set out in the form of a diversion agreement. The result of the diversion agreement and the news of the diversion shall be submitted to the President of the District Court for determination. The Chief Justice shall issue a determination within a period of no more than 3 (three) days from the receipt of the diversion agreement. Such determination shall be submitted to the child counselor and the judge of the child who handles the case within a maximum of 3 (three) days since it is stipulated by the President of the District Court. Subsequently, upon receipt of the determination of the Head of the District Court on the diversion agreement, the child's judge or the judge of the child issues the stipulation of a hearing and shall also contain the editorial "ordering the accused to be removed from detention", against the child who is in custody of the case.
- 5) If the failed versions of the case proceed to the trial stage. Furthermore, the judge continues the proceeding in accordance with the trial procedure for the child.

In the Pati District Court from 2014 until February 2016 there were 638 criminal cases entered. It consists of 275 cases in 2014, 309 cases in 2015 and 54 cases up to February 2016. Of the 638 criminal cases within 2014 to February 2016 there are 17 cases of conflicted children with laws handled by the Pati District Court. From these data shows that a very prominent increase occurred in 2015 with 13 cases, which previously in 2014 only amounted to 3, whereas in the year 2016 until February there were only 2 cases of children in conflict with the law. Based on the table in the period of two years 2 months starting from 2014 to February 2016 there are 17 (seventeen) types of crimes committed by children, namely Extortion and assault as much as 1 (one) case, beating 2 (two) cases, Theft as many as 5 (five) cases and Wanton as many as 9 (nine) cases. So from the data there is the fact that the case of children in conflict with the law handled Pati District Court at most is a case of immorality.

From these data it can be concluded that the number of children in conflict with law from 2014 to February 2016 amounted to 17 (seventeen) cases of children. However, of the 17 (seventeen) cases undergoing a diversion there are only 2 (two) cases, one case in 2015 and one case at the beginning of

2016. From the fact that there are not all cases of children in conflict with the law in the Pati District Court through a process of diversion.

According to the interview with Etri Widayanti, as one of the judges of the facilitator diversion in Pati District Court, it is because children who commit criminal acts in the jurisdiction of Pati District Court on average are threatened with high criminal penalty that is above 7 (seven) years. In addition, the indictment of the public prosecutor of the children who was transferred to the Pati District Court on average contains charges with threats of 7 years or more. Moreover, the judge in Pati District Court cannot apply alternative settlement procedure (non-litigation) in the form of diversion. The judge in conducting the examination of the child in court is a funnel of the law if the SPPA Article 7 Paragraph (2) letters (a) and (b) clearly state that 'diversion is exercised in the event that a criminal offense is punishable by imprisonment under 7 (seven) years and not a repeat of a crime. Based on the aforementioned article, the diversion can only be done with a limitative indicator of a criminal penalty under 7 (seven) years. Consequently, the consequences are criminal acts committed by a child threatened with 7 (seven) years or more, and the judge does not have the authority to undertake non-litigation settlement efforts in the form of diversions due to the sound of the article in the event that the conditions of settlement through diversion and restorative justice are very clear. Thus, judges find it difficult to pursue alternative solutions by way of diversion, although both parties either the perpetrator or the victim have a wish or consent that the case can be attempted for a diversified settlement (Widayanti 2017).

Since Law Number 11 of 2012 on the Juvenile Justice System came into force on July 31, 2014 to date, there are 2 (two) children in conflict with the law at the Pati District Court pursuing the settlement process through diversion and resort-justice procedures. The first case is related to the criminal act of beatings, against the child charged with Article 80 paragraph (1) of Law no. 23 of 2002 in conjunction with Article 55 paragraph (1) to 1 of the Criminal Code. The second case, also related to the criminal act of beatings, against the child was accused of First Article 170 paragraph (1) of the Second Criminal Code Article 76 C *jo* Article 80 paragraph (1) of Law no. 35 Year 2014 *Subsidiar* Article 76 C *jo* Article 80 paragraph (1) of Law no. 35 of 2014 *jo* Article 56 of the Criminal Code. Therefore, the child who is in conflict with the law based on the relevant laws and regulations must be pursued the settlement procedure through the diversion by the judge of Pati District Court. And settlement efforts through diversion with the restorative justice approach have been made to both cases but none have succeeded in reaching a peace agreement through diversion.

Furthermore, the implementation of the concept is diversified according to the restorative justice paradigm. It is based on the same procedure diversion with forms of settlement efforts using several methods and approaches that reflect the paradigm of restorative justice in efforts to

solve cases of children in conflict with the law at the Court of Pati ([Widayanti 2017](#)).

The forms of settlement efforts offered by restorative justice based methods and approaches in Pati District Court are as follows:

- 1) Mediation;
- 2) Conciliation followed by reconciliation;
- 3) Restitution;
- 4) The apology of the perpetrator;
- 5) Regretful acts by perpetrators;
- 6) The perpetrators' accountability;
- 7) Guarantees from the perpetrator's parents for the future to educate and supervise the child not to repeat his actions again;
- 8) Recovery of the original condition of both victims and perpetrators;
- 9) Service to the victim;
- 10) Recovery of perpetrators through community elements, which may take the form of community education, social work or leave it to religious-based educational institutions to restore the behavior of child offenders;
- 11) It is expected that the final outcome will be a consensus-based agreement approved by all parties involved in the diversion and restorative justice procedures.

Parties involved in the diversion process with the restorative justice approach at the Pati District Court:

- 1) Victims and families of victims. The involvement of victims in the settlement of restorative justice is quite important. This is because during this time in the criminal justice system, the victim is not involved when the victim is a party directly involved in the conflict (the aggrieved party). In the deliberation the interests of the victim are important to be heard and are part of the decision to be taken. In addition, the victim's family needs to be involved because in general the core issue is from the family especially if the victim is a minor.
- 2) Actors and families. The perpetrator's family is an absolute party because remembering the age of the immature perpetrator is also considered very important because the family will be part of the settlement agreement, such as in the case of compensation payments or the implementation of other compensation in accordance with the consensus agreement.
- 3) Community representatives are important parties to represent the interests of the environment where the criminal incident occurred. The goal is that the interest of the public nature is expected to remain represented in decision-making. The criteria of local community leaders are village heads, village heads and other figures who have legitimacy as community representatives and have no interest in the cases faced.

The Pati District Court in settling cases of children in conflict with the law has endeavored the procedure of diversion and restorative justice in accordance with the provisions of legislation for 2 (two) cases of children in conflict with the law at the Pati District Court. The settlement efforts by

bringing together both parties of the family of the perpetrator and the victim's family with the model of settlement using the methods of mediation, conciliation and restitution simultaneously. Thus the case of children in conflict with the law at the Pati District Court has been attempted to avoid the judicial process (litigation) and diverted outside the judicial process (non-litigation) carried out through a diversion procedure with a restorative justice-based approach.

THE BARRIERS & PROBLEMS IN THE IMPLEMENTATION OF DIVERSION

ACCORDING to the data of the research that has been discussed in the previous problem formulation shows that there are only 2 (two) diversion attempts made by the Pati District Court and 2 (two) cases that are attempted to diversion and even fail to meet an agreement. From the data, it is found an obstacle in implementing the concept of diversion and restorative justice in settling cases of children in conflict with the law in Pati District Court that is as follows:

- 1) Low community understanding of diversified concepts and restorative justice approaches;
- 2) Child Criminal Justice System;
- 3) The success of the diversion process and the restorative justice approach depends largely on the family and community on which the child is returned;
- 4) It is very difficult to prevent children from retributive justice punishment in the event of a very serious offense;
- 5) Law enforcement apparatus of diversion and restorative justice implementation

According to the interview to Etri Widayanti, as one of the Judges of Diversion Facilitator at Pati District Court, the main obstacle in seeking diversion and restorative justice is located on the side of the victim or the family of the victim who does not accept the perpetrator's actions and wants revenge in the form of criminal the judge;s decision in the trial or the victim wants to make peace through the diversion channels provided that the offender is able to pay the claim for material damages high enough.

To overcome obstacles in the implementation of diversion and restorative justice in the Pati District Court, the authors point to the efforts put forward by [Pranis \(1998\)](#) that in order to provide an understanding of the course of the diversion process with the restorative justice approach, there are several steps to build community involvement in taking the initiative of restorative justice, such steps are:

- 1) Training and information on restorative justice and models that can be applied in the community;

- 2) To provide education independently to the restorative justice implementing legal apparatus about the condition and condition of the community;
- 3) Identify capable and influential leaders in their respective communities through information or records concerning such persons;
- 4) Understand the role of community groups that enable them to work together;
- 5) Explain to the public the purpose of implementing restorative justice clearly and openly to the public. The explanations conveyed are the importance of restorative justice, its implementation process, the benefits gained, and other important things of restorative justice;
- 6) Embracing potential supporters in criminal justice and educating leaders about restorative justice;
- 7) Good cooperation with community leaders to explore existing and growing needs, and to invite community participation in every program they undertake;
- 8) Any recruitment of mediators shall be endeavored to involve community members;
- 9) Continuing to exchange information with members of the community by accommodating their opinions, especially from components of community groups that are not always involved in making restorative justice decisions;
- 10) Attempt to the maximum extent possible to involve every member of the community in any process, especially parties required in the process, such as victims, perpetrators of youth organizations, mosque organizations, or other organizations;
- 11) Provide basic training on justice, restorative justice of conflict resolution and community environment development to staff of criminal justice system and community members and make reference of system and order of implementation.
- 12) Describe the responsibilities of each party involved in implementing restorative justice to the community. So that necessary cooperation and good understanding between law enforcement agencies with the parties ie perpetrators, victims and families of perpetrators or victims of the concept of diversion and restorative justice.

Thus efforts to implement diversion and restorative justice in the settlement of children in conflict with the law not only focus on the perpetrators and victims only. The role of the community and law enforcement officers is instrumental in ensuring that perpetrators can be avoided from the retributive justice process. However, it changes to the nature of restorative justice (recovery), and achieves the ultimate goal of the Child Criminal Justice System, which is solely for the best interests of the child.

CONCLUSION

LAW Number 11 of 2012 on Child Criminal Justice System and its implementation rules have regulated the policy of the concept of diversion and restorative justice with the aim that children who commit crimes are no longer faced in the judicial process but through alternative settlement, that is by completion which is restorative justice. In fact the policy of SPPA Act is still not perfect because found several points of weakness that is as follows:

1. Regarding the provisions of the diversion in Article 7 paragraph (2) subparagraph a of the SPPA Act precludes the diversionary effort that can be made to a child in the event that a criminal offense committed is punishable by imprisonment of 7 (seven) years or more. This article does not accommodate the spirit of child protection where the basic philosophy of child protection in the CRC set forth in the preamble is "the child needs special protection because of physical and mental inadequacy" so that the efforts of non-formal alternative settlement through diversion and restorative justice should be done as much as possible in the children's case and retributive justice retaliation should begin to be abandoned and replaced by the application of restorative justice to the best interests of the future and avoiding negative stigma against children in conflict with the law.
2. The existence of regulatory inequalities regarding the child's criteria or criteria can be attempted to diversify between the SPPA Act and the Supreme Court's PERMA. In this case PERMA Supreme Court provides extension of provisions on criterion of criminal threat of 7 years or more can be attempted to diversion if the child is indicted in the form of indictment *subsidiar*, alternative, cumulative or combination (combination).

Implementation of the concept of diversion and restorative justice in efforts to resolve cases of children in conflict with the law at the Pati District Court has been seeking the diversion of child cases under the SPPA Act for diversion and restorative justice approaches in order to safeguard the interests and rights of the child. However, not all parties, especially from the victim or the victim's family, agree with the perpetrator or the family of the perpetrator and ultimately the victim or the victim's family still insist that the child (perpetrator) be processed during the hearing in court and sanctioned by the judge.

Constraints that occur in the implementation of the concept of diversion and restorative justice in settling cases of children in conflict with the law in Pati District Court, namely:

1. Lack of divergence and restorative justice approaches, especially by the victim or the victim's family.

2. Diversion is considered a bargain place of peace that is measured only by the amount of material compensation but not the coaching and restoration of the original state according to the concept of restorative justice
3. Lack of limited training and human resources in resolving conflicts and techniques facilitating or leading mediation in diversified execution with restorative justice approaches

Therefore, diversion and restorative justice efforts must be made against children in conflict with the law regardless of the severity of the criminal threats perpetrated by the child so that in the end there is no treatment of different settlement efforts in the handling of conflict resolution efforts with the child, especially in the level examination in the District Court so as to achieve the goal of a good Criminal Justice System. In the implementation of the diversion will inevitably relate to the concept of restorative justice which emphasizes restoration of the child's case in conflict with the law so that the focus is not on retributive justice.

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The Completion Pattern of Adultery Case Based on the Customary Law of Sabunese

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Adultery, according to Sabu Society is relations between a man who is bound a custom matrimony or religious marriage with a woman who is bound a matrimony or one of them has bound in a matrimony. Adultery, based on the positive law is ruled in Article 284 of Indonesian Penal Code (KUHP). Chapter 284 KUHP has the point that a man or woman who has been married and doing adultery (overspel). The point in chapter 284 KUHP has similarity with the point in customary law of Sabunese, namely adultery is conducted with someone (man or woman) who has been joined in matrimony. Based on the research has been done, it found that the people of Sabu is prefer to completing adultery customarily because of some factors, that is: sanction and serious fine, it is normally using the completion customarily with the people of Sabu, the justice law based on the people of Sabu, the effect of completion and completion pattern. Two patterns of completion which appears in completion process of adultery based on the customary law of Sabu is the completion pattern in kinship way which are preventing and protecting.

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INTRODUCTION

ADULTERY according to the people of Sabu is intercourse between a man who has been bound by a marriage both a traditional marriage and a religious marriage with a woman who has been bound by a marriage or one of the parties has been bound by a marriage. Adultery (*satiety, huka*) is an act that violates the values of politeness and obedience that can damage the kinship of the Community of Sabunese, therefore customary law (*wolo-ku rai*) also regulates the prohibition of adultery for the indigenous people of Sabu. Adultery according to positive law is regulated in Article 284 of the Criminal

Code (KUHP). Article 284 of the Criminal Code has elements of a man or woman, having married and did anything (*overspel*). The element in article 284 of the Criminal Code has in common with the elements in the Sabu customary law that adultery is carried out with someone (male or female) who already has a marital bond. The offense applied in positive law is an absolute complaint offense which means that the complaint can be accepted if the complaint is committed by someone who feels aggrieved in this case a husband or wife but in customary law, the complaint is made by anyone who catches the perpetrator's hand while committing adultery, this becomes the difference between customary law and positive law (Soesilo 1996).

Furthermore, the adultery or *overspel* is regulated in Article 284 of the Criminal Code which can be categorized as one of the crimes against decency. Decency offenses in the Criminal Code are contained in two chapters, namely Chapter XIV Book II which is a crime and Chapter VI Book III which includes the type of violation (Bahiej 2003). Those included in the group of decency crimes include actions:

- a. relating to drinks, which relates to morality in public and that relates to objects and so on that violate decency or pornographic nature (Articles 281 - 283);
- b. adultery and others related to obscene acts and sexual relations (Articles 284-296);
- c. trafficking of women and underage boys (Article 297);
- d. relating to medication for abortion (Article 299);
- e. intoxicating (Article 300);
- f. submit children for begging and so on (Article 301);
- g. animal abuse (Article 302); and
- h. gambling (Article 303 and 303 bis)

The criminal provisions stipulated in Chapter XIV concerning crimes against decency are deliberately formed by the legislators with the intention of protecting people from immoral acts and behaviors both by speech and by acts that offend morality because contrary to the views of people about sexual compliance, both viewed from the point of view of the local community and in terms of the habits of the community in carrying out their sexual lives (Lamintang 1990; Bahiej 2003; Berlian, Andrisman, Warganegara 2019). As stated by Wiryono Prodjodikoro that morality is also about good customs, but specifically a little more about the sex of a human being. Accordingly, criminal acts concerning decency offenses should only be acts that violate the norms of sexual decency which are classified as crimes against decency (Dading 1982, Bahiej 2003; Brenner 2006). However, according to Roeslan Saleh, the notion of decency should not be limited to the notion of morality in the sexual field, but also includes other matters that are included in the mastery of norms in behaving in the community (Nawawi Arief 1996; Bahiej 2003; Astuti 2015; Burns 2007; Chirayath, Sage, Woolcock 2005).

Based on the things described above, the author feels interested in conducting further research on the Pattern of Settlement of Adultery Cases

According to Sabu Customary Law. Based on the background description, the problem in this research is why in the adultery case investigation, the Sabunese prefer traditional examination? What is the pattern of adultery cases in Sabu customary law? The research that will be carried out by this researcher falls into the category of empirical legal research.

In this study the primary data collection technique that the researchers did was field research namely research conducted by examining the field directly using direct interview method. While secondary data collection techniques are carried out through library research. The data processing method in this case uses stage editing which is perfecting the answers from respondents and coding which is to rearrange regularly and systematically all the data that has been obtained. In the research method of data analysis used is descriptive qualitative, that is the entire data collected both primary and secondary data are arranged systematically, classified in patterns and themes, categorized and classified and linking one data to another after interpretation and interpretation to provide an understanding of the legal issues being studied.

PRINCIPLES UNDERLYING THE ESTABLISHMENT OF A HOUSEHOLD (THE RELATIONSHIP WITH ADULTERY CASE)

ADULTERY according to The Community of Sabunese is a sexual act committed by someone who has been bound by a traditional marriage (*kenoto*) against someone who is already married or who is not yet married. The people of Sabu hold the principle of monogamy which means that they can only have a wife and a husband, which means that if they violate the act, it can be said that adultery is the principle. Underlying the Establishment of a Household Customary law regulates various things in life such as marriage or in a household. The establishment of a household is based on several principles. The main principle is love, without love, a household cannot work well. The following principle is an agreement and the principle of agreement covers several stages, namely: the *Oro li* stage is the initial stage in the Sabu traditional marriage ritual series, which is considered as an introductory stage between the two family families, the female family and the male family before entering the core stage of traditional marriage. *Maho ami* Stage is the second stage which is carried out in traditional marriage (*kenoto*) at this stage the two families discuss matters that need to be considered in the marriage event. This stage focuses more on the agreement of the two families so that there is no misunderstanding in the implementation of customary marriages. The agreement in question is about marriage dowry requirements (*belis*) which must be met by the male family at the time of *kenoto*. *Kenoto* stage is the core stage in indigenous marriage. At the core of the conversation at the *kenoto*

stage, women surrender the requirements in the form of *belis* to the female family and the female family accepts the requirement. After *Kenoto* is over, the bride must leave her family to follow her husband, through the *Pida Ammu* program. This *ammu pida* program is divided into two parts, namely the giving of advice (*takka li*) and the giving of ancestral food (*penga'a*). Providing advice is carried out by parents of the bride and groom. Advice given by parents to the newlyweds in order to maintain domestic harmony, such as *jhe adho jhoko do ie takajha haku ama namone* whose straight translation is not permissible and not good for your father's pocket but in the sense that the meaning of the advice is not to be presumptuous or not may commit adultery, if there is a mistake between you, rebuke each other do not be angry with each other (*left nehala hedou pelango hedon ri hedon bhole era nepebubu dhara era*), do not walk alone (*bhole kako miha*) (Astuti 2015; Crouch 2009; Dake 2015).

The structure of the indigenous people of Sabu is divided into four people who become the Adat Council or in the Sabu language called *Bangngu Uudu*. The main task of *Bengngu Udu* is to lead everything related to customs that take place in the Community of SaBunese. The Adat Council consists of *Deo Rai* (the highest adat leader), *Mone Rue* (the problem of cleaning up disgrace), *Eppu Lodho Lou* (an incident involving the sea), *Eppu Lodho Rai* (an incident that occurred on land) (Haq & Sumanto 2017; Holzner & Oetomo 2014; Imanuel 2013).

CUSTOMARY RULES RELATED TO ADULTERY

CUSTOMARY rules are a provision that must be obeyed by every member of the Community of Sabunese. The rules even though not written but still obeyed and carried out, because it has become a provision agreed upon jointly. The rules relating to adultery among others are that a married man is not permitted to enter the sister's room, and vice versa a married woman is not allowed to enter the brother's room. This rule is called "*takajha haku ama namone*" the meaning contained in this term is a prohibition. Sabunese consider this to be a very taboo act if done, either by men or women. That is why they are given advice so that they are always as loyal as they are in a married life. This prohibition is closely related to the term *medera wurumada highi* and *medera wurumada ei*. Marriage is a matter that is done on the basis of mutual liking between men and women, and needs to be maintained.

Based on this provision, men or women avoid behaviors that go beyond social boundaries and respect a marriage. The term *medera wurumada highi* for men and *medica wurumada ai* for women means that the blanket for men (*highi*) has a tassel on the lower end of the blanket which is normally used to have a limit on the ankle but if it exceeds this limit or exceeds the ankle so that it is dragged to the ground the user of the blanket will step on the

tassel of the blanket causing it to fall and remove the sheath. Likewise the case with women who use sarong (*ei*) if it is used to exceed the limit, it will be stepped on resulting in falling and the sheath is released or open. When holding a wedding Parents explain and enter into an agreement with the bridegroom, if the bridegroom commits an offense leaving his wife to continue to fall in love with another woman (adultery), he must bear the shame of all his family and also the shame of the family of the woman. Customary fines, he (male) must kill animals in this case, pigs (*wawi*) and buffalo (*kebhao*), in customary terms the local community is called “*hengebbhi pudi mekae ama nemone*” (Jaya 2016; Masril 2014).

This fine is given not for the purpose of divorce but to only cover the shame of the family or in other words as an apology from the man who commits adultery. The main purpose of the fine is to reconcile. Animals that are in the form of fines can be replaced with equivalent animals, such as cattle (*hapi*) and horses (*djara*) (Jaya 2016; Krisnawan 2015; Missa 2010)

SETTLEMENT PROCESS

WHEN there is a customary violation of the act of adultery, the family reports to the people in *Kolo Tede*. The people in *Kolo Tede* are assigned as *Opas*/ police. When reporting to *Kolo Tede*, clothing and items used during adultery must be brought to *Opas*. When they were taken to *Mone Rue* in *Dhara Roe* (house of rebellion) the two perpetrators of adultery were taken in a procession while being pelted with dried *lontar* seeds or commonly called *saboak* (*wokeke*) and *nitas* (*wue kepaka*) until they arrived at the door *Dhara Roe*'s house fence. Throwing with *wokeke* and *wue kepaka* is a punishment that must be followed so that the actions of the perpetrators do not be followed by other people. When arriving at the *Dhara Roe* yard there was a monument. The two perpetrators were told by *Kenuhe* to sit on the monument and be given drinking sugar water which had been stored in *Dhara Roe* for decades (*Ei Nahu Gumi*) (Pigalao 2004; Dake 2015).

The provision of sugar water that has been stored for decades has the purpose of remembering their actions, as well as the agreements discussed during the traditional marriage (*kenoto*). During their detention in *Dhara Roe*, the 2 perpetrators of adultery will be given a sentence to process the customary land in *Dhara Roe*. The tool used to loosen the land is not using *tajak* (*pengo'o*) as the local community usually cultivates the land, but uses *iron gali* (*uda*) [the traditional land is usually processed by people who live in *Dhara Roe*]. This punishment was carried out with the aim of self-reflection and asking forgiveness from the ancestors. The length of the prison period depends on the agreement between *Mone Rue* and the family of the two perpetrators of adultery. They will continue to be held in *Dhara Roe* until the ransom is handed over by the family to redeem the perpetrator. In other

words, the length of the prison period depends on how quickly the family can obtain and hand over the ransom. The type and number of ransom animals have been established for a long time before the people of Sabu recognize letters, so they cannot be negotiated (added / subtracted). The ransom that has been decided in customary law is 1 male dog, 1 rams, 1 female lamb, 1 male pig, 1 female pig, 1 male rooster, 1 female hen, 1 male buffalo, and 1 female buffalo (Pigalao 2004; Dake 2015).

SABU CUSTOMARY SANCTIONS

SANCTIONS according to the Sabu are a reward that must be received by someone what if they violate customary provisions. Sanctions applied in the Sabu customary law are a process of restoring a condition and paying attention to the conditions of the parties. Sabu's traditional sanctions include, fines, compensation, being ostracized, thrown, paraded around the village, working on customary land, and drinking sugar water for decades. The type of fine above is a guideline for the Customary Assembly in resolving a customary problem. Fines are given to perpetrators who have committed an act of harming the public, family or personal person in the form of material or moral loss. With fines, it is expected that the community's losses will be recovered. Compensation is a sanction that burdens a person who has committed acts that harm the community. Excommunicated sanctions are imposed because they have repeatedly harmed and embarrassed the public. Thrown, paraded, and worked on customary land and drinking water syrup for decades is a sanction that is applied in immoral issues such as adultery. Sanctions are given wisely because this sanction must be in accordance with the actions taken. Because sanctions are applied in addition to giving a reddish effect also to restore peace and harmony in society (Pramesti 2008; Raharjo 2010; Rizal 2017).

The purpose of customary sanctions to follow the philosophy of the indigenous people of Sabu loves family relations so that the settlement of adat disputes is solely to restore the peace and harmony of society, even though they love family relationships someone who has committed adat violations must be punished according to the rules. There is a way of life that expresses the expression in sanctioning based on justice that giving sanctions is not to blame someone but to improve the situation to be better "*pemola rujhara do kelekku*" which means to straighten a tortuous road. The application of sanctions must be in accordance with his actions "*cellphone dhui miha nehala ludu*" which means that he must be responsible for the actions committed. Customary law sanctions regarding the issue of adultery cannot be tolerated because adultery is a problem that can destroy the integrity of the household in accordance with the philosophy of the Sabunese who love family relationships but if the relationship is damaged by a shameful act the family is severely punished. So that it becomes an example for others so as not to

tarnish the good name of the family (Rizal 2017; Susiatiningsih 2006; Upara 2014).

Fines according to the Sabu are the price of a violation committed. The phrase giving a fine must be in accordance with his actions. The fine in The Community of Sabunese is a fine in the form of animals. Fines in the form of animals are applied if a person commits an act that is detrimental and disturbs tranquility and comfort in society. The application of fines in the form of animals consists of compensation fines, penalties to cover shame and fines that are not exceptions. Compensation fines mean fines applied if someone destroys ownership from someone in this case land grabbing, damage to crops in the garden and others. This fine is applied with the aim of maintaining peace in society. The fine closes shame that the fine is applied because someone has committed an offense that defiles the sanctity of the village (Upara 2014; van Klinken 2014; Zulfa 2010).

THE FUNCTION OF CUSTOMARY INSTITUTIONS RELATED TO THE SETTLEMENT OF ADULTERY

IN CONNECTION with the settlement of the adultery issue that has the right to complete is the Adat Council which holds the title Mone Rue, Mone Rue has the right to complete adultery if the two adulterous couples have their own spouses or have conducted an adat marriage. Mone Rue was assisted by Kenuhe or commonly regarded as Opas in The Community of Sabunese but did not forget to report the issue of adultery to Deo Rai. If the act of adultery is carried out by someone who is married to someone who is not married then the unmarried person is handled by a representative from Mone Rue, Leo Ko, while the married person is still brought before mone rue. Mone Rue was in charge of conveying the rewards or sanctions applied to the adulterous couple who were brought to Dhara Roe, in addition to conveying sanctions and fines, Mone Rue was in charge of overseeing all the processes both during the sentence and when paying fines. Payment of fines in the form of animals hurry animals that are really healthy, as evidenced by the examination by Kenuhe, if the condition of the animal is not healthy then Kenuhe will report to Mone Rue and the animal must be replaced. When all customary arrangements have been carried out Mone Rue along with other Customary Councils are tasked with advising adulterous couples not to commit the same mistakes again, in addition to the advice given to maintain the integrity of each household even though this adultery is a matter that cannot be tolerated but with sanctions and fines can stabilize the relationship between families so that the act of adultery can be forgiven.

1. Sabu Obedience to Sabu Customary Law

LEGAL obedience according to the Sabunese is obeying the rules that have been established together for a long time by traditional elders. Legal obedience is not free from legal awareness, and good legal awareness is law obedience, and good legal unconsciousness is disobedience. Statutory observance must be juxtaposed as a cause and effect of legal awareness and obedience. Obedience of the Sabunese has the characteristic that the law is obeyed not because of fear of sanctions or fines that will be given by customary law but that obedience arises because the Sabunese feel that customary law contains values that are in accordance with the culture and lifestyle of the Sabunese who hold family. Obedience is also inseparable from the morals possessed by the Sabunese, obedience is an obligation that must be carried out but for the Sabunese, obedience is not an obligation but a lifestyle that is in accordance with the values that live in The Community of Sabunese and beliefs rooted in the heart so able to control the behavior and actions of adherents from negative traits. Besides that, there are also because materially and formally, customary law comes from The Community itself, or is the will of the group. Therefore, the legal compliance will remain as long as the group's will is acknowledged and upheld jointly, because this group's will causes the moral obligations of the Community to arise and be maintained.

Legal awareness and compliance, there is a fairly fundamental difference between customary law and positive law. The awareness of indigenous peoples towards good and bad norms is voluntary as a result of moral obligations. Basically customary law is obeyed because customary law comes from The Community itself. The consequence is that people must obey these rules, in accordance with the soul and sense of justice that is owned by the community, and has legal consequences which if not adhered to will cause sanctions for the perpetrators.

2. Customary Behavior of Sabunese

CUSTOMARY behavior is an activity or activity of indigenous peoples which is a response to the customary symptoms that occur (Astuti 2015; Chirayath, Sage, Woolcock 2005). Customary symptoms include the rainy season (performing a ceremony in the rainy season which means thanksgiving), ceremonies in the dry season (ceremonies asking for rain), customary violations (repellent ceremony or disgrace) and others. The customary behavior of the Sabunese as in the principle of life of the Sabunese is to maintain the integrity of kinship or kinship, so the customary behavior is divided into:

1) Customary behavior to understand each other

It is the behavior shown at the time of solving the problem that the Sabunese know what is happening, how to resolve it in the best way and be familiar with the customs of the Sabunese.

- 2) Customary behavior for mutual trust
Customary behavior to trust each other means the behavior shown when resolving problems, the people of Sabu entrust the whole solution to the problems faced by indigenous elders.
- 3) Customary behavior to help each other
Customary behavior to help each other means that the traditional behavior shown by the people of Sabu in solving problems is not only the responsibility of a person but a joint responsibility, so to resolve the need for cooperation.

The above behaviors stated that in resolving a problem, the Sabunese cling to the principle of kinship, namely joint ownership so that if a problem occurs, the problem is resolved together. This is because what is experienced by the people of Sabu is only understood by the people of Sabu and resolved by the Sabunese themselves in this case the cooperation between indigenous elders and the community.

THE FACTORS OF SOCIETY PREFER TO SETTLE ADULTERY BY CUSTOM

THE SETTLEMENT of adultery by custom is a priority for the people of Sabu, because the people of Sabu feel that the settlement process is traditionally very familiar with the traditions of the Sabunese, as well as the justice and legal certainty of the people of Sabu. Familiarity means that life in The Community of Sabunese is a unity that cannot be separated because The Community of Sabunese adheres to a kinship system based on lineage and region. Each lineage has a system of problem solving that is made and agreed upon so that the Sabunese are more familiar with the settlement system traditionally not with the exception of adultery. There are also factors that cause the people of Sabu to choose to complete adultery based on customary law:

- 1) Heavy penalties and penalties
Heavy penalties applied in sanctions against perpetrators of adultery were chosen because the Sabunese considered that by giving heavy penalties the perpetrators of adultery would not repeat the act of adultery by themselves. This is evidenced by the expression "*lai ju, lai bhale pa no*" meaning that the punishment applied in accordance with the action. The punishment of committing adultery is severe because the Sabunese consider the act of adultery to be detrimental to the kinship in the family as evidenced in the phrase "*pemekae ama namone*" or embarrassing the family.
- 2) The familiar settlement of adultery in Sabu customary law
"*Lai no lai in lemma*" is an expression that shows the familiarity of customary law with The Community of Sabunese which means that the

problem is our problem as well so it must be resolved by us too. Customary settlement is very much in accordance with the prevailing customs and in accordance with the principles of the Sabu's life that is family. This means that in the settlement of the Sabunese do not regard the perpetrators as enemies or opponents but as their own children, grandchildren or relatives, this is evidenced by the expression "*pedu rupara due*". Literally it means connecting two palm leaves from two trees that grow close together. The leaves of the *lontar* tree symbolize two people (male and female large families symbolized by palm trees. If there is a problem and then one who finishes it is the family itself. Because the Sabunese adopt a patrilineal kinship system so the relationship between the Sabunese is very close. that can solve the problem fairly in the family of Sabunese is the family itself.

3) The context of legal certainty according to the Sabunese

The views of the Sabunese on the legal certainty in the Sabu customary law is that an offense must be punished not allowed, but must look at the customary provisions that apply. Although not written, legal certainty according to the Sabunese is the observance of The Community against the customary law itself. Legal certainty is also according to the Sabunese that a person is ensnared by a customary dispute in this case adultery. then the adulterer who is married must pay a fine including 9 (nine) animals. Nine animals are fines that absolutely must be paid with the same value. The value of these fines is considered by the people of Sabu to contain a certainty, although it is dynamic, but the fine value has never changed. The phrase "*nadu we do tao hala pemaja nga wolo uku rai*" contains a legal certainty which means anyone who does wrong still faces customary law. In addition to the value of fines, legal certainty in The Community of Sabunese also does not consider one's status in applying customary law.

4) Legal justice according to the Community of Sabunese

Justice according to the people of Sabu is a condition that shows a truth about a thing. The people of Sabu consider justice to be an act that must be accounted for before the Almighty. The phrase "*lai ju, lai bhale pa no*" which means what is done is also to be received, the purpose of the phrase is that in applying the punishment must be in accordance with the actions taken, this is the principle of justice adopted by the people of Sabu. Justice in The Community of Sabunese can create a balanced situation, in addition to creating balance in the Community of Sabunese, justice is also a way to reconcile the parties to the dispute.

CONCLUSION

BASED on the description described in the previous chapters, Authors emphasized that the process of the customary settlement in the case of adultery is chosen because customary law contains values that are in accordance with the behavior and habits of the Community of Sabunese, certainty and justice in accordance with the customs that apply in the methamphetamine society, the impact of the settlement process which ends not divorced and settlement pattern that prioritizes family relationships. Based on the research conducted by the authors on the pattern of settlement of adultery cases according to Sabu customary law, the pattern that emerges in this settlement is a pattern of family settlement consisting of the nature of preventing and protecting every member of The Community and aiming to improve the original condition which does not lead to divorce as a pattern of settlement according to positive law.

Authors suggest that it is expected that the government can adopt customary law as a regional regulation in order to avoid the polemic between customary law and state law, so that in the settlement process it does not ignore state law. The Sabu customary law community is expected to be able to maintain the customary law and existing values as a means in the settlement process of customary disputes that occur. The Community is expected to be able to provide teaching to the next generation regarding the values that already exist in the methamphetamine society so that the prevailing customs and rules can be maintained from generation to generation.

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Law Enforcement Policy on Violation of Illegal Cigarette Circulation in Indonesia (Study on Indonesian Customs Directorate General)

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Abstract

The tax regulation is subject to a criminal act, then the Government in this Directorate of the General of Customs and Excise supervision, the circulation of illegal cigarettes. This research was conducted by the Directorate General of Customs and Excise as well as a crackdown on illegal cigarettes. This research uses the juridical normative method. Results of the study concludes as follows: first, the examination of the goods, examination of the goods, building or other place, letter or document to the goods, or against the people, against the Enforcement of goods and means of transport; and Locking, sealing, and / or sticking a necessary safeguards against goods or means of transport. Second, the efforts of the Directorate General of Performance and Surveillance, Dissemination, coaching against the cigarette companies, opening up information services and billing, complaints against criminal acts of illegal cigarettes.

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INTRODUCTION

CIGARETTES are tobacco products that are still the prima donna for state revenues from the taxation sector in Indonesia, especially the imposition of excise duties which are overseen by Customs and Excise of Civil Servant Investigators (*Penyidik Pegawai Negeri Sipil*, hereinafter called as PPNS) who are principally Criminal Investigators in the Customs and Excise field. As an investigator of a criminal offense related to imposition of excise, the Directorate General of Customs and Excise has special authority as an Investigator as referred to in Law Number 8 of 1981 concerning Criminal Procedure Law (**KUHAP**) to conduct criminal investigations in the field of Customs and Excise (**Sutarto 2010**).

The law enforcement system in general, and included in criminal acts relating to excise, must also refer to Law Number 8 of 1981 concerning

Criminal Procedure Law where the principle must be based on Pancasila and the 1945 Law. The principle is a form of state commitment upholding human rights and guaranteeing all colors of the country and its position in law and government that must uphold the law and government without exception, which means that all countries without exception must uphold the law of the government and uphold the law which can be interpreted as obeying the law. Article 1 paragraph (3) of [the 1945 Constitution states that the Republic of Indonesia](#) is a legal state where law is made as the supreme commander in realizing truth and justice in Indonesia. Law is a series of rules that control certain behaviors and actions of human life in living in a community ([Purnomo 1978](#)).

The law applied in the community is not only to guarantee people's rights and maintain order, but also used as a social engineering tool. In many cases of illegal excise, for example, very comprehensive law enforcement is urgently needed given the potential for substantial state losses in this case. Moreover, the potential of tobacco in Indonesia with export value in 2013 reached 41,765 tons spread in many countries ([Directorate General of Estate Crops 2015](#); [BPS 2018](#)), even the Government prioritized excise on tobacco products as one of the country's revenue sources that has a high economic function because of the contribution of excise tax on tobacco to a very large state treasury, besides that it becomes a vast employment area and absorbs large labor in tobacco processing into cigarettes which involves many workers ranging from tobacco farmers, clove farmers and factory workers showed that the magnitude of the role of tobacco in economic development in Indonesia.

Cigarettes or tobacco products are still the prima donna for state recipients from the taxation sector, especially excise in addition to imposition of excise on Beverages Containing Ethyl Alcohol (*Minuman Mengandung Etil Alkohol*, hereinafter called as MMEA) and EA (Ethyl Alcohol) ([Syahputra 2016](#)). Imposition of excise on cigarette products directly has made a very significant contribution to the country, and each year revenues always exceeds the target set and on the one hand the target set is always up. The success of the Directorate General of Customs collects income for the state coffers of the excise sector in reality. This condition is not always followed by the obligations of taxpayers and excise. This is evidenced by the fact that there are still many factories or cigarette companies that do not use excise tapes on their products or misuse the use of excise band only to avoid the obligation to pay state taxes.

The amount of illegal cigarette circulation can be proven by the destruction of 6.9 million illegal cigarettes as well as 45 (forty five) bottles of illegal alcoholic beverages which are the result of prosecution of Customs and Excise Customs Office Semarang's Supervision and Service Office for the period 2015 to 2018 and has saved state revenues from potential losses of 3 billion rupiah ([Customs of Semarang 2019](#); [Asmara 2018](#)).

To prevent the occurrence of non-compliance with employers, the government in this case the Directorate General of Customs and Excise

undertakes supervision and prevention of the circulation of violations from these entrepreneurs, whether circulated by cigarettes or the acquisition of rights not from the employers' obligations or other forms of violations by issuing various policies. Circulation of cigarettes without excise band is one of the criminal acts. In addition, in order to optimize the efforts of state revenue from the excise sector, in addition to efforts to affirm the excise tax object, it also needs to improve excise tax administration systems and increase law enforcement efforts and affirmation of employee guidance in the context of good governance.

Cases of violations in the excise sector that are still seriously handled by law enforcement Directorate General of Customs and Excise are cases of illegal cigarette circulation that are increasingly widespread in Indonesia with many cigarette factories or companies that do not have permits for ownership of the principal number of entrepreneurs subject to excise and not using ribbons excise on its products or by misusing the use of excise ribbons to avoid taxable obligations on the state, therefore that the large potential countries lose their income from cigarette taxes (Sutedi 2012). The Directorate General of Customs and Excise as law enforcement officers in the field of Customs and Excise should take action against all people (individuals or groups) or companies that commit violations in the field of excise indiscriminately looking at certain circumstances or reasons, therefore as to provide a deterrent effect on the perpetrators violations in the field of excise against the circulation of illegal cigarettes in the market throughout Indonesia.

Basically the imposition of excise tariffs based on [Minister of Finance Regulation No.146/PMK.010/2017 of October 25, 2017](#) has experienced a fairly high increase from the previous excise tariff. The increase in high excise tariffs besides being able to increase state revenues can have a negative impact, among others on the circulation of plain cigarettes (without clipping excise band), attachment of fake excise tapes, attachment of excise tapes that are not intended, such as lower retail prices and not in accordance with its designation.

Moreover, if the violations in the excise sector are increasingly prevalent in Indonesia, this can result in the failure to achieve excise tax receipts optimally and the widespread circulation of illegal cigarettes. Therefore, to avoid undesirable things need to be firmly enforced (law enforcement) therefore that the target of excise tax can be achieved optimally.

Based on the description of the background above, this article discusses two important things, namely: (1) how is the law enforcement policy by the Civil Servant Investigator of the Directorate General of Customs and Excise on violations of criminal acts of illegal cigarette circulation in the community and (2) what are the efforts of PPNS Directorate General of Customs and Excise to deal with the circulation of illegal cigarettes in Indonesia?

The article used is a normative juridical research method, with an approach in the application of normative law consisting of a statute approach, conceptual approach, historical approach, and comparative approach

(Diantha 2016). The research specifications on this article are descriptive-analytical, namely making a systematic, factual and accurate planning of facts therefore it is expected to get a clear and detailed description and description. The data collection method used is literature study and document study which examines primary legal materials, secondary legal materials, and tertiary legal materials related to the Investigation Policy by Civil Servant Investigators of the Directorate General of Customs and Excise in the Framework of Law Enforcement on Cigarette Circulation Violations Illegal. The data analysis method used in this study was carried out qualitatively. Data are analyzed normatively-qualitatively by interpreting and constructing statements contained in documents and legislation.

BASIS FOR CRIMINAL LAW ENFORCEMENT IN CASES OF ILLEGAL EXCISE

LAW enforcement is intended to improve order and legal certainty in the community (Sanyoto 2008). Law enforcement is the stage of the process of the realization of an abstract concept into a reality (Ishaq 2012). Law enforcement in principle must be able to provide benefits or utility for the community, but in addition the community also expects law enforcement to achieve justice. However, we cannot deny that what is considered useful (sociologically) is not necessarily fair, and vice versa what is perceived as fair (philosophically), is not necessarily useful for the community (Nawawi Arief 2007). Law enforcement can guarantee legal certainty, order and legal protection in the era of modernization and globalization when this can be done, if various dimensions of legal life always maintain harmony, balance and harmony between civil moralities and based on actual values in civilized societies. As an activity process that includes various parties including the community within the framework of achieving goals, it is imperative to look at the enforcement of criminal law as a criminal justice system (Reksodiputro 1993).

The strength of our criminal justice system depends on its ability to convict the guilty and clear the innocent. But we know that innocent people are sometimes wrongly convicted and the guilty remain free to victimize others (Muhlhausen 2018). For the people of Indonesia, the weak law enforcement by the state apparatus will determine the perception of whether or not the law will be obeyed. If law enforcement in the community carried out by the state apparatus is weak, then the public will perceive the law as non-existent and as if they are in the jungle, on the contrary if the law enforcement by the state apparatus is strong and done well and consistently, then the community realizes the law exists and they will submit and obey it (Jainah 2012).

1. Customs and Excise PPNS in Illegal Excise Law Enforcement

LAW Number 39 of 2007 concerning Excise states that Civil Servant and Excise Investigators are certain Civil Servants Officials within the Directorate General of Customs and Excise are given special authority as investigators as referred to in Act Number 8 of 1981 concerning Criminal Procedure Law to conduct investigation of criminal offenses in the field of Customs. The investigator in the Law has the authority to:

- a. Receiving reports or statements from someone about a criminal act in the customs sector;
- b. Calling people to be heard and examined as suspects or witnesses; c. Research, search and collect information relating to criminal acts in the customs sector;
- c. Making arrests and detention of persons suspected of committing a criminal act in the customs sector;
- d. Request information and evidence from people suspected of committing a criminal offense in the customs sector;
- e. Photographing or recording through audiovisual media on people, goods, transportation facilities, or anything that can be used as evidence of criminal acts in the customs sector;
- f. Check records and bookkeeping that are required according to this law and other related books;
- g. Taking fingerprints;
- h. Searching for houses, clothes, or bodies;
- i. Search the place or means of transport and inspect the items contained in it if a criminal act is suspected in the field of customs;
- j. Confiscating objects suspected of being goods that can be used as evidence in connection with criminal cases in the customs sector;
- k. Providing safety signs and securing anything that can be used as evidence in connection with criminal acts in the customs sector; m. Bring in experts needed in connection with the examination of criminal offenses in the customs sector;
- l. Order to stop people who are suspected of committing a criminal offense in the customs sector and examine the suspect's personal identification;
- m. Stop the investigation; and
- n. Conduct other actions that are necessary for the smooth investigation of criminal offenses in the field of customs according to responsible law.

The above authority has a function regulated in Article 3 of the Regulation of the Director General of Customs and Excise Number P-53/BC/2010 which states that the authority under supervision is carried out in accordance with the following functions:

- a. Main functions by the Intelligence Unit, Enforcement Unit and Investigation Unit;
- b. Special functions by the Narcotics Unit; and
- c. Supporting functions by the Operation Facility Unit.

2. Crime of Illegal Cigarette Circulation

CRIME comes from a term known in Dutch criminal law, namely *strafbaarfeit*. Although this term is found in Dutch WvS, so is the Dutch WvS (KUHP), but at this time there is no official explanation of what is meant by the *strafbaarfeit*. The lawmakers in the Criminal Code (KUHP) have used the word *strafbaarfeit* to refer to “criminal acts” but without giving an explanation of what is really meant by the word *strafbaarfeit*. According to Wirjono Prodjodikoro, he argued about criminal acts which are acts which can be subject to criminal penalties and the perpetrator can be said to be a subject of a criminal act (Prodjodikoro 2011). The criminal act according to Moejatno is an act that is prohibited by a legal rule accompanied by a threat (sanction) in the form of a certain crime for those who violate the prohibition in the legislation (Moeljatno 2012). Every criminal act contained in the Criminal Code (KUHP) generally has basic elements, namely subjective elements and objective elements.

The subjective elements of a criminal act contained in the Criminal Code (KUHP) consist of:

- a. intentional and accidental (*dolus* or *culpa*)
- b. intent or *voornemen* on an experiment or *poging* as referred to in Article 53 paragraph 1 of the Criminal Code.
- c. kinds of purposes or *oogmerk* such as those found for example in the crimes of theft, fraud, extortion, forgery and others;
- d. plan in advance or *voorbedachte raad* such as those contained in the crime of murder according to Article 340 of the Criminal Code; and
- e. feelings of fear or *vrees* such as those included in the formulation of criminal acts according to Article 380 of the Criminal Code.

While the objective element of a criminal offense contained in the Criminal Code (KUHP) includes:

- a. unlawful or *wederrechtelijkheid*;
- b. the quality of the perpetrator, for instance, “circumstances as a civil servant” in a position crime according to Article 415 of the Criminal Code or “the condition of being a board or commissioner of a limited liability company” in crime under Article 398 of the Criminal Code and
- c. causality, namely the relationship between something action as a cause with something reality as a result.

Violations of criminal acts in the excise sector are increasingly prevalent in Indonesia, where one of them is against cigarette excise for the circulation of illegal cigarettes in a number of regions so that it can cause a lack of state income for the distribution of illegal cigarettes.

General provisions in Law Number 39 of 2007 state that excise is a state levy imposed on certain goods that have the characteristics or characteristics set out in this Law. Based on the division of criminal law on the basis of the source of Law No. 39 of 2007 concerning Excise, it is a special criminal law that originates from legislation outside the codification which is

included in the group of laws and regulations not in the field of criminal law, but in which there are legal provisions criminal (Chazawi 2002).

Pursuant to Article 2 of Law Number 39 of 2007 concerning Excise, it states that goods subject to excise are certain items which have characteristics or characteristics, namely as follows:

- a. the consumption needs to be controlled;
- b. the circulation needs to be monitored;
- c. its use can cause negative impacts on the community or the environment;
or
- d. its use needs to impose state levies for justice and balance

Provisions regarding sanctions for the circulation of cigarettes that are not attached to the excise tape are regulated in Article 54 of Law Number 11 of 1995 *jo.* Law Number 39 of 2007 concerning Excise states that:

Everyone who offers, surrenders, sells, or provides for sale of excisable goods that are not packaged for retail sale or not clipped with excise tapes or not affixed with other excise payment as referred to in Article 29 paragraph (1) shall be punished with the shortest imprisonment 1 (one) year and a maximum of 5 (five) years and/or criminal fine of at least 2 (two) times the excise value and at most 10 (ten) times the excise value that should be paid.

This regulation becomes the legal basis for law enforcement relating to the circulation of illegal cigarettes.

LAW ENFORCEMENT POLICY BY PPNS DIRECTORATE GENERAL OF CUSTOMS AND EXCISE ON CIRCULATION OF ILLEGAL CIGARETTES

INDONESIA is a law state (*rechstaat*) as stated in the 1945 Constitution, in an effort to deal with crime in the community by means of reasoning, in its operation using a criminal justice system with an integrated model (Integrated Criminal Justice System) that is realized and applied in investigative power (by the Investigating Body/Institution), Prosecution authority (by the Public Prosecutor's Agency/Institution), Judicial authority and Decision/criminal decision (by the Court) and the power of the Implementation of a Criminal Decision (by the Implementing Agency/Executing Agency).

The stage of Investigation which is also the first stage in the criminal justice system, is a stage that absolutely plays a vital role in efforts to uphold law and crime prevention in society, because without the stages/process of investigation automatically the next stages in the criminal justice system are

the prosecution stage, the stage of adjudication/imposition of a criminal decision and the stage of implementation/criminal execution cannot be carried out.

Customs and excise officials who are authorized in criminal offenses of illegal cigarettes are Customs and Excise Civil Servant Investigators (PPNS) who are criminal investigators in customs and excise fields, certain Civil Servants Officials within the Directorate General of Customs are specifically authorized as Investigator as referred to in Act Number 8 of 1981 concerning Criminal Procedure Law to conduct criminal investigations in the fields of Customs and Excise.

Civil Servant Investigators or PPNS Based on Article 1 number 5 of Government Regulation Number 43 of 2012 concerning procedures for the Implementation of Coordination, Supervision and Technical Development of Special Police, Investigation of Civil Servants, and Forms of Initiative Security referred to as Civil Servants certain that based on the laws and regulations are appointed as Investigators and have the authority to conduct criminal investigations within the scope of the law which become their respective legal basis.

Supervision and control is related to the high consumption of cigarettes in Indonesia based on Article 28H of [the Constitution of the Republic of Indonesia 1945](#) State which states that:

Everyone has the right to live in physical and spiritual prosperity, to live and get a good and healthy environment and the right to receive health services.

Then in Law Number 39 of 2009 concerning Human Rights in Article 9 paragraph (3) states that: "*Everyone has the right to a good and healthy environment.*" In Law Number 36 of 2009 concerning Health, it states as follows:

Safeguarding the use of materials containing addictive substances is directed so as not to disturb and endanger the health of individuals, families, communities, and the environment ([Art. 113 par. 1](#))

Addictive substances as referred to in paragraph (1) include tobacco, products containing tobacco, solids, liquids and gases which are addictive in nature, which can cause harm to himself and/or the surrounding community ([Art. 113 par. 2](#)).

Violations of criminal acts in the excise sector are increasingly prevalent in Indonesia, where one of them is against cigarette excise for the circulation of illegal cigarettes in a number of regions so that it can cause a lack of state income for the distribution of illegal cigarettes. To guarantee the

repayment of excise owed on Excise-Affected Goods produced, the Excise Law regulates sanctions for anyone including Cigarette Factory Entrepreneurs who violate or do not comply with the provisions contained in Law Number 39 of 2007 and the implementing regulations.

The application of sanctions in the Excise Law is carried out through two types of sanctions, namely administrative sanctions and criminal sanctions. As part of fiscal law, the Excise Law should prioritize administrative settlement as a recovery and fulfillment of tax authorities so that the settlement is sufficient by imposing sanctions in the form of fines.

However, if the violation contains elements of crime such as forgery of excise ribbons, use of excise ribbons that are not their right, falsification of documents, selling BKC without regard to provisions that cause state losses, sealing damage, then such violations are subject to criminal sanctions.

Based on Article 33 of Law Number 39 of 2007 concerning Excise, the Customs and Excise Officers are authorized to:

- a. Take necessary actions on excisable goods and/or other goods related to excisable goods in the form of termination, inspection, enforcement and sealing to implement this law;
- b. Take the necessary actions in the form of not serving orders for excise ribbons or other excise payment marks; and
- c. Prevent excisable goods, other goods related to goods subject to excise, and/or transportation facilities.

In carrying out the authority carried out by Customs and Excise Officials can be equipped with firearms of the type and terms of use which are regulated by Government Regulation No. 21 of 1996 concerning Enforcement in the field of Customs.

Regarding the procedure for prosecuting the process of authority, it is regulated in Article 2 of [Government Regulation Number 21 of 1996 concerning Enforcement in Customs](#) which states to guarantee state rights and compliance with provisions of the Law, Customs and Excise Officials have the authority to carry out prosecution in Customs sector as an effort to find and find an event that is suspected of being a violation of the provisions of the Act, including:

- a. Termination and inspection of transporter's advice;
- b. Examination of goods, buildings or other places, letters or documents relating to goods, or to people;
- c. Enforcement of goods and means of transportation; and
- d. Locking, sealing, and/or attaching the necessary safety marks to goods and transport facilities.

ROLE OF PPNS OF THE DIRECTORATE GENERAL OF CUSTOMS AND EXCISE IN LAW ENFORCEMENT OF CIRCULATION OF ILLEGAL CIGARETTES

THE RISE of crimes against illegal acts of illegal cigarette trafficking that occur in society is strongly influenced by the low legal awareness which is one of the causes of the difficulty in realizing law enforcement in the community with a high level of crime against the illegal acts of illegal cigarette circulation. These conditions led to the development of globalization without a change in the legal system that gave rise to legal uncertainty, non-ideal law enforcement, human rights violations, and lawlessness in society. In the law enforcement system in Indonesia, it is determined by all law enforcement officers, one of whom is law enforcement in the criminal act of illegal cigarette circulation, namely the Civil Servants Official of the Directorate General of Customs and Excise.

The efforts of Officials of Civil Servants of the Directorate General of Customs and Excise in dealing with the circulation of illegal cigarettes can be carried out as follows:

1. Inspection and Supervision

Examination and supervision carried out by Civil Servants of the Directorate General of Customs and Excise in every area of Indonesia must be carried out to test the compliance of cigarette manufacturers in the Indonesian region whose work operations stand out and their economic development is very good.

The supervision system for excisable goods is intended to ensure the effectiveness of the implementation of legislation in the excise sector. In this case, the object of supervision in the excise sector is the production and distribution of goods subject to excise, from distributors to retailers, both for goods subject to excise that pay excise and those who obtain exemption facilities or not collected by excise.

This is done by PPNS of the Directorate General of Customs and Excise so that reduced circulation of illegal cigarettes in small roadside shops, as well as against the circulation of plain cigarettes because plain cigarettes causes a decrease in excise tax on tobacco products. Furthermore, PPNS also organizing the efforts to supervise and prevent the circulation of the violations of this businessman, whether in the form of cigarettes, without the excise tape or the acquisition of rights not from the obligations of the employer itself or other forms of violations by issuing various policies.

The field of supervision carried out by Civil Servants of the Directorate General of Customs can be found in [Law Number 39 of 2007 concerning Excise](#) as follows:

- a. Excise documents and customs excise documents electronically. This is to anticipate technological developments, because it requires a legal certainty regarding the validity of data sent electronically which can be used as evidence by adding provisions that stipulate that excise documents and excise tax documents in the form of electronic data are legal evidence according to the law.
- b. The required distributor has a license in the form of a Taxable Goods Entrepreneur's Identification Number (*Nomor Pokok Pengusaha Barang Kena Cukai*, hereinafter called as NPPBKC). With this provision, the intermediary institutions involved in distributing excisable goods are required to have NPPBKC so that the scope of supervision of the circulation of goods subject to excise can be increased.
- c. Enforcement in the form of termination, inspection, prevention and sealing can be carried out on other items related to. This provision provides a broader opportunity to gather sufficient initial evidence for the purpose of investigation if a violation of excise provisions is suspected.

The inspection and supervision was carried out by the intelligence team of the Civil Servants of the Directorate General of Customs and Excise in each region of Indonesia to find out information about the criminal acts of illegal cigarette circulation without excise by directly plunging into the field, especially in cigarette factories and small shops on the edge roads and ports which are illegal cigarette entry routes without excise, therefore that in the case of inspection and supervision, it is expected that the distribution of illegal cigarettes can be found immediately before entering small markets.

2. Dissemination of Regulations concerning Illegal Cigarette

The socialization of the regulations on illegal cigarette crime is carried out by Civil Servants of the Directorate General of Customs and Excise in every area of Indonesia to convey information related to regulations on criminal acts on illegal cigarette circulation to cigarette manufacturers by counseling.

3. Guidance or Coaching for Cigarette Companies

Coaching is carried out routinely and incidentally. Routine guidance is a coaching carried out by Civil Servants of the Directorate General of Customs and Excise carried out continuously to guide cigarette companies in the Indonesian territory with the implementation of new regulations on socialization and efforts to implement them on the cigarette trade. Regular coaching also has the benefit of knowing what are the obstacles for companies that commit illegal cigarette violations.

In addition to regular coaching, there is also incidental coaching which is a coaching that was previously carried out suddenly or unscheduled. This guidance is carried out if there are some changes to the applicable regulations

and the latest regulations must be immediately disseminated to cigarette manufacturers in the Indonesian territory, therefore there is no illegal cigarette abuse.

4. Organizing Information and Complaints Services

Civil Servants of the Directorate General of Customs and Excise in attempting to reduce or eradicate criminal acts of illegal cigarette circulation circulating in the community are increasing by opening information and complaints services at each office of the Directorate General of Customs and Excise. Information and complaint services should be carried out 24 hours in every office in the region in Indonesia, information and complaints services are not only carried out in every office of the Directorate General of Customs and Excise but also to make social media or other internet webs so as to facilitate the public to assist the Directorate General of Customs and Excise in eradicating illegal cigarette circulation.

5. Firmness of Billing against Illegal Cigarette Circulation Actors

Billing is carried out by the state civil servant apparatus of the Directorate General of Customs and Excise if there is a cigarette manufacturer who is accused of violating existing regulations. Violations of the illegal circulation of cigarettes cause excise debts to reduce state revenues.

CONCLUSIONS

AT THE END of this paper, the author underlines and confirms that law enforcement by the Directorate General of Customs and Excise PPNS on Circulation of Illegal Cigarettes based on Article 2 of Government Regulation No. 21 of 1996 concerning Actions in Customs, namely Termination and inspection of transportation advice, Inspection of goods, buildings or other places, letters or documents relating to goods, or to people, enforcement of goods and means of transportation; and Locking, sealing, and / or attaching the necessary safety marks to the goods and means of transport. Then, related to the efforts made by the PPNS of the Directorate General of Customs and Excise in dealing with the circulation of illegal cigarettes, it can be carried out on Inspection and supervision carried out by Civil Servants of the Directorate General of Customs and Excise, Socialization of illegal cigarette crime regulations in order to convey information related to acts criminal acts on the circulation of illegal cigarettes to cigarette manufacturers by counseling, fostering tobacco companies, opening information and complaints services, collecting excise losses to the state against criminal acts of illegal cigarette distribution.

I also recommend that the Directorate General of Customs and Excise and the Office of the relevant agencies in the context of effective supervision

and law enforcement of illegal cigarette circulation be expected to be more observant in seeing the various factors in inhibiting the effectiveness of work, so that the right solutions can be found to overcome these problems. The search for solutions to these problems is expected to be carried out together with the offices of the relevant agencies.

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Law Quote

**“Accipere quid ut
justitiam facias
non est tam
accipere quam
exiorquere”**

—

**To accept anything as a reward for doing
justice is rather extorting than accepting**

Fostering as an Alternative Sanction for Juveniles in the Perspective of Child Protection in Indonesia

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Abstract

Crimes committed by juveniles today continue to grow, as well as various law enforcement approaches. Juveniles as legal subjects have special attention not only in matters of children's rights but also in the punishment of children. Various crimes committed by juveniles occur a lot and lead to no longer what is called juvenile delinquency, but a serious crime. The Child Protection Act and the Child Criminal Justice System Law explicitly regulate the protection of children's rights in the context of human rights. Fostering sanctions for juveniles are one of the ways that are encouraged compared to providing severe criminal sanctions, while here another criminal law is a double-edged sword and ultimum remedium. This paper examines efforts to guide children as an alternative sanction in juvenile criminal law. Studies in this paper include studies of Child Criminal Law, Criminal Law, Human Rights, and the Law on Child Protection.

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INTRODUCTION

MANY cases of criminal acts experienced by children occur in Indonesia, this urges law enforcement officials to make efforts to deal with crimes against children. However, if seen at this time what is also a concern of the general public, not a few cases of criminal acts that occur in children are actually carried out by children as well. This adds to the community's concern that it turns out that at a very young age, it is possible for children to become perpetrators of criminal acts.

Various forms of criminal acts can be carried out by children, but in this case the author sees that the criminal acts committed by children are actually different from criminal acts committed by adults. Childhood is a prone time to act, because in childhood children are very vulnerable to various desires to do something, for example crossing walls, ditching, throwing stones and other actions.

Regarding juvenile delinquency, the author argues that juvenile delinquency can basically be divided into two forms, namely pure juvenile delinquency, where juvenile delinquency is juvenile delinquency that does not intersect with criminal law, but actions taken are not commendable such as skipping school. The second delinquency is delinquency that has been included in a crime or commonly called delinquent, this second form of mischief which then requires legal treatment because it has violated criminal law.

Law No. 11 of 2012 concerning the Juvenile Criminal Justice System (*Sistem Peradilan Pidana Anak*, hereinafter called as [SPPA Law](#)), affirms that with regard to Children Confronting the Law are children in conflict with the law, children who are victims of criminal acts, and children who are witnesses of criminal acts. In connection with a child who commits a crime, he is referred to as a child in conflict with the law. In SPPA, what is meant by a child who has a conflict with the law, hereinafter referred to as a child, is a child who is 12 (twelve) years old, but who is not 18 (eighteen) years old who is suspected of committing a criminal act ([Pramukti & Fuady 2018](#); [Sutedjo & Melani 2013](#)).

In handling cases of children as perpetrators of criminal acts, the criminal law used is to use the special procedural law of children stipulated in Law No. 11 of 2012 which has replaced Law No. 3 of 1997 concerning juvenile court. In the judicial process, it turns out that prison sentences are still often handed down by judges in child cases, the authors see from Sri Sutatiek's quote in his book, which states that the 2004 Human Rights Research and Development Agency concluded that the profile of children in conflict with law in Indonesia is more many were sentenced to imprisonment rather than actions, so systematized naughty children underwent fostering at the Children's Correctional Institution ([Sutatiek 2013](#)). The results of the study also found that the inadequate atmosphere and facilities within the Penitentiary Center encouraged children to be more psychologically and mentally depressed and isolated from their original environment, so that the inadequate facilities would allow the convict to fulfill their own needs ([Sutatiek 2013](#); [Sutedjo & Melani 2013](#)).

Another thing that is feared by the imposition of imprisonment is prisonization. It is important to know that prisonization (imprisonment) is socialization between prisoners in prisons that trigger convicts to learn other forms of crime. The risk of prisonization has increased, given the guidance system in Correctional Institutions in Indonesia according to Wirjono Projodikoro, usually several prisoners are gathered in a room, including placement in their beds and in doing work ([Sutatiek 2013](#)).

Another thing that is also the impact of imprisonment is stigmatization that arises, the label of former prisoners will be a detrimental effect of imprisonment received by children in conflict with the law. Thus it will damage the future of children because the community will reject the presence

of former child prisoners, so that children will become isolated from the community (Wangi 2013; Yunus 2013; Arifin 2018).

Therefore, imprisonment is expected to be the final criminal imposition of children in conflict with the law, because of the bad impact of imprisonment on child development. Children in conflict are expected to only get jail terms if indeed the condition of the child is indeed dangerous for the community and must be secured.

Some criminal alternatives can be imposed on children in conflict with the law, one of which is fostering within the institution. With regard to the type of criminal offense, the convict must undergo a series of coaching carried out by the institution in which the institution can be a job training institution or a private or government-led fostering institution. Related to that, the authors see that this form of crime is very good given to children who commit criminal acts because it will avoid the negative impact of imprisonment.

Based on the above background, there are two main things discussed in this paper, which relate to how the criminal relevance of guidance in institutions for children who commit criminal acts with the purpose of punishment in Indonesia; and the urgency of the existence of a fostering institution for children undergoing punishment within institutions in the juvenile justice system in Indonesia.

FOSTERING AS AN ALTERNATIVE SANCTION FOR JUVENILES

THE RISE of criminal acts that occur in the community in Indonesia has become a constant work for law enforcement officers in Indonesia. Various ways and efforts are made in order to overcome and prevent and minimize various criminal acts that occur. It is also felt in tackling various crimes related to children. In relation to criminal acts, children are parties who are very vulnerable to being victims and perpetrators of criminal acts.

In the event that a child becomes a criminal offender, various types of criminal offenses are currently very vulnerable for children. This is triggered by various backgrounds which in the end caused the child to commit a criminal act. As a consequence of a criminal act committed, every child who commits a crime has a criminal responsibility that must be experienced.

Law No. 11 of 2012 concerning the Juvenile Criminal Justice System is explained that the child who is a criminal offender is referred to as a child in conflict with the law, hereinafter referred to as Child is a child who is 12 (twelve) years old, but not yet 18 (eighteen) years suspected committing a crime. With this arrangement, it was explained that basically children who could be held responsible for criminal acts ranged from 12 years to 18 years.

If a child who has not reached 12 years is suspected of committing a crime, the arrangement is regulated in Article 21 SPPA Law which explains that in the event that the child is not 12 (twelve) years of committing or suspected of committing a crime, Investigator, Community Advisor and Professional Social Worker take the decision to hand it back to the parent / guardian; or b. include in education, coaching and mentoring programs in government agencies or Institute for Organizing Social Welfare (*Lembaga Penyelenggaraan Kesejahteraan Sosial*, hereinafter called as LPKS) in agencies that handle the field of social welfare, both at the central and regional levels, no later than 6 (six) months (Wangi 2013; Yunus 2013; Arifin 2018).

From the article explained that the criminal responsibility of a child starts at the age of 12 years, but in the process of detention or conviction of children, it can only be done to children who are 14 years old. The basis for criminal acts for children who are not yet 14 years old can be seen in Article 69 Paragraph 2 which explains that children who are not yet 14 years old can only be sanctioned by action. This suggests that only children aged 14 years can be subjected to criminal punishment by a judge if they commit a crime.

In criminalizing children in Indonesia, SPPA Law has regulated the types of crimes for children. As for the form of crime in Article 71 SPPA Law, it is explained that the criminal form for children is an additional principal and criminal penalty, namely:

- (1) The principal punishment for the Child consists of:
 - a. criminal warning
 - b. criminal terms:
 - 1) coaching or fostering outside the institution;
 - 2) community service; or
 - 3) supervision
 - c. work training
 - d. coaching or fostering in institutions; and
 - e. imprisonment
- (2) The Additional punishment consist of:
 - a. deprivation of profits derived from criminal acts; or
 - b. fulfillment of customary obligations.
- (3) If the material law is threatened with cumulative crimes in the form of imprisonment and fines, criminal penalties will be replaced with job training.
- (4) Crimes imposed on children are prohibited from violating the dignity of the child.
- (5) Further provisions regarding the form and procedure for implementing criminal acts as referred to in paragraph (1), paragraph (2), and paragraph (3) shall be regulated by Government Regulation.

With the regulation of various forms of criminality that can be imposed by judges in handling cases of child cases, then if seen in this case the judge should still pay attention to the principles of legal protection for children

regulated in SPPA Law. It was explained in SPPA Law that criminal deprivation of liberty is the last resort in handling child cases. Basically, with the principle that deprivation of liberty is the last resort, this explains that as much as possible imprisonment is not imposed on children who commit criminal acts. As is known that a little more than the process of imprisonment of a child prison that is carried out will have a negative impact on the child in the process of growth and development.

Therefore in imposing criminal sanctions, the judge has other criminal choices that still pay attention to the aspects of the best interests of the child. One of them is criminal guidance in the institution. Imprisonment for children as part of the *ultimum remedium*, children are sentenced to criminal sentences in the Child Correctional Institution (*Lembaga Pemasyarakatan Khusus Anak*, LPKA) if the circumstances and actions of children will endanger the community. Imprisonment sentences against children are only used as a last resort.

This type of crime is a fostering within an institution carried out at a job training place or a training institution organized by both the government and the private sector. Criminal guidance in the institution is dropped if the circumstances and actions of children do not endanger the community (Makaro 2004). In relation to the choice of punishment for children in conflict with the law, in this case the choice of criminal punishment must also be in accordance with the objectives of punishment for the child who should be wanted.

Maidin explained in his book that the Criminal Justice System has a dual functional dimension, on the one hand it functions as a means of the community to detain and control crime containment, on the other hand the Criminal Justice System also functions for secondary prevention, namely trying to reduce crime among those who have committed criminal acts and those who intend to commit crimes, through the process of detection, punishment and criminal conduct (Gultom 2014). Whereas Muladi, as quoted by Gultom (2014), explains that the juvenile justice system has the aim of:

1. Resocialization and rehabilitation of criminal offenders
2. Eradication of Crime
3. To achieve social welfare

In line with what was conveyed by Muladi, Juvenile Criminal Justice, was held with attention to child welfare (Gultom 2014). Child welfare is important because:

1. Children are the potential and successors of the ideals of the nation whose foundation has been laid by the previous generation;
2. So that every child is able to assume these responsibilities, he needs to have the opportunity to grow, develop naturally;
3. Whereas in the community there are children who experience obstacles to spiritual, physical, social and economic well-being;
4. The child has not been able to maintain himself;

5. That removing these obstacles will only be implemented and obtained if the child welfare business is guaranteed (Wahyono & Rahayu 1993).

The philosophy of Child Criminal Justice is to realize child welfare, therefore law is the basis, guidelines and means of achieving prosperity and legal certainty in order to guarantee the treatment and actions taken; especially for Children (Wahyono & Rahayu 1993). In the legal process involving children as subject of offense, do not ignore their future and still uphold the authority of the law for justice.

According to the Beijing Rule in rule 5.1 it is explained that in the juvenile justice system will prioritize child welfare and will ensure that any reaction to child offenders will always be commensurate with the circumstances of offenders and law violations (Prakoso 2018). It is stated that "The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence" (The Beijing Rules 1985).

Whereas in the Convention on the Rights of the Child 1990, the purpose of the justice system is contained in Article 3, stated that:

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

According to UN Resolution 45/113 dated December 14, 1990, The United Nations of Protection of Juvenile Deprived of Liberty, the Court System for children must uphold children's rights and safety and promote physical and mental well-being in children and prison sentences must be used as a goal last one. Whereas in Law No. 11 of 2012, the aim of the Juvenile Criminal Justice System is to be able to realize a judiciary that truly guarantees the protection of the best interests of children facing the law as the next generation.

In line with the objectives of the criminal justice system for children described above, in criminal law the purpose of punishment is a matter that must be considered by the judge in imposing criminal charges on perpetrators of criminal offenses, including children who commit criminal offenses. In the purpose of punishment, criminal prosecution is directed to the process of fostering the perpetrators of criminal acts, as well as preventing the perpetrators of criminal acts from repeating criminal acts again. The convicted sentence is also able to prepare the criminal offender to return to the community while still providing a crime that does not have a negative impact. Whereas we know that if someone accepts the criminal form of deprivation of independence, the criminal process according to the author has a negative impact on the perpetrators, especially children.

THE URGENCY OF FOSTERING AS AN ALTERNATIVE SANCTION FOR JUVENILES IN INDONESIA

THE IMPOSITION of criminal decisions in the form of fostering children in the institution has relevance to the purpose of punishment which will improve the child who has committed a criminal offense but the child is still given responsibility for the criminal acts that have been committed. The criminal choice for criminal offenders is a matter of considerable importance. The truth is that criminal prosecution of criminal offenders should have values in accordance with the objectives of punishment that are to be achieved. Likewise with the judicial process for children who commit criminal acts, criminal choice is very important to note considering that children who commit crimes have a future that must also be considered (Wangi 2013; Yunus 2013; Arifin 2018).

One of the criminal sanctions that recognized as an alternative sanction for a child who commits a crime other than a criminal offense is criminal guidance or fostering in the institution. This type of crime is regulated in Article 80 which explains that:

- 1) Fostering within the institution is carried out at work training sites or coaching institutions organized by both the government and the private sector.
- 2) Fostering in the institution is dropped if the child's condition and actions do not endanger the community.
- 3) Fostering in institutions is carried out in a minimum of 3 (three) months and no later than 24 (twenty four) months.

Referring to Article 80, that criminal guidance in the institution can be imposed on the child who is a criminal offender. According to the author, this criminal choice is an alternative to other basic forms of crime other than criminal matters other than imprisonment that need to be optimized. This is

because this form of crime is able to cover up the shortcomings of criminal deprivation of freedom against children.

With the judge imposing criminal decisions on coaching within the institution, this is done by providing guidance conducted at the job training place. Or the convicted child gets guidance at a guiding institution that has been appointed by the judge but not in the LPKA. Therefore, the impact of deprivation of independence will be avoided by children. So, with the existence of criminal guidance in the institution, this will affect the existence of the institution in question. In Article 80 it is explained that the training is carried out at the place of job training and the guiding institution under the government or the private sector is appointed by the judge. In this case the author argues that in SPPA Law it does not clearly regulate with regard to the coaching institution.

In the implementing regulations SPPA Law also does not regulate the institution in the form of whether the institution is an educational institution, social institution, or other form of institution. so the author feels that this has become a shortage of management arrangements in the institution. To be able to optimize the form of guidance within the institution, the existence of the institution is clearly needed. Therefore, the judge in deciding to provide guidance to the child will have a reference regarding which institution fulfills the intended punishment.

CONCLUSION

IN THE current era, children can become perpetrators of crimes. As a form of legal protection for children who are perpetrators of criminal acts, then based on clarification and the results of the research of the author, it is necessary to apply criminal guidance in specific institutions formed by the government. This is important as an alternative form of punishment for child offenders to guarantee and provide legal protection for them as children. Specifically, the authors provide recommendations for the government, so that they will immediately formulate formal and material rules relating to the format of criminal guidance in institutions for offenders. Institutions that are used as a means of criminal guidance can be a type of social institution or educational institution that is adapted to the pattern of child development. Thus, the effect of deterrence and development of children's competencies will be obtained at the same time.

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Progress and Decline of Legal Thought: Ex-Corruptor as a Legislative Candidate (Analysis of General Election Commission Regulation (PKPU) No. 20/2018)

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KPU Regulation Number 20 of 2018 is one of the rules that must be adhered to regarding legislative candidates who will be registered as participants in the legislative elections. The KPU regulation was decided by the Supreme Court as a statutory regulation that is not in accordance with the laws and regulations related to the election on it. In fact, normatively, the provisions in the KPU Regulation are in accordance with the rules for the formation of legislation. Normatively, banning legislative candidates who are former prisoners of corruption is a progressive effort from the government to create a government free of corruption. The prohibition does not violate the concept of human rights protection.

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INTRODUCTION

DEMOCRACY is one of the principles of the rule of law and Indonesia legally in Article 1 paragraph 3 of the 1945 Constitution of the Republic of Indonesia (hereinafter abbreviated as the 1945 Constitution of the Republic of Indonesia, [UUD 1945](#)) states explicitly that the State of Indonesia is a rule of law. Democracy is a value of life in a good society, a pattern of social interaction, and is the result of a compromise of the interaction of interests in the form of public policy ([Sanit 2015](#)). Democracy is also widely mentioned as a system of government originating from the people or in short based on popular sovereignty.

The real form of a democratic system of government is through elections. Democratic political systems can be seen from the most powerful collective decision makers in the system and are elected through general elections ([Huntington 1997](#)). Therefore elections become a means of carrying out people's sovereignty based on indirect democracy or representation. The decision-making process in the form of public policy does not involve the

people directly but is represented by those who have been elected in the general election.

Sirajudin & Winardi (2015) said that to get a consolidation of substantial democracy is through the electoral system. This is important because it is a means or tool for the people to select their representatives to make decisions. Political parties also have an important role in democratic law. The basic function of the political party itself according to Subekti (Sirajudin & Winardi 2015) is to lead to the formulation and implementation of public policies that will regulate society. Political parties as organized groups aim to gain political power and fight for political positions to carry out the policies they make.

The sovereignty of the people as stated in Article 2 paragraph 1 of the 1945 Constitution of the Republic of Indonesia must be manifested in a tangible form through a direct, general, free and confidential general election. To carry out such elections, an independent election organizer is needed. Independence of election organizers is needed because elections are an instrument or means that can be engineered to achieve good goals while being manipulated for purposes that are contrary to good intentions (Sirajudin & Winardi 2015). Electoral institutions are those responsible for implementing elections smoothly and fairly.

Electoral institutions appointed by the Constitution are the General Election Commission as stated in Chapter VIIB Article 22E paragraph 5 of the 1945 Constitution of the Republic of Indonesia. As an election organizing institution guaranteed and protected by the constitution, KPU is categorized as a state institution that has constitutional importance (Asshiddiqie 2006). As an election organizer, the General Election Commission (KPU) has the task of compiling a KPU regulation for each stage of the election (Art 12(c) Law No.7 of 2017). In addition, it was also given the authority to establish KPU Regulations which had been followed so as to become a regulation that applies to each eligible participant (Art 13(b) Law No.7 of 2017).

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As a concrete manifestation of the duties and authorities given by the law, the KPU issued a KPU Regulation for the stages of legislative elections in 2019. In early July 2018, the Ministry of Law and Human Rights has enacted Election Commission Regulation Number 20 of 2018 concerning the Nomination of Legislative Members prohibit the nomination of former drug

dealer prisoners, child sex crimes, and corruption (Andayani 2018). According to the Commissioner of the Commission, Hashim Ash'ari, the establishment of this Commission regulation is to support the President Joko Widodo program to combat corruption (Andayani 2018). This is also a breakthrough from the KPU to minimize the number of corruption committed by legislators in previous periods.

Commission Regulation concerning a ban on convicted legislators nominate Corruption is getting opposition from various parties. According to Bambang Soesetyo (DZA 2018) as Chair of the Republic of Indonesia Parliament, the General Election Commission Regulation Number 20 of 2018 is contrary to the prevailing laws and regulations. Further, he states that the regulation depriving a person's rights to be elected and a government agency should not deprive citizens. A similar reason was also stated by Refly Harun that the Election Commission Regulation eliminated the constitutional rights of people intentionally and consciously (Chairunnisa 2018). Rejection was also expressed by the Minister of Law and Human Rights, Yasonna Laoly (Ihsanudin 2018), that Regulation Election Commission is contrary to the provisions of Act No. 17 of 2017 on General Elections which states that an ex-convict who was serving a sentence for five years or more, may nominate themselves on the condition that they are concerned to announce their status as prisoners to the public (Art 240(1)g Law No.7 of 2017).

Jimly Asshiddiqie (Nugraheny 2018) argues differently when the General Election Commission Regulation has not been promulgated in the state gazette. According to him, the Election Commission can enact its own draft Election Commission Regulation nomination of legislative candidates are otherwise promulgated by the Ministry of Law and Human Rights. Furthermore, it was said that there should be no intervention in the enactment of one of the technical rules of the election from the government. At the end of the promulgation of the General Election Commission Regulation, Widodo Ekatjahjana, Director General of Laws and Regulations at the Ministry of Law and Human Rights, stated that the enactment of the Election Commission Regulation was for the sake of democracy and election administration so as not to be disturbed (Gatra 2018).

Therefore the author wants to analyze further the General Election Commission Regulation Number 20 of 2018 concerning the Nomination of Members of the House of Representatives, Provincial Regional Representatives, and Regency /City Regional Representatives. Is the General Election Commission Regulation Number 20 of 2018 in accordance with the normative rules for the formation of legislation in Indonesia? Next, the legal issue is whether the provisions of article 7 letter h Election Commission Regulation No. 20 of 2018 violate the rights of citizens?

The method used to analyze the problem is to use normative research methods. The study is conceived as what is written in the legislation and become a benchmark in the society behaves towards what is considered proper (Efendi & Ibrahim 2018). Soerjono Soekanto and Sri Mamudji (Efendi

& Ibrahim 2018) mention that normative research is conducted legal research by examining the literature that includes general principles of law, the legal systematics, synchronization of law, comparative law and legal history. The approach used to discuss the problems in this study is the legislative approach, conceptual approach, analytical approach, historical approach, and philosophical approach.

SUITABILITY ELECTION COMMISSION REGULATION NO. 20 OF 2018 WITH THE NORMATIVE RULES FORMATION LEGISLATION

THE LAW becomes valid if it is made by an authorized institution and is sourced and based on higher norms (Indrati S. 2016). Hans Nawiansky (Indrati S. 2016) complements this opinion that legal norms are not only layered and tiered, but the legal norms of a country are also grouped into four major groups. The division of groups by Hans Nawianski includes *Staatfundamentalnorm*, *Staatsgrundgesetz*, *Formell Gesetz*, and *Verordnung & Autonome Satzung*.

The normative rules for the establishment of attributes in Indonesia are attributive to the Constitution which is regulated by Law Number 12 of 2011 concerning the Establishment of Legislation. The hierarchy of laws and regulations in force in Indonesia is regulated in Article 7 of the Law Establishing legislation. While the General Election Commission Regulation fulfills the elements stipulated in the provisions of article 8 paragraph 1 of the PUU Law, which includes regulations made by commissions that are of the same level established by law.

The General Election Commission as the organizer of the general election gets the attributive authority of the constitution which is national, permanent, and independent (UUD 1945, Art 22 E(5)). To hold general elections, the General Election Commission has the duties and authorities granted by the Election Law. One of the duties and authorities of the General Election Commission is to draft and stipulate the rules of the General Election Commission for each stage of the election (Art. 12C, 13B, Law No. 7 of 2017). The general election itself consists of 23 stages including at the stage of election dispute resolution for the legislature and also the election of the President and Vice President (“KPU-Portal Publikasi Pemilihan Umum 2019” t.t.). One of the stages in the election is the Preparation of General Election Commission Regulations and the nomination of members of the House of Representatives, Regional Representative Council, Provincial Regional Representative Council, and Regency/City Regional Representative Council and Nomination of President and Vice President. So based on the duties and authorities given by the Election Law, the General Election

Commission has fulfilled the formal requirements or juridical enforcement of the establishment of legislation. Bagir Manan (Sirajudin 2016) said that the first requirement in juridical or normative enactment of legislation is the existence of authority from the legislators.

Next, the second condition mentioned by Bagir Manan (Sirajudin 2016) is about the suitability between the form or type of legislation and the material content. Every formation of legislation must be based on the principle of the formation of good legislation, one of which is the principle of conformity between types, hierarchy, and material content (Art 5 C Law No. 12 of 2011). The purpose of this statement is that every formation of legislation must really pay attention to the material content that is appropriate and in accordance with the type and hierarchy of legislation.

In the Law on the Establishment of laws and regulations, there are two types of legislation, namely legislation in and outside the hierarchy. The types of legislation stipulated in Article 7 paragraph (1) of the Law Establishment of legislation is a type of legislation in the hierarchy. Whereas the opposite type of legislation that is outside the hierarchy is regulated in the provisions of Article 8 paragraph (1) of the Law on the Establishment of legislation. The General Election Commission Regulation is a statutory regulation that is outside the hierarchy because it is formed by a commission that is formed by the Act or on the basis of an order of the Act.

As a statutory regulation that includes types outside the hierarchy, to determine the content of the material, it must be known in advance the level of the institutions that make up the regulation in the state organ structure. The General Election Commission is an institution formed by the constitution to hold elections that are national, permanent and independent. Jimly Asshidiqie (Asshiddiqie 2005a) also said that the General Election Commission received the title as an independent and self-regulatory body where the institution is not only an institution that makes regulations that apply in its work area but also implements, supervises and sanctions parties who violate these rules. The regulations made by the General Election Commission are, of course, regulations relating to the General Election or more precisely as a regulation that explains technically the Election Law. Thus, the content of the provisions of the General Election Commission may not exceed what is stipulated in the Election Law.

In the formulation of Article 4 paragraph (3) KPU Regulation Number 20 Year 2018 concerning the Nomination of Members of the House of Representatives, the Provincial People's Legislative Assembly, and the Regency/City People's Representative Council¹, it states that the selection of

¹ Before getting a judicial review decision from the Supreme Court Speaker, the formulation in this article gets a lot of debate. After obtaining a Judicial Review decision from the Supreme Court, the formulation of this article has been written off and declared invalid. The focus of the research study is the formulation of judicial review article before the Supreme Court to indicate the synchronization and harmonization of laws with the legislation on it

candidates must be democratic and open and not including former drug dealer convicts, child sex crimes and corruption. Then, this article is strengthened and clarified again in Article 7 paragraph (1) letter g The same General Election Commission regulation that the legislative candidate has never been convicted based on a court decision that has a permanent legal force which is punishable by imprisonment of five years or more. Both formulations of this article are derivatives that provide legal certainty and explanation of Article 240 paragraph (1) letter g of Law Number 7 of 2017 concerning General Elections. So that it has followed the rules in Article 6 paragraph (1) of Law Number 12 of 2011 concerning the Establishment of Legislation which regulates the principles in the material content of legislation.

The third condition according to Bagir Manan (Sirajudin 2016) is the necessity to follow a certain procedure. The ordinance is meant as has been stipulated in the Law on the Establishment Regulation Legislation: planning, preparation, discussion, approval or determination, and enactment. In every process of the formation of legislation, the Election Commission in making the Election Commission's regulations are in accordance with the provisions set forth in Act Establishment of the Regulation Legislation, and that in each of these processes also involve the parties involved in organizing the elections including the Parliament, the Ministry of Law and ham, etc².

But the weakness contained in the Act formation of legislation related to these issues is not regulated clearly how the process promulgate regulations made by the electoral commission. So, if based on the opinion of Jimly Asshidiqie that the General Election Commission is a self-regulated body, then the General Election Commission can automatically enact the rules it has made.

The fourth condition according to Bagir Manan (Sirajudin 2016) is not in contravention of legislation that is at a higher level. Conformity between the General Election Commission Regulations and higher legislation can be seen in the consideration section of the regulation, namely Law Number 7 of 2017 concerning General Elections. More precisely is based on the provisions of Article 249 paragraph (3) and Article 257 paragraph (3) of the Election Law which states that further provisions regarding verification of legislative candidates will be regulated in the General Election Commission regulations.

On the substance of the regulatory commission's election, lays out more details about the provisions of legislative candidates who cannot follow

² The General Election Commission has a very important role in realizing a democratic legal state and also has constitutional importance, the General Election Commission has full authority in carrying out its functions without getting intervention by other institutions. This position also strengthens the position of the General Election Commission as an independent and self regulatory body. Thus, although without having to communicate with other parties, the General Election Commission can still formulate, compile and enact a regulation of the General Election Commission for the smooth running of democratic elections

the contestation of election is under threat of criminal prosecution of more than 5 years contained in the electoral law³. More complete these provisions contain several elements: (a) have never been imprisoned; (b) based on court decisions that have obtained permanent legal force; (c) committing a crime that is threatened with imprisonment of 5 (five) years or more; and (d) present to the public. Author sharpens the third element *punishable by imprisonment*.

The phrase "threatened" consists of the basic word "threat" has three meanings when viewed in a large dictionary of Indonesian. First, state the intention (intention, plan) to do something that is harmful, difficult, troublesome, or harmful to the other party. Second, give a sign or warning about the possibility of a disaster that will occur. Third, is expected to befall someone or something. The precise meaning if linked to the provisions of previous legislation is the third meaning. Someone who is threatened with imprisonment of 5 (years) or more does not mean that the criminal sentence given must be 5 years or more, but the threat of punishment formulated in a statutory regulation is that period.

The crime of corruption as regulated in [Law Number 31 of 1999 jo Law No. 20 of 2001](#) provides a penalty of more than five years, even up to the threat of life imprisonment. In narcotics criminal acts as drug dealers, they are threatened with criminal penalties of more than five years ([Chap. XV Law No. 35 of 2009](#)). For any child sex crimes to law threatened with imprisonment of at least five (5) years (Art. 81 Law No. 35 of 2014). Thus, it can be said that the Election Commission Regulation is to clarify several criminal acts which are subject to criminal penalties of more than 5 (five) years. In addition, some of the crimes mentioned in this election commission regulation are categories of extraordinary crime.

THE PROVISIONS OF ARTICLE 7 CLAUSE H ELECTION COMMISSION REGULATION NO. 20 OF 2018 NOT VIOLATE RIGHTS OF CITIZENS

LAW is a tool to regulate the subject of legal obligations and obtain their rights properly ([Nasution 2014](#)). Indonesia in its constitution stated explicitly as a state based on law (Art 1 (3) UUD 1945). Thus indicating that the Indonesian state adheres to the principles of the rule of law. [Jimly Asshidiqie \(2005a\)](#) argues that the idea of a state of the law is related to the concept of nomocracy, which is the determining factor for all activities in administering

³ See more fully in Article 240 paragraph 1 letter g of Law Number 7 of 2017 concerning General Elections in conjunction with Article 7 letter g of the General Election Commission Regulation Number 20 Year 2018 concerning the Nomination of Members of the People's Legislative Assembly, Provincial People's Representative Council and Regional People's Representative Council /City

power is law. The Indonesian government has powers that are limited by the Constitution and not justified in acting arbitrarily.

The rule of law will be further enhanced with a democratic system of government, a government based on the sovereignty of the people. The democratic system of government⁴ shows that all citizens participate ruled either by a legislative, as well as outside the people's representative institutions in determining the government's political decisions (Nasution 2014). Freedom and equality in a democratic system of government aim to create good and clean governance.

The principle of the rule of law carried out by Indonesia is a legal state based on Pancasila⁵. Every government activity, the formation of legislation, or other policies must have Pancasila. The aim of the state of Pancasila law is not only to create good and clean governance but also to realize the nation's goal of increasing public welfare⁶. This general welfare can be said as the basic right of all Indonesian citizens. So that it becomes the government's main obligation to realize and protect.

Speaking of basic rights will also be related to views on human rights. Understanding of human rights is still very too narrow if it defines that human rights are a natural right, a right granted to humans since he was born (Nasution 2014). Such understanding will direct a view to safeguard human interests individually and shifting the paradigm of protecting the people individually. The development of the concept of human rights has always evolved to find a concept where the implementation is in accordance with the characteristics and character of the community⁷. The basic concept of human rights also raises the recognition of the right of every person to social and international order in exercising their rights and freedoms to the restrictions

⁴ Democracy is also an idea or way of thinking that prioritizes the equal rights, obligations and treatment of all citizens in all laws and government. Democracy also requires an openness with the principle of fair play to give birth to people's participation in running the government

⁵ The state law of Pancasila is a country based on the ideals of the Pancasila law. Legal ideals contain the meaning that the law as a rule of public behavior rooted in ideas, feelings, intentions, inventions, and thoughts of the community itself. The ideals of the Pancasila law are based on the value of the One and Only God, Respect for human dignity, national insight and insight, equality and feasibility, social justice, moral and noble character, and participation and transparency in the decision making process.

⁶ The state law of Pancasila is a country based on the ideals of the Pancasila law. Legal ideals contain the meaning that the law as a rule of public behavior rooted in ideas, feelings, intentions, inventions, and thoughts of the community itself. The ideals of the Pancasila law are rooted in the value of the Supreme Godhead, Respect for human dignity, national insight and insight into the archipelago, equality and feasibility, social justice, moral and noble character, and participation and transparency in the decision making process

⁷ The development of thinking about human rights began with the existence of the Universal Declaration of Human Rights which was formulated by the United Nations organization in 1948. The results of the discussion at that time were written documents produced by all nations representing various cultural backgrounds, beliefs, ideologies and political orientation.

set by law (Nasution 2014). Daniel S. Lev said that restrictions on these rights must be in accordance with the parameters of a democratic society, not according to the parameters of an authoritarian society or even those who take refuge in democratic masks (Lev 1970).

Human rights are a basic right that is active or teleological in a democratic understanding (Simanjuntak 2017). The purpose of this statement is that human rights are rights that must be carried out by citizens both personally and jointly in a legitimate association to realize common interests. Human rights will not be realized without the participation of the community to create, oversee, and enforce the laws that have been made.

The most obvious implementation of human rights is the implementation of general elections specifically regulated in Chapter VIIB Article 22E of the 1945 Constitution of the Republic of Indonesia. In this provision the active standard of human rights consists of five things: (a) directly, publicly, freely, confidentially, honestly and fairly; (b) political parties as participants; (c) individuals for the Regional Representative Council; (d) General Election Commission; and (e) regulated by law (Simanjuntak 2017).

The series of electoral process, in essence, is to fill all positions that are at the peak of the state, namely the legislature and the executive. The selection of legitimate state officials through the general election has the main task of making and implementing the law. The task of making law is always through a practical political process, but after the law is made, the whole law must be subject to the law made in advance. Although in reality, the legislature as a legislator makes more political decisions than carrying out proper legal work (Mahfud M.D 2012).

Political parties as election participants, in the constitutional system of the Republic of Indonesia, are required to pass selection according to qualifications based on the conditions set out in the Election Law. In addition, in the constitution, it is also stated that the institution appointed as the executor of the general election is the election commission. Election supervisory bodies are formed by the state as an institution that oversees the performance of electoral commissions

Nikolas Simanjuntak (Simanjuntak 2017) suggests there are three justifications that political parties have a role and a very important function in a single democratic system. First, politics is for the management of many things both people and interests, positions, and state money. Second, there are no alternative institutions that are able to carry out these affairs simultaneously. Third, all political process practices must be carried out by all politicians both inside and outside political parties. Therefore, it can be concluded that the political duties and responsibilities of political actors as a

process of hominization and humanization to realize a political performance as the best service work⁸.

Human rights become positive rights in two forms, namely moral and law, both of which are the basis of being and acting from a human being in living together socially (Simanjuntak 2017). Moral and law become a value of humanity as an effort to glorify, promote, and promote human civilization. Law is present to treat and maintain moral enforceability. So that the legal position towards morals is a real and valid instrument in society to form human values. In this state, the moral and legal context it was then used as a guide to implementing the country's basic objectives which were called state achievements⁹.

Corruption is the opposite situation from the achievements of the country. Simanjuntak (2017) said that corruption is a human crime. Corruption¹⁰ has greater destructive power because it uses state money originating from the people and its use for community services, deflected for the personal benefit of a state official. The entire offense stipulated in Law number 31 of 1999 *jo* law number 20 of 2001 if it is proven that human rights violations will occur in Article 28C, Article 28D, and Article 28H of the constitution of the Republic of Indonesia. Violations committed by corruptors Should get the most severe punishment more than punishment for ordinary criminals.

Appropriate punishment has been formulated by the electoral commission to prohibit the ex-convict corruption to be a candidate in the legislative elections this 2019 period. A corrupt person who has violated the fundamental responsibility of the state should not be included as a legislative candidate in the general election contestation

The formulation in Article 7 letter h of the regulation on the number 20 general election commission in 2018 basically does not violate human rights. This is in line with the constitutional provisions stipulated in article 28I paragraph (4) of the Constitution of the Republic of Indonesia which states that protection, promotion, enforcement and fulfillment of human rights are

⁸ Homonization is a general humanitarian process by including humans in a very minimal scope of human life. This process requires an advanced process through further education to humanize humans specifically in the process of humanization. The process of humanization is the process of appointing humans to a higher culture in the advances of culture and science. Hominization and humanization are an integral process to realize a better human life and must be carried out simultaneously and at the same time in a broad and deep scope for a long period of time

⁹ It is called an achievement because the government gets the power and authority to rule from the people on the basis of contracts or agreements. That on the one hand must provide the promised achievements. This contract is referred to as a political contract, namely a contract made in a political arena that is only moral in its efforts to fulfill these promises.

¹⁰ In Law Number 31 of 199 in conjunction with law number 20 of 2001 there are seven categories of offenses in corruption, namely state losses, bribery, embezzlement in positions, extortion, fraudulent acts, correct interests and gratuities

the responsibility of the state, especially the government. The General Election Commission as part of a state organization tries to uphold the social rights of the Indonesian people by banning former corruption convicts. It is precisely the prohibition that is a clear proof that the government is also present in upholding the rights of citizens who are the fundamental responsibility of the state, namely forming a government that is clean and free from corruption.

CONCLUSION

IT IS emphasized that, General Election Commission Regulation Number 20 of 2018 concerning the Nomination of Members of the People's Legislative Assembly, Provincial Regional Representatives, Regency/City Regional People's Representatives Council complies with the normative rules for the establishment of legislation in Indonesia. In the normative rules, there are unclear rules regarding the process of enacting a statutory regulation that is outside the hierarchy as stipulated in Article 8 paragraph (1) of Law Number 12 of 2011 concerning the Establishment of Legislation. So that the General Election Commission as a state organ responsible for the legitimacy of Democracy in Indonesia has the right to renegotiate the regulations it makes to be in harmony with Indonesia's democratic ideals.

The next conclusion is that the ban on former corruptors as members of the legislative candidates does not violate the human rights of Indonesian citizens. Corruption is a crime or crime against humanity which limits the social development of the community which is the responsibility of the state. Therefore, the ban on former corruptors is actually the enforcement of human rights to achieve Indonesia's democratic ideals.

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Promoting the Right to Education through A Card: A Paradox of Indonesia's Educational Policy?¹

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In 2015, the Indonesian government unveiled the Smart Indonesia Program, or Program Indonesia Pintar (PIP). The program consisted of educational subsidies through cash transfers exclusively granted to students aged from 6 to 21 years old from poor families. This paper examines the role of the PIP subsidy pertaining to the fulfilment of the right to education. As a consequence, it resulted in a competing account between cash transfers and the minimum standard of government duties to fulfil the need for adequate educational support. There is a paradox in the government's educational policy on the fulfilment of human rights to education in dealing with the PIP program. While educational complexities faced in remote areas cannot be hindered and it is granted not solely to students from vulnerable families. Such discrepancies in programs circumstantially affirm that the government ignores the root of Indonesia's educational problems, including providing free education as its obligation to human rights. The research conducted concludes by suggesting the government to evaluate the current policies by considering budget priorities and the efficiency of providing inclusive education.

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INTRODUCTION

AS ONE of world's most populous countries, Indonesia relentlessly faces critical challenges in efforts to providing the right to education. The data from the Ministry of Education and Culture 2012 showed children could not access primary schools up to 2.4% (OECD 2016), in spite of the high drop-out rate at each school level (OECD/Asian Development Bank 2015). A series of policies have been introduced to cater to the need for accessible education and

improved educational quality. The latest policy is the Smart Indonesia Program, or *Program Indonesia Pintar* (PIP), and it provides financial aid through cash transfers granted to students aged from 6 to 21 years old from poor families. The policy, however, has been questioned regarding the extent to which it enables the promotion of the rights to education as part of human rights.

This paper reveals that the fulfillment of the right to education is an arduous task for the government of Indonesia, specifically for how it is promoted. The discussion will specifically examine the role of the PIP policy pertaining to the fulfillment of the right to education, and its further implications, by providing a competing account of cash transfers regarding the minimum standard of government duties to fulfill adequate educational support. This paper is not aimed to provide a comprehensive account of cash transfer programs or educational policies in decentralized Indonesia. Rather, this paper discusses the relevance of the cash transfer program to the promotion of the right to education.

The background reflects how this paper is organized. The first part of this paper will discuss the relationship between the PIP policy and the access to education, including the obligation of government to fulfill the right to education. In the second part, this paper will analyze the responsibility to protect and fulfill the right to education in a series of policy and global commitments for providing education as human rights. The third part will examine a series of policies and its challenges at providing free and improved education that focuses on teacher performance to ensure the right to education can be enjoyed by all citizens.

DECENTRALIZATION & CASH TRANSFERS POLICY

SINCE the early 2000s, there has been a dramatic change in educational policies (Kristiansen & Pratikno 2006). While the government decentralized the educational administration of primary and secondary schools (Kristiansen & Pratikno 2006) from central to regional authorities,² there remains at least two major challenges, *inter alia*: providing inclusive education and providing improved educational quality (Bangay 2005). Indeed, government decentralization grants regional authorities larger opportunities to solve challenges; however, the formulation of policies to promote the right to education is another problem arising in contemporary Indonesia when

² In the third phase of regional authorities' decentralization, it introduces concurrent affairs, viz. compulsory concurrent powers and optional concurrent powers. The decentralization of educational administration is categorized as part of compulsory concurrent powers divided into three levels which is essentially: (a) national authority to regulate standardization and accreditation; (b) provincial authority to manage secondary school; and (c) district and municipal levels to manage primary and nursery schools.

considering diverse problems in each region. Therefore, after almost two decades of a decentralization agenda, there is still a high number of students that cannot access education at formal schools (OECD/Asian Development Bank 2015).³

Indeed, providing access to education is a key component to solving a number of barriers to an inclusive education system. It is a key component specifically because it deals with compulsory education provided by the government. In 2013, the government unveiled universal secondary education which prioritizes the accessibility of education (Ministerial Regulation of Education and Culture No. 80 of 2013 on Universal Secondary Education).⁴ This action implies that the government acknowledges that education should be universally attainable. This initiative does not only deal with the obligation to provide but also shaping of the country's future development with competitive human resources in the globalized world.

Nevertheless, poverty is one of the main reasons for the high drop-out rate of students. This demonstrates how a family's economic condition significantly influences a child's participation in school (OECD/Asian Development Bank 2015). The United Nations International Children's Fund (UNICEF) finds that rich families are greatly linked with children to have access to school in Indonesia (OECD/Asian Development Bank 2015). This finding affirms that richer families will have more opportunities for their children to access higher education. In other words, the right to education still cannot be inclusively accessed due to the economic gap between poor and rich families. Accordingly, children from poor families are a vulnerable group that needs a special concern from the government.

With the following disparity, in 2005, the Indonesian government introduced the School Operational Assistance Grant or *Bantuan Operasional Sekolah* (BOS) to respond to the rising of school's tuition fee charged by schools to students⁵ (Kharisma 2013). The BOS scheme opened opportunities

³ In 2012, it counted the drop-out rate of primary school with 1.09% and the percentage increased to 4.6% of primary school discontinuing junior secondary school and up to 8% of drop-out rate in this level. It also provided children who cannot access education through formal school with approximately 2.4%.

⁴ Universal secondary education is materialized in the form of providing education as much as possible to citizens to access formal educational levels, viz. (a) Junior Secondary School or *Sekolah Menengah Pertama* (SMP)/Islamic Junior Secondary School or *Madrasah Tsanawiyah* (MTs)/equivalent levels; and (b) Senior Secondary School or *Sekolah Menengah Atas* (SMA)/Islamic Senior Secondary School or *Madrasah Aliyah* (MA)/ Vocational Secondary School or *Sekolah Menengah Kejuruan* (SMK)/equivalent levels. The primary aim of universal secondary education is to provide every citizen services on the basis of equal opportunity to access secondary school.

⁵ The BOS scheme is the improvement of Social Safety Scheme or *Jaring Pengaman Sosial* (JPS) in educational sectors as previously applied in 1998-2003 and the following policy on the effect of the reduction of gasoline subsidy in 2003-2005. In the BOS scheme, schools will be granted financial aids to cater schools' operational costs based on the number of students. It aims to compensate schools so that schools will no longer charge a fee to students (primarily students from poor families).

for more accessible education with a lower tuition fee. To some extent, schools applied for the free, monthly tuition fee because the schools' basic expenditure has been provided by the government (Sugiono et.al 2015). The program gradually contributed to the reduction in the charge of tuition fees which positively impacted the rising of student participation in accessing a formal education.

A decade after the BOS program, the government launched the Smart Indonesia Program or *Program Indonesia Pintar* (PIP). It compensates students from poor families through a card, a legal document required in the PIP subsidy. As the distribution of cash transfers is administered through an electronic form, the program improves upon the Poor Financial Aids or *Bantuan Siswa Miskin* (BSM)⁶ (Ministerial Regulation of Education and Culture No. 12 of 2015 on Smart Indonesia Program) which was launched in 2008 (OECD/Asian Development Bank 2015).⁷ The main aim of the program is to apply universal junior secondary school and senior secondary school so that students from poor families can successfully complete 12 years of education (Art. 2 Ministerial Regulation of Education and Culture No. 12 of 2015). Thus, it is important to discuss further the relationship between the right to education and the PIP policy.

1. The PIP Policy and the Right to Education: Searching for their Relevance

In President Joko Widodo's administration, BSM was replaced by the Indonesian Smart Card Program or *Kartu Indonesia Pintar* (KIP). This administrative requirement is one of the few differences with the former cash transfer program. In addition, the nomenclature of BSM was strongly characterized as cash transfers prioritized to poor students, while the PIP subsidy has been identified as a program given to smart students from poor families.

Administrative rules define the PIP subsidy as a cash transfer program granted to children from the age of 6 to 21 from families that hold a Welfare Family Card or *Kartu Keluarga Sejahtera* (KKS); therefore, the grant should be given only to poor families. The goal of the PIP policy is for all students to study in formal and non-formal institutions. Formal institutions comprise of students in primary schools, junior high schools, and senior high schools. While non-formal education includes Islamic boarding schools, course institutions, and training institutions.

⁶ Once students are granted financial aids, they are required to hold Smart Indonesia Card or *Kartu Indonesia Pintar* (KIP) which is granted to children from families holding Social Protection Card or *Kartu perlindungan Sosial* (KPS) / Welfare Family Card or *Kartu Keluarga Sejahtera* (KKS).

⁷ BSM was perceived as a program to provide equity among Indonesian students in which it was to ensure all children from vulnerable economy received cash transfers to promote school participation.

To adhere to the PIP policy, it could be an alternative to diverse government formulas to alleviate the educational gap, including child participation and the right to education. Through the PIP policy, the cash transfers are granted on a six months basis. Students in primary school, junior high school, and senior high school are granted IDR 225.000,00, 375.000,00, and 500.000,00 respectively.⁸ In practice, even though the funds granted to students are primarily aimed to support school expenses,⁹ students can arbitrarily use it once the money has been released from banks.

Through the PIP policy, the government strives to reduce the number of drop-out students due to economic disparity. This policy is aimed to contribute to the improvement of access to education which will widen learning opportunities for students from poor families. This policy affirms a non-discriminatory policy in which the program is aimed at providing larger access to education, regardless if the student is boy or girl, rich or poor, and living in village or city. Therefore, this article assumes that the government through the PIP policy has the responsibility to protect and provide human rights through positive action as guaranteed in the 1945 Indonesian Constitution since it is expected to provide inclusive education.

On one hand, such program can be included as a means to bring equal protection under the law by asserting equality before the law needs positive action¹⁰ (Tussman & TenBroek 1948). This policy confirms the government to actively reduce gaps by providing special treatment for the most vulnerable persons. Therefore, this reflects that the effort to provide cash transfers is intended to realize equality of rights and treatment in response to inequality¹¹ (Sartika, Safitri, & Edison 2017). In the end, with such cash transfers, students have the potential to access basic education despite economic challenges in their families. On the other hand, while the PIP policy has contributed to school participation (Ahmad 2018), this program encounters problems regarding the spread of information and the distribution of the subsidies. In Tanjungpinang, despite the absence of reliable data verification (Sartika, Safitri & Edison 2017), there is no adequate information on the program. So, many families do not know how to access information and gain benefits from this program (Sartika, Safitri & Edison 2017). As the program is not well informed, there are many families that do not use the subsidies properly (Saraswati nd). In Jember, there were many students from rich families who

⁸ "Program Indonesia Pintar Melalui Kartu Indonesia Pintar (KIP) - Klaster I - Tanya Jawab : Tim Nasional Percepatan Penanggulangan Kemiskinan - TNP2K," accessed February 19, 2017, <http://www.tnp2k.go.id/id/tanya-jawab/klaster-i/program-indonesia-pintar-melalui-kartu-indonesia-pintar-kip/>.

⁹ "Program Indonesia Pintar Melalui Kartu Indonesia Pintar (KIP) - Klaster I - Tanya Jawab : Tim Nasional Percepatan Penanggulangan Kemiskinan - TNP2K."

¹⁰ Equal protection of the laws is aimed at the state responsibility to actively provide the protection to all citizens to enjoy human rights so that it enables to objectify equality to all citizens.

¹¹ Positive action can be interpreted as an action to identify and overcome discriminatory practices, especially for those who do not benefit.

received this cash assistance. The information counted that 1,057 out of the 1,067 students who were in grades seven, eight, and nine of Government Junior High School Jember 1 (SMP 1 Jember) received PIP assistance (Solichah 2017).

These facts confirm that such problems are serious as this policy was substantively aimed to provide positive action in human rights. Cash subsidies are seen as protection for citizens who need special treatment to access the right to education. Unfortunately, in practice, benefits are going to richer families. Similar problems often occur, particularly when government programs, in the form of financial assistance, have been followed by further challenges due to poor data collection and verification, including worse aid distribution (Perdana 2015). In this context, the PIP is counterproductive and does not meet what was expected: to anticipate and answer high rate of dropouts among students. These problems, therefore, can be concluded to be a result of the negligence of the government in its efforts to protect human rights.

2. Quo Vadis: Educational Subsidies or the Right to Education?

In the context of human rights, there are two consequences for providing educational subsidies while attempting to fulfill the right to education. Providing educational subsidies may affect the fulfillment of the right to education, but the right to education specifically emphasizes the obligation of the state to provide adequate education. In other words, the state is obliged to ensure that every student can access their rights so that they can go to school and receive proper knowledge at school. This is different from providing subsidies which play a role in supporting the level of school participation through cash transfers, not the accessibility and availability of education to be enjoyed all citizens. Indeed, it takes how the government considers the proper formula on the right to education.

It is essential to take experiences from other developing countries on how they formulated duties on the right to education. As Indonesia is a third-world country, there is the assumption that the country has relatively similar problems with other developing countries, such as improper planning and budget distribution. To this extent, most programs unveiled for poverty alleviation, including in the field of education, are in the form of cash.

In Mexico, cash assistance became a popular policy model. Cash was granted to families who met certain requirements to ensure school-age children could attend school properly. In the end, this program was re-evaluated because of the ineffectiveness of its implementation. However, the evaluation often does not consider what matters make success in improving children's quality and family welfare (de Brauw & Hoddinott 2011).

Mexico's experience confirms that the cash assistance program, in practice, does not have positive impacts to solve the problems in the country. In other words, cash assistance is not an appropriate tool to answer problems

of poverty and vulnerable citizens as this model is faced with difficult challenges to its effective implementation.

In general, African countries also often adopt the cash assistance policy model as a way of increasing growth (Garcia, G. Moore, & M. T. Moore 2012). This model is also applied in order to meet the pressure to reduce poverty and fulfill human rights, but it is still not an effective drug to solve problems in Africa (Garcia, G. Moore, & M. T. Moore 2012).

Ecuador's experience is another example. The country also faced difficult challenges in implementing a cash assistance program. Ecuador expected that its policy model would provide positive achievement for the development of children. However, in practice, those who are from poor families often wasted the cash they received for their other needs (Paxson & Schady 2010).

The use of assistance in the form of cash in Indonesia remains at a high level of risk. These risks include the accuracy of the use of cash assistance for the benefit of supporting access to education. In other words, there is the concern of whether cash assistance would be used for the intended need or for other purposes that are counterproductive in the mission of accessing education. Therefore, from such facts, it is important to suggest that the government re-evaluates the PIP policy, including improving the data collection, verification, and its distribution into other than cash transfers rather than just the mode of distribution (Liputan6.com 2017).

THE RIGHT TO EDUCATION AND EDUCATIONAL POLICIES

SUBSIDY programs in education will become more intense to debate as it is discussed in the lens of human rights. The right to education is guaranteed in the constitution and international covenants ratified by the government of Indonesia. The right to education covers what matters need to be fulfilled by the government in realizing the protection and fulfillment of human rights to education to its citizens. As in Article 31 of the 1945 Constitution, the right to education is granted for citizens and they are obligated to attend basic education, whose finance is subsidized by the government.

Further provisions are regulated in the Law on the National Education System (National Education System Act). Article 34 confirms that the government, both at the central and regional levels, guarantees the implementation of minimum compulsory education for basic education without fees. In addition, Article 5 states that the right to education includes the same rights to obtain quality education. It is also stated that there is a special protection of rights for citizens who have physical, emotional, mental, intellectual, and social disorders. In this context, the right to education includes special service education for citizens who live in remote or

underdeveloped areas, including indigenous peoples. Special education is also given to citizens who have special talents and intelligence. All rights granted are in the context of providing citizens with the opportunity to improve education so that citizens are life-long learners.

In referring to international instruments, the provision of the right to education also includes free, basic education which requires the government to fulfill and provide. This right is mentioned in Article 26 (1) of the Universal Declaration of Human Rights 1948, Article 13 Paragraph (2) (a) of the International Covenant on Economic, Social and Cultural Rights 1966, Article 28 (1) (a) of the Covenant on the Rights of the Child 1989 or Article 4 (a) of the Covenant on Discrimination in the Education 1960.

Such laws justify the right to education as an important role in the national agenda, particularly, when the state is obliged to provide free, basic education. This paper considers that Indonesia will enjoy demographic dividend by 2030 but they depend on how the government formulates the right to education so that education is accessible for the young generation¹² (McDonald 2014). UNICEF introduces a conceptual framework for the approach to the right to education comprising of three interrelated dimensions. These three dimensions include the right of access to education, the right to quality education, and the right to respect for the learning environment. The right of access to education is based on equal opportunities without any discrimination; it is an inclusive approach to education for children. The right to quality education enables children to develop their potential and use various opportunities to develop their skills. To achieve this goal, education is required to be child-oriented with relevant curriculum and support by appropriate resources and supervision. The right to respect in the learning environment is entitled to every child. To achieve this goal, education must be consistent with human rights, including equal respect for each child, various opportunities for participation, free from all forms of violence, respect for language, culture and religion (UNICEF and UNESCO 2007). Therefore, this asserts that the scope of access to education includes not only equal opportunities without any discrimination as part of inclusive education for all children but also excellent education that supports every child to enjoy learning environment.

While access to education should meet the quality of education, this paper considers Article 5 of the National Education System Law that is concerned at providing quality education. This law states providing access to education should be followed by the improvement of quality so that there is an improvement in the quality of human resources. Such article affirms the importance to improve the quality of education so that it brings positive impacts to the quality of learning and skills-based student achievement. The

¹² It is estimated that during 2010-2035 there will be increasing population of Indonesia consisting of 30 million in Java, 18 million in Sumatra, 4 million in Bali and Nusa Tenggara, 6.5 million in Kalimantan, 5 million in Sulawesi and 4.5 million in Maluku and Papua.

government, however, needs to formulate the budget in a way that supports access to education, followed by an improvement in the quality of education, as it is widely known that better education will influence a better rate of economic growth. Subsequently, the improvement of the quality of education justifies at improving the welfare of citizens.

Eric Hanushek, an economist on the economics of education and public policy, argues that without the improvement in the quality of school education, developing countries will face difficulties improving their long-term, economic sustainability (Hanushek 2013). The role of quality schools at this stage influences the increase in resource capital, so the better education supports individual income and economic growth. For example, when Singapore gained the autonomous status from the British Government, it was poor with the majority of its population having high illiteracy and no skills (OECD 2017). At the same time, policy focused on expanding basic education as quickly as possible and recruiting large numbers of teachers to achieve a universal basic education. This was achieved in 1965 (OECD 2017). Quality-based policies began in 1979 with emphasis on skills in order to support domestic economic growth (OECD 2017).

In fact, Indonesia cannot eradicate poverty through education policy as quick as what Singapore has practiced. Indeed, Indonesia is complex consisting of culturally, religiously, and linguistically diverse population with higher economic gap compared to Singapore. However, Indonesia revised educational policies by providing a larger amount of national budget. It is written in Article 31 Paragraph (4) of the 1945 Constitution in which the state prioritizes a minimum education budget of 20% from the state budget to support the implementation of the national education system. This improvement then juxtaposes Indonesia and Singapore as countries that have high priority in education, reserving a budget portion of 20% of the total state budget (Tan, Liu & Low 2017).

After more than a decade, however, Indonesia faces considerable challenges in regards to the expense of providing better education. As the unitary state, education in Indonesia is a nationally-driven agenda, and provincial and local governments are limited in exercising powers. One of the fundamental problems is that Indonesia cannot resolve complex problems nationally. Such problems are, nonetheless, providing decent schools, free basic education, and unskilled teachers which result in lower quality of education. Three surveys measuring worldwide educational performance, such as the Trends in International Mathematics and Science Study (TIMSS), Progress in International Reading Literacy Study (PIRLS) and the Program for International Student Assessment (PISA), show that education in Indonesia has not improved significantly from the previous rankings (Manning & Sumarto 2011; ADB & OECD 2015). The latest PISA results published in 2016 ranked the average score of Indonesian students in reading, mathematics, and science as number 62 of the 70 countries in the world participating in this survey (The Jakarta Post 2017). In contrast, in the same

survey, Singapore was ranked first in the world. Therefore, it is evident that the success derives from their reform educational policy and because the country put education as a driving aspect of its national economic development (OECD 2015). Therefore, when education is considered important to improve the quality of human resources and the standard of living, the government has obligations not only to provide access to basic education but also use funding efficiently.

EVALUATING EDUCATIONAL POLICIES IN INDONESIA

THIS SECTION outlines the evaluation of national education policies at providing the right to education. This section specifically consists of evaluations relating to free education as mandated by the law and international instruments. In addition, teacher performances and wellbeing are evaluated against Indonesia's struggles over better education.

1. Free Education Issues

Due to the aforementioned facts, it is important to criticize Indonesia's educational system, particularly on the availability of inclusive education. In one hand, the government needs to improve accessible education followed by the improved quality of education. The limited budget, however, can be no longer be a mere issue to justify this problem. Rather, the government of Indonesia needs to manage the national budget efficiently to reduce economic gaps among students and foster national investment in education. In this regard, the Asian Development Bank classifies several key factors on managing budgets and access to education, *inter alia*: readjusting student and teacher ratios, reducing teachers' absence in schools, and rationalizing non-permanent teachers against good standards and high performance in teaching (ADB & OECD 2015). These three efforts are predicted to bring positive impacts to budget efficiency as a means to solve existing budget problems. If those efforts are successfully done, they would ease the provision of free education as Indonesia's commitment in the full realization to the national education system and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) ratified by Indonesia in 2005. Therefore, as the right to education is regarded part of derogable rights in which the enjoyment of such right can be strictly limited in accordance government's budget the ratification confirmed that Indonesia is ready to fulfill the responsibilities specified in the covenant. In the Covenant, one of these commitments needs to be realized by providing free basic education.

Free basic education has a problem in its application. The responsibility of the government as Article 31 Paragraph (2) of the 1945 Constitution, which mandates the government to regulate the administration of education to realize compulsory education, does not necessarily run properly. The budgeting process for fulfilling free education is often an obstacle due to problems in implementation. One justifiable obstacle is that the amount of budget set by the government is too small.¹³ In addition, efforts for free education resulted in different obstacles for each region. The diverse amount of income in each region challenges efforts to fulfill free education for policymakers.¹⁴

Changes in administrative powers in education also bring impacts in the implementation. After the third Regional Government Act 2014 was promulgated, there are new provisions to involve regency and provincial governments. According to such a new act, education at the elementary and junior high school levels is taken over by the regency government, while the high school level is subjected to the provincial government. Insofar this change, however, has an adverse impact on the budgeting process that impedes the implementation of free education.¹⁵

2. Teacher's Quality and Well-being

Education is strongly intertwined with teacher-student relations. Both teacher and student have major roles in the efforts to educate national life. While students become the focus of government's policy aimed to be able to access the right to education, teachers play a vital role in this aim in producing quality education. In addition to educational fees, the role of schools for providing quality teachers needs to be in the government's prioritized agenda (Komnas HAM 2009). Ministry of National Education acknowledges that the teaching profession in Indonesia bears big challenges in transforming teacher's competence to meet national standards (Jalal et al 2009). The Organization for Economic Co-operation and Development (OECD) also aggregately notes that teachers in Indonesia still have a low performance to bolster better education in Indonesia, especially teachers at the elementary level. The

¹³ "Anggaran Pendidikan Gratis Di Jember Tak Sesuai Kalkulasi Awal - Beritajatim News," accessed February 19, 2017, http://beritajatim.com/politik_pemerintahan/280688/anggaran_pendidikan_gratis_di_jember_tak_sesuai_kalkulasi_awal.html.

¹⁴ "Akar Kontroversi Pendidikan Gratis Di Jember - Beritajatim News," accessed February 19, 2017, http://beritajatim.com/pendidikan_kesehatan/272130/akar_kontroversi_pendidikan_gratis_di_jember.html.

¹⁵ "DPRD: Pendidikan Gratis Jember Seharga 1 Pak Rokok - Beritajatim News," accessed February 19, 2017, http://beritajatim.com/politik_pemerintahan/280655/dprd_._pendidikan_gratis_jember_seharga_1_pak_rokok.html.

OECD asserts that education in Indonesia considers teachers as one of the major problems for providing the right to education.

When steps towards improvement have been taken by the Indonesian government there was a high number of teachers' absences in school; in 2013-2014, there was an estimated number of around 10% (OECD 2006). These absences affect the effective pedagogical process at schools. In fact, schools aggregately only provide students to learn less than minimum school hours resulting in particularly low ability in mathematics (OECD 2006). Teachers' absences at school, however, increases in rural and remote areas with all its limited infrastructure (OECD 2006). This results in an increased level of students' absences from school (OECD 2006).

The information also notes that teachers' absence to school increased by 26% due to schools' administrative duties, such as attending meetings or training (OECD 2006). In addition, such absenteeism also significantly led to additional work for teachers to cover financial shortages as schools do not provide enough salary for teachers (OECD 2006). The government responded to these problems by introducing teacher certification; however, this leaves new problems because the program lacks effectiveness. The program has been operational since 2006 with the Teacher Professional Program and Training or *Program Latihan dan Profesi Guru* (PLPG) (Ramli & Jalinus 2013).

The PLPG sets requirements on the minimum qualifications for the teacher's teaching process. There are a series of training in the field of pedagogy and exams to be passed before teachers are certified. However, the implementation tends to be unable to transform the participants into professional teachers. While this certification program is recognized to improve the quality of teacher welfare, the World Bank's research reveals that it resulted in the better teachers' salary but not followed by the improved teachers' performance at schools (Chang et al 2013). In other words, there is no significant difference between certified teachers and uncertified teachers in terms of their professional competence in the aspects of knowledge and teaching skills towards student achievement (Chang et al 2013).

The above statement can be justified as the reason to argue that the government has carried out inappropriate policies so that the budget expenditure does not meet a significant impact to improve the quality of both teachers and students. The World Bank highlights that such actions are the result of the government's focus on structure rather than cultural changes in education (Chang et al 2013). A structural approach that is not followed by a cultural aspect to transform performance in education results in the failure to achieve an improvement in the quality of education in Indonesia. Therefore, the right to education is still under big projects for how it is negotiated with better government's policy.

CONCLUSION

EDUCATIONAL policy has become increasingly complicated in Indonesia, especially when it is articulated, debated, and negotiated with the right to education. A series of policies were created by the Indonesian government in order to increase school participation and improve the quality of education in Indonesia. In its implementation, however, these efforts often were challenged to the extent to which the government formulated a series of weak policies that resulted in human rights debates. While the series of PIP policies were unveiled, for instance, inaccurate data collection suffered the unfair distribution of aid to students from poor families, the distribution of cash assistance, in some cases, was wrongly targeted so that it essentially contradicted with the aim of the program. As the policy is linked to human rights, its implementation confirms that the government has been negligent in a series of policies in fulfilling human rights responsibilities. Indeed, a cash assistance program was aimed by the government to raise school participation; however, it tends to lack effectiveness when the budget allocation is not distributed to support the right to education, including accessible education and free education as both are officially acknowledged by the government as universal education.

It is necessary to review the effectiveness of PIP policies as an effort to fulfill the right to education for citizens. The evaluation includes the use of the budget to be more relevant to the fulfillment of human rights. In the midst of budget constraints, the clash of policy formulations between cash assistance and free basic education commitments are on the problem of formulation, but Indonesia is bound by ICESCR so that free education should be the priority. On the other hand, by referring to Article 5 of the National Education System Law, the commitment to provide education, which includes quality aspects, should be considered by the government. This is especially because Indonesia is often ranked by TIMSS, PIRLS, and PISA to have lower performances in education compared to that of other countries in Southeast Asia.

In responding to this, the government needs to reconsider the aspect of the fulfillment in the right to education. Free education should be an impetus to fix the budget expenditure rather than use the budget inefficiently. A series of policies need to reevaluate education as an investment in order to support the national economy in providing prosperity in the country. Therefore, evaluation of the process of teachers' certification is needed to ensure the budget can be distributed efficiently and bring positive impacts for the improvement of the quality of education.

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Quote

“Democracy cannot succeed unless those who express their choice are prepared to choose wisely. The real safeguard of democracy, therefore, is education”



Franklin D. Roosevelt

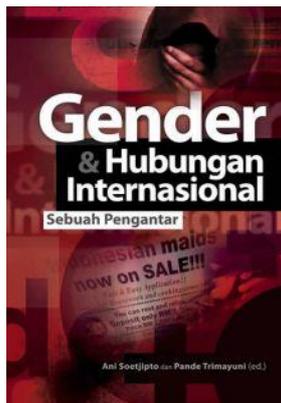
Source: <https://www.brainyquote.com/topics/education>

BOOK REVIEW

The Position of Women in International Relationship: A Book Review *Gender & Hubungan Internasional, Ani Soetjipto, Jalasutra Bandung, 2013, 320 pages, ISBN 978-602-825-293-5*

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 10.15294/jils.v4i01.30175



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GENDER and feminism are multidisciplinary studies. Therefore, when the International Relations (IR) study uses a gender lens and feminist perspective, analysis and discussion of international

DATA of BOOK

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|----------------|-----------------------------------|
| Author | : Ani Soetjipto |
| Published Year | : 2013 |
| Title | : Gender & Hubungan Internasional |
| Language | : Indonesia, <i>Bahasa</i> |
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| Publisher | : Jalasutra |
| ISBN | : 978-602-825-293-5 |
| Page | : 320 pages |

political issues becomes more comprehensive, deep, and sharper.

International issues that are examined using gender lenses are becoming more diverse and broader beyond traditional HI issues that we have known so far.

The issue of violence against women in war, women as agents of peace, global migration, issues of trafficking in women (women trafficking), female migrant workers, domestic workers, to women's rights in conventions and protocols of international conventions are some of the gender-dimensional international issues that specifically discussed in this book.

The book by Ani Soetjipto on Gender and International Relations, explains that the study of feminism and international relations has developed more than three decades ago, starting from the holding of an international conference in the late 1980s, and in 1990 under the sponsorship of Ford Foundation in the US. In the same year there was also a special issue about Women in International Relations in the Millennium Journal which marked the beginning of Gender and International Relations studies.

The period was also marked by the study of Gender and International Relations, with the birth of two books namely by Jean Bethke Elstain, *Women and War* (1987) and Cynthia Enloe, *Banana, Beaches and Bases: Making Feminist Sense of International Relations* (1989). Furthermore in England, feminist thinkers emerged such as Grant and Newland with his book entitled *Gender and International Relations* (1991), Sandra Withworth with her book entitled *Feminist Theory and International Relations* (1994).

This book is quite relevant to be used as one of the reading material for International Relations students, especially those who are trying to understand gender, feminism and international relations studies, including anyone interested in gender and international relations issues. Through this book, we are led to be able to have a broad understanding that the issues in International Relations are not only issues and issues related to war, peace, diplomacy, weaponry, trade, but there are still other issues, one of which is gender which can be reviewed from various perspectives. As a reader, this book invites us to understand Gender issues extensively by linking them in various studies such as security, international political economy, human rights and international law.

For example, how to link gender and security issues in HI, this book provides a variety of writings presented from various writing results that provide readers with a new perspective, especially looking at how women in conflict, such as what is peace from a feminist perspective, include rape of women in conflict. Another issue in this book is the link between Gender, Feminism and International Political Economy, which discusses how international migration and global inequality, the migration flow of domestic workers and marriage in the study of international political economy.

Although this book presents interesting issues related to Gender and International Relations, there are notes that need to be added, there has not been an in-depth discussion of the definitions and concepts of sex, gender and other terms generally needed for beginner readers or readers who have not

understand Gender studies specifically, for example gender stereotypes, gender relations, gender roles, gender discrimination, sex abuse, male domination, etc. Eventhough the term is inherent and very important as a basic understanding in Gender studies. And if we review the introductory sub-section of this book, a discussion about the concept of sex, gender is more specifically devoted to the concept of gender and the theory of feminism in the eyes of international relations.

Finally, this book also reviews Human Rights in International Relations, takes a case study of the struggle of the Rights of Women in the Continent of Africa and the Women's Convention an Opportunity to challenge Gender-based injustice in Iran. Overall this book has provided us as readers to have a more comprehensive understanding of gender issues in international relations and by reading this book it will be very encouraging for students who are exploring non-conventional issues focused on issues of gender and international relations.

Legal cases of international organizations will not stop until this book. The discussion of case studies in this book can still be used as a reading material and an insight for the reader because there are some that are still in accordance with the times. Given a case example in concrete not only mere theory provides a nuance of understanding for the reader to continue to deepen and dig deeper into international law itself.

This book also includes various forms of examples of statements of international agreements between countries such as: Singapore Declaration of 1992, Scale of Assessments, Rule of Procedure of the General Assembly, Resolution 1514 (XV): Declaration on the Granting of Independence to Colonial Countries and Peoples, Resolution 1514 (XV): Principles Which Should Be a Guide for Determining whether or not An Obligation Existence to Information of the Charter of the United Nations, and Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.

This book explains how to look at international relations in terms of gender as well as feminism, mostly in this book discussing women and their human rights in international relations in the world. The author wrote this book based on his perspective as a subject of women's law to international law. This book uses language that is easily understood and understood by students so it is very helpful in learning activities and very helpful in giving references in making lectures related to international relations.

There are a number of advantages and disadvantages in this book, besides the book that is easy to obtain because it is in various bookstores in Indonesia, the price is quite affordable in accordance with the objectives of the students in Indonesia. This book can also be obtained through online media, with a process that is not so complicated.

Another advantage possessed by this book is the use of words that are easily understood by students, and also not only in writing, but also with

pictorial descriptions that are enough to add to the mood when reading, because if only the writing is in it. the readers will surely fall very easily into boredom, the pictorial information presented by the author is also a color and not blurry description. The picture is quite focused and clear.

Other advantages, namely, the design of the cover used, the design of the cover used in this book is very elegant and very selling, making the eyes of the viewer immediately curious about what this book contains, although the design is minimalist but it is precisely the design that attracts the attention of people whose age is under 40 years old. The elegance of this design makes this book seem to have a weight for and read and as if only smart people are reading.

The combination of colors on the cover design is very fused, the red color is marooned a little and given the transparency of the writings or letters makes this book more beautiful to look at. Not only the front cover, the back cover is like that, the back cover not only presents the synopsis or a rough summary of this book, but also presents how the author wrote this book, and also does not miss the author's biography.

In addition to the many advantages of this book, this book does not escape from its shortcomings, as a book that is affordable for students, makes the capital issued for this book a little too, because seeing from an economic point of view to get a decent profit, the publisher minimizes the cost of making books, which causes the use of basic materials for this book are materials of low quality, such as for example the paper used. The paper used in this book is very thin and the color is brownish opaque, and if it is returned by hand it will immediately leave the scab on the paper immediately, and it is also very easy to tear.

Likewise on the quality of the glue used to glued the sides of the book, because the low quality of the glue used causes the thinner paper to be easy to remove from the side, so it must be very careful if you want to read it. Maybe not the quality of the glue is low, it could also be the wrong gluing technique or indeed because of the quality of the paper used earlier which makes the glue so hard to stick tightly.

Books include books that are often used by students to look for references, because they are quite easy to read, in the use of quotes this book uses footnote techniques, in my opinion footnotes are easier to read and found compared to body-notes located at the end of sentences and in the middle of a paragraph it is quite difficult to tell the contents of the paragraph and which one is quoted. If the quote footnote will be immediately placed at the bottom of the sheet, it is quite easy to find a quote, just look for a small number at the end of the sentence and then adjust it to the quote that is located at the bottom.

In terms of restructuring, this book in my opinion is quite well structured. This book also notes that the references used in writing this book use reliable references and do not use arbitrary references. In terms of presentation techniques, in my opinion this book is very concerned about how

this book presents each chapters, with the intention that the majority of readers are students easy to understand from the ground up to arrive at the subject of this book.

In the first part of this book it explains the notions of gender itself, gender differences, and to human rights acquired. Then it continues to the understanding of its international law, then continues to its international relations, and to the point of discussion. Very systematic indeed is the composition of the book, and is very helpful for students in understanding international relations extensively.

Law Quote

**“Silent enim
leges inter arma”**

—

In times of war, the
law falls silent

Marcus Tullius Cicero

Source: <https://www.goodreads.com/quotes/tag/university>

SUBMISSION *AND* AUTHOR GUIDELINE

JILS manuscripts preparation and style guidelines follow, with a slight modification, documentation of the Chicago Manual of Style (14th ed., University of Chicago Press).

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The article should be between 5000 and 15.000 words. The allowable length of the manuscript is at Editor's discretion; however, manuscript with a length less or exceeding the words may be returned to the author(s) for revision before the manuscript is considered by the Editors. The word count excludes table, figures, and references.

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Submission

Email The draft manuscript submitted also have to be sent by email: jils@mail.unnes.ac.id, in English and Bahasa (for Indonesian), and in English (for Non-Indonesian). The first step review will be: paper standard review, format, and potential information for the manuscript including the refinement of title, and after the first step review, the Author suggested to submit the manuscript through online submission system.

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