Journal of Law & Legal Reform
Published by
UNNES
POSTGRADUATE PROGRAM, MASTER of LAWS
FACULTY of LAW, UNIVERSITAS NEGERI SEMARANG, INDONESIA
K Building 2nd Floor, Sekaran Campus, Gunungpati
Semarang, Central Java, Indonesia, 50229
Email: law.journal@mail.unnes.ac.id

ISSN Print 2715-0941
ISSN Online 2715-0968

JOURNAL OF LAW AND LEGAL REFORM

VOL 2 (1) JANUARY 2021

Journal of Law & Legal Reform

ISSN Print 2715-0941 ▪ ISSN Online 2715-0968

VOLUME 2 ISSUE 1 • JANUARY 2021

CONTEMPORARY ISSUES ON LAW & JUSTICE

PUBLISHED BY
POSTGRADUATE PROGRAM, MASTER of LAWS
FACULTY of LAW, UNIVERSITAS NEGERI SEMARANG, INDONESIA

INDEXED IN DOAJ
GARUDA GARBA RUJUKAN DIGITAL

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Journal of Law & Legal Reform

Journal of Law and Legal Reform is a double blind peer-reviewed journal, published by Postgraduate Program (Master of Laws Program) Faculty of Law Universitas Negeri Semarang. The Journal exclusively published in English both printed and online version, and publish four times each year, every January, April, July, October. The Journal publishes article (Research and Review Article) concerning to legal studies. The journal is intended to be a scientific legal journal that publishes a high quality of law research and works. In order to guarantee wider reach on a global scale, this journal opens opportunities for anyone, researchers, academics, practitioners, and students from all over the world to publish their best manuscripts in this journal. The name of the journal—Law and Legal Reform—to give the impression that this journal brings the spirit of legal change with all its aspects.

EDITORIAL TEAM

Journal of Law & Legal Reform

VOLUME 2 ISSUE 1, JANUARY 2021

CONTENTS

RESEARCH ARTICLE

REVIEW ARTICLE

Published by Postgraduate Program, Master of Laws, Faculty of Law, Universitas Negeri Semarang, Indonesia

Published by Postgraduate Program, Master of Laws, Faculty of Law, Universitas Negeri Semarang, Indonesia

Journal of Law & Legal Reform

EDITORIAL

Various issues regarding law and justice are interesting to be studied at this time. Delaying the boundaries of justice so that there is no uniformity of meaning is one of the challenges in law enforcement both in Indonesia and in various countries. This edition of the Journal of Law and Legal Reform raises the general theme "*Contemporary Issues on Law and Justice*" with the expectation of being able to provide a discourse on justice and law from various perspectives.

In particular, we would like to express our deepest gratitude to all those who contributed to publishing this edition of the journal. We convey an invaluable thank you to all of the board of reviewers for their hard work and kindness in maintaining the quality of the writing in this edition. We also thank all the teams involved in this edition.

We would also like to thank all the writers in this edition for their amazing works. The authors of this edition come from various countries: ***Indonesia, Malaysia, United Kingdom, and Nigeria***. The authors' institutions come from: Mahasaraswati University Denpasar, Denpasar State Hindu Dharma Institute, Purworejo State Prosecutor's Office, Semarang State University, Niger Delta University Nigeria, International Islamic University Malaysia, Institute of Foundation Studies, Federal University Otuoke, Bayelsa State Nigeria, University of Derby UK, and IAIN Pekalongan.

Regards
Dr. Indah Sri Utari, S.H., M.Hum
Editor in Chief

Published by Postgraduate Program, Master of Laws, Faculty of Law, Universitas Negeri Semarang, Indonesia

Journal of Law & Legal Reform

Published by Postgraduate Program, Master of Laws, Faculty of Law, Universitas Negeri Semarang, Indonesia

Journal of Law and Legal Reform (2021), **2(1)**, *pp.* 1-14.
DOI: **https://doi.org/10.15294/jllr.v2i1.40816** ISSN (Print) 2715-0941, ISSN (Online) 2715-0968

RESEARCH ARTICLE

THE POLICY OF EMPLOYMENT INFORMATION SYSTEM DEVELOPMENT IN BALI PROVINCE IN THE ERA OF INDUSTRIAL REVOLUTION 4.0

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CITED AS
Wiryawan, I. W. G., & Dewi, B. (2021). The Policy of Employment Information System Development in Bali Province in the Era of Industrial Revolution 4.0. *Journal of Law and Legal Reform*, *2*(1), 1-14. https://doi.org/10.15294/jllr.v2i1.40816

ABSTRACT

The era of Industrial Revolution 4.0 encourages the implementation of information technology-based government in various fields including in the field of manpower. The Regional Government of Bali Province has a legal product in the form of the Bali Provincial Regulation Number 10 of 2019 concerning Manpower Implementation mandating the development of a labor system. In this study, two issues will be discussed, namely the basic considerations for the development of an employment information system and the formulation of a law regarding an employment information system. The development of a manpower information system is based on the government's duties in providing public services and regional autonomy. The legal formulation regarding the manpower information system is written in the form of a regional regulation which should also be followed by a governor's regulation.

Keywords: *information system; employment; industrial revolution 4.0.*

Submitted: 09 August 2020, Revised: 10 October 2020, Accepted: 11 December 2020

TABLE OF CONTENTS

INTRODUCTION

The modernization and development of the globalization era nowadays will affect various sectors of life as a nation and state. Technological advances have changed the face of the world's economy. In the beginning, everything was done conventionally to a modern direction, especially in the industrial and trade sectors. As part of a nation in the world, Indonesia, the country with the most population in the Southeast Asia region, has an ever-increasing population growth resulting in the increasing number of workforce every year amidst the limited employment opportunities because of the economic growth that has not been able to absorb it to enter the job market.

According to data from the Central Statistics Agency of the Republic of Indonesia, the total workforce in February 2020 was 137.91 million, an increase of 1.73 million compared to February 2019. In contrast to the increase number of the workforce, the Labor Force Participation Rate (TPAK) decreased by 0.15 percentage point. In the last year, unemployment increased by 60 thousand people, in contrast to the TPT (unemployment rate) which fell to 4.99 percent in February 2020. Judging from the level of education, the TPT for Vocational High Schools (SMK) was still the highest among other education levels, which was 8.49 percent. The working population was 131.03 million people, an increase of 1.67 million people from February 2019. Employments experienced the increase in percentage were mostly Educational Services (0.24 percentage points), Construction Services (0.19 percentage points), and

Health Services (0.13 percentage point). Meanwhile, the decline in employment were mainly in Agriculture (0.42 percentage points), Trade (0.29 percentage points), and other services (0.21 percentage points) (BPS, 2020).

Manpower problems in Indonesia are increasingly complex when entering the era of the Industrial Revolution 4.0 resulting in disruption in various fields, including the labor sector. Regarding the relationship between the industrial revolution 4.0 and employment, Beni Agus Setiono stated the following:

> The rapid development of technology will sooner or later affect the demand for labor in the future. Going forward, the demand for labor will shift. Industry will tend to choose middle and highly skilled labor instead of less-skilled labor because its role in doing repetition work can be replaced by robot autonomization (Benny Agus Setiono, 2019: 182).

One of the important phases in technological development at this time is the emergence of the 4th wave industrial revolution, or better known as the Industrial Revolution 4.0. Not only in the industrial and trade sectors, but with the 4.0 industrial revolution, everything is connected to information and communication technology which is very helpful for human activities in fulfilling their daily needs. The use of digital technology makes it easier for humans to exchange information, communication, and meetings indirectly. In addition to the community having the advantage of enjoying the use of digital technology, the government can also use this technology to maximize the government's duties in regulating its country, such as registering the population, accessing information about matters relating to the community such as economy, politics, social and culture to monitoring the activities of its people. to fit the ideology of the country. This will have implications for the effectiveness of decision-making and policies taken by the government.

Accurate and effective information systems, in fact, always relate to the term "computer-based" or computer-based information processing. Such fast, accurate and reliable information is needed, for example in the context of making strategic decisions" (Moekijat, 2019: 89). The need for big data in information systems is the main thing by the Regional Government of Bali Province in taking policy strategies that will be issued, both in drafting regulations, supervision, and other activities so that they are right on target. This has also led the Governor together with the DPRD to formulate several policies that include several articles regarding regulations regarding information systems. The policy is expected to be able to use information technology optimally and effectively in providing policies and supervision regarding the implementation of the regulations themselves.

The Bali Provincial Government has issued Bali Provincial Regulation Number 10 of 2019 concerning Manpower Implementation. This provision mandates the development of an employment information system. This study examines two problems, namely the basic considerations for the development of an employment

information system and the formulation of a law regarding an employment information system.

METHOD

This research is a normative legal research that discusses legal issues regarding the legal policy for the development of an employment information system in Bali. At a macro level, the policy for the development of an employment information system is contained in The Bali Provincial Government has issued Bali Provincial Regulation Number 10 of 2019 concerning Manpower Implementation. These provisions have not been translated into juridical technical regulations. As a result, Bali does not have an employment database. This research was carried out with a statute approach and legal conceptual approach. Legal materials consist of primary and secondary legal materials which are collected through literature study. The analysis was conducted qualitatively argumentative.

EMPLOYMENT INFORMATION SYSTEM: HOW DOES THE LAW REGULATE IT?

I. BASIC CONSIDERATIONS FOR THE DEVELOPMENT OF AN EMPLOYMENT INFORMATION SYSTEM

The development of a manpower information system at the regional government level cannot be separated from the idea of the industrial revolution 4.0. The word Industry 4.0 was born from the idea of the fourth industrial revolution. The industrial revolution has occurred four times. The first industrial revolution occurred in England in 1784 where the invention of the steam engine and mechanization began to replace human jobs, so that production increased significantly. The second revolution occurred at the end of the 19th century in which production machines powered by electricity were used for mass production activities. The use of computer technology for manufacturing automation starting in 1970 marked the third industrial revolution.

Today, the rapid development of sensor technology, interconnection and data analysis has led to the idea of integrating all these technologies into various industrial fields. This idea is predicted to be the next industrial revolution. The number four in the term Industry 4.0 refers to the fourth revolution. Industry 4.0 is a unique phenomenon when compared to the three industrial revolutions that had preceded it.

Industry 4.0 is announced a priori because the actual event has not happened yet and is still in the form of ideas. The era of the fourth Industrial Revolution is marked by artificial intelligence, super computers, genetic engineering, nanotechnology, automatic cars, and innovations. These changes occur at an exponential rate that will impact the economy, industry, government and politics. In this era, the world has become a global village (Satya: 2018: 20).

The potential benefits of Industry 4.0 include improving the speed of production flexibility, improving service to customers and increasing revenue. The realization of these potential benefits will have a positive impact on a country's economy. Industry 4.0 does offer many benefits, but it also has challenges to face. The challenges faced by a country when implementing Industry 4.0 are the emergence of resistance to changes in demographics and social aspects, instability in political conditions, limited resources, the risk of natural disasters and the demand for environmentally friendly technology. There is a wide gap in terms of technology between the current conditions of the industrial world and the conditions expected from Industry 4.0. Companies are reluctant to implement Industry 4.0 for fear of the uncertainty of benefits. In general, there are five major challenges that will be faced, namely the aspects of knowledge, technology, economy, social and politics.

Talking about the challenges of the political aspect, the State must be able to follow technological developments so that policies issued by the Government are effective and in accordance with the development of this modern society. One of them is when the Government provides public services and population data collection. Based on Law Number 25 of 2009 concerning Public Services, Public Services are activities or a series of activities in order to fulfill service needs in accordance with statutory regulations for every citizen and resident for goods, services and / or administrative services provided by public service providers.

Public services regarding the manpower information system in the era of the Industrial Revolution 4.0 are currently clearly described in Law Number 25 of 2009 concerning Public Services. Referring to Article 23 paragraph (1) of Law Number 25 of 2009 concerning Public Services, it is stated that "In order to provide information support for the implementation of public services, it is necessary to establish a national Information System." Article 23 paragraph (4) of Law Number 25 of 2009 concerning Public Services further states that the Provider is obliged to manage the Information System which consists of Electronic or Non-electronic Information Systems which at least includes: profile of organizers, executive profile, service standards, service announcements, complaint manager and performance appraisal.

The availability of manpower information is an implementation of achieving government targets in implementing public services. Marsh and Ian suggest 2 (two) perspectives that are important to observe in public services, namely: First, the dimensions of service delivery agents (government agencies or work units) and Second, the dimensions of customers or users (the people who utilize them). Based on the dimensions of service providers, it is necessary to pay attention to the level of performance achievement which includes fair services (spatial dimensions and social

class), work readiness and work mechanisms, affordable prices, simple procedures and a certain time for completion. Meanwhile, from the dimension of public service recipients, they must have an understanding and be reactive to deviations or unqualified services that appear in the practice of public service delivery. The active involvement of the community both in monitoring and submitting complaints against the practice of public service delivery is an important feedback factor for improving the quality of public services and meeting the standards set (Salam, 2004; Herlambang, 2018; Ndun, Helan, & Pekuwali, 2020).

As a consequence of the inherent function of public services, state administration is required to accept positive responsibility in terms of creating and distributing levels of income and wealth and providing public welfare programs. If this positive responsibility can be carried out, the existence of the government will grow into a large and strong government, both within the scope of functions and the number of personnel required to carry out its duties and responsibilities.

Each operator is required to provide a national information system. That way, information technology can play a big role in fulfilling the system on a national scale. The role of information technology is not only needed by the community in facilitating the information provided by the Government, both regional and national, but the Government also benefits from the information system provided. As what is felt by the Government in Bali.

The manpower aspect which covers various dimensions in government and industrial society in fact has problems regarding the validity of employment data which makes employment policy making based on valid data. This is in fact the manpower data issued between government agencies in particular out of sync and when compared to data in the field, as well as the industrial community is also not the same. This raises the assumption that the manpower sector is one of the areas least ready to face the Industrial Revolution 4.0, one of which is data mastery.

Legal breakthroughs in the legislative process in Bali Province in the implementation of manpower policies is the development of an employment information system. The development of an employment information system is one of the most interesting issues to analyze in relation to the integration of employment data in Bali Province. This policy is one of the government's efforts to provide data needs for the benefit of policy making by the government itself as well as the needs of the industrial world for valid data on employment as a basis for business development in Bali Province. This policy of information system development is an act of government law. Regarding this matter, R. Abdoel Djamali said the following:

> Policy as a government legal action falls within the context of administrative law, namely the legal regulations governing administration, namely the relationship between citizens and their government which is the cause until the state functions. State administrative law is as a whole legal rule that regulates how the state as the ruler carries out efforts to fulfill its duties (Djamali, 2001: 67).

Satjipto Rahardjo said that when talking about law, the target of the discussion is not only around the law as a consistent, logical and closed system but also as a means of channeling policies in development or changing society (Rahardjo, 1980: 13). Local government policies in regulating manpower are carried out by developing an employment information system. The development of a manpower information system is based on regional autonomy. Regional autonomy is the authority to establish and implement policies on its own initiative. The implementation of regional autonomy is the equivalent of regional government, namely the government of, by and for the people of the national territory of a country through system government institutions that are formally separated from the central government (Hoessien, 2009: 25).

The development of a manpower information system by the Regional Government is a mandate of the central government policy in providing public services for the community. According to Bagir Manan, the basics of the relationship between Central and Regions within the framework of decentralization are of four types:

1. The basics of deliberation in the state government system: The 1945 Constitution requires that people be implemented at the regional level government, meaning that the 1945 Constitution requires that participation in the administration of regional level government is only possible by desentralization.
2. The basis for the maintenance and development of the principles of indigenous governance: At the regional level, the original government structure to be maintained is in accordance with the basis of deliberation in the state government system.
3. Basics of diversity: "Unity in Diversity", symbolizing Indonesia's diversity, autonomy, or decentralization is one way to loosen the "spanning" that arises from diversity.
4. Basic rule of law. In its development, the understanding of the rule of law cannot be separated and has a popular understanding. Because in the end, laws that regulate and limit state or government power are interpreted as laws made on the basis of people's power or sovereignty (Manan, 1994: 161-167).

An information system is a system within an organization that meets the daily transaction processing needs, supports operations, is managerial and strategic activities of an organization and provides certain external parties with the necessary reports. Information is generated by an information system process and aims to provide information to assist management decision making, day-to-day operations of the company and appropriate information for the company (McLeod, 2004: 43).

II. LEGAL FORMULATION REGARDING EMPLOYMENT INFORMATION SYSTEM

Information systems are a combination of information technology and the activities of people who use technology such as computers, gadgets, radios, etc. to support human activities such as operations and management. In a very broad sense, the term information systems is often used to refer to the interactions between people, algorithmic processes, data and technology. In this sense, this term is used to refer not only to the use of information and communication technology organizations, but also to the way in which people interact with this technology in supporting human activity processes. In short, it is to facilitate all human needs through unlimited information, to communication which can be done with no distance limitation.

The development of information systems has also become an aspect of governance. The government information system is the use of information technology by the Government in the state governance process to make it easier for the government to determine policies, such as using the intranet and the internet, which has the ability to connect the needs of the population, business and other activities, such as the process of business transactions between the public and the government through an automation system and internet networks as well as monitoring activities carried out by the government towards its citizens in implementing regulations established by the Government itself.

The information system is a collection of sub-component sub-systems both physical and non-physical which are interconnected with one another and work together in harmony to achieve one goal, namely processing data into useful information. Information systems are as a combination of humans, technological tools, media, procedures and controls that aim to organize communication networks so that they can help in making the right decisions. Activities contained in the information system, among others:

a. Input, an activity to provide data to be processed.
b. Process, an activity of how data is processed to produce value-added information
c. Output, an activity to generate reports from the above process.
d. Storage, an activity to maintain and store data.
e. Control, an activity to ensure that the information system runs as expected (Azhar, 2000: 43).

In more depth, government agencies in preparing the vision and mission of information technology policies will look more at the equity factor (making information technology to improve service quality for public use). To achieve the target of effective application of information technology, it is necessary to establish a computerized government or e-government and human resources and education. The reason is because the application of information technology will be optimal if the users of technology services have knowledge and really understand the technology so that the target of applying information technology is achieved.

The manpower aspect is one of the areas that requires high data accuracy, so that accuracy in policy making cannot be separated from the support of employment data held by the government. The development of a manpower information system by the Government is basically to be able to find out manpower information so that it can

provide policies to a more effective and efficient supervision. The development of an employment information system is regulated in the Bali Provincial Government which has issued a Regional Regulation of the Province of Bali Number 10 of 2019 concerning the Implementation of Manpower.

Regional regulations that are formed by the Regional Government, the Governor, the Regent, the Mayor together with the Regional People's Representative Council, basically have a function as a policy instrument for implementing regional autonomy and co-administration as mandated in the 1945 Constitution of the Unitary State of the Republic of Indonesia and Law on Regional Government. Regional regulations are the implementing regulations of higher laws and regulations. In this function, Regional Regulations are subject to the hierarchical provisions of the statutory regulations, thus Regional Regulations may not conflict with the higher laws and regulations; Regional regulations are also a means of accommodating regional specificities and diversity as well as channeling the aspirations of the people in the regions, but in their regulation they remain within the corridors of the Unitary State of the Republic of Indonesia based on Pancasila and the 1945 Constitution of the Republic of Indonesia; and as a development tool in improving regional welfare (Dirjen Peraturan Perundang-undang, 2008: 7).

In Article 8 of the Bali Provincial Regulation Number 10 of 2019 concerning the Implementation of Manpower, it is stated as follows:

(1) The Provincial Government is obliged to build a Manpower information system.
(2) The Manpower information system as referred to in paragraph (1) shall contain at least:
    a. obliged to report about employment;
    b. must report job vacancies;
    c. reports on the use of foreign workers;
    d. reports on the placement of workers at home and abroad;
    e. reports of apprenticeship participants at home and abroad;
    f. certification;
    g. reports and recording of Work Agreement;
    h. registration of a Trade Union / Labor Union;
    i. Outsourcing agreement; and
    j. Disability employment information.
(3) Entrepreneurs / management of Companies, Workers / Laborers and Workers / Labor Unions are required to report the contents of data as referred to in paragraph (2) online to the Manpower information system as referred to in paragraph (1).
(4) The Manpower information system as referred to in paragraph (1) shall be implemented independently and / or integrated with other information systems.

Article 8 of the Bali Provincial Regulation Number 10 of 2019 concerning Manpower Implementation is the legal basis for the Bali Provincial Government to take policies

in building an integral labor information system. In this connection, Hobbel states four basic functions of law, namely:

1. Establishing the relationships between members of society, by indicating what types of behavior are permitted and what are prohibited;
2. Determining the distribution of power and specifying who is allowed to enforce coercion and who must obey it and at the same time choosing the appropriate and effective sanctions;
3. Resolving disputes;
4. Maintaining the community's ability to adapt to changing living conditions, namely by reformulating the essential relationships between community members (Warassih, 2005: 27).

The manpower information system will cause the government have a data base which can be used by the central and regional governments as a basis for consideration in government policy and management through the output generated from the manpower information system. The Provincial Government of Bali issues manpower through several clauses regarding the use of information systems. This is very important for Bali Provincial Government in the context of utilizing information technology in running the government. It is different from before in which the use of technology was not so optimal that information attainment, policy making, and supervision were less effective. Considering the above conditions allows the Bali Government to pay attention to the use of information technology from various sectors, for entering into the formulation of regulations.

The manpower information system policy is a legitimate government action in the laws and regulations. Basically, there are two measuring tools for the validity of governmental acts, namely: 1) statutory regulations as written legal rules and 2) general principles of good governance as unwritten legal rules. For the government, first of all, a rule is needed as a norm of governmental action. Such formulation is a general norm of state administrative law which in its development in several countries is currently accommodated in a general state administrative law codification (Nasution, 2006: 126).

In the most basic concept of governance, there are three main stakeholders interacting with each other and carrying out their respective functions, namely the state or government, the private sector or business world, and society. Government institutions function to create a conducive political and legal environment, while the private sector creates jobs and income, while the community plays a role in building social, economic and political interactions, including inviting community groups to participate in economic, social and political activities (Sumarto, 2004: 73). The three components must cooperate in providing accurate data at least concerning the mandatory manpower report; are obliged to report job vacancies, the use of foreign workers, the placement of workers at home and abroad, the apprenticeship participants at home and abroad, the certification and recording of Work Agreement, the registration of a Trade Union / Labor Union, the Outsourcing agreement, and the disability employment information

The information system is a procedure for submitting data provided to related parties to the Government. Therefore, the information obtained can be used as one of the considerations in providing policies, supervision, and other activities related to the work itself. The data in question is in the form of data concerning the employment itself, such as the workforce, educated, experienced, and migratory workforce, etc., in which all the data will be collected in a data system called big data. This big data will be used by the Government as a later consideration.

In practice, the policies of the Bali Provincial Government still encounter obstacles, namely weaknesses in the use of big data. In a Big Data system, some data is classified according to its scope. Regarding employment where Big Data is available at the manpower office, and the information received also consists of several bodies that have their respective jurisdictions, such as migrant labor which is held by an agency that has the authority is to collect data on migrant workers, an agency that specifically covers local, women, and children manpower. These several agencies that have a specific scope of authority regarding manpower will provide information to the manpower office as the center of the manpower itself which is then used as considerations taken by the Government in responding to the needs of the community itself. The problem is where there are differences regarding the data from the center, namely the manpower office, with the agencies under it. Therefore, the policies that should be in accordance with the results of the information received are less effective in the society.

The inclusion of clauses on the information system of local regulations is considered so important that all parties involved can position themselves and improve coordination. Therefore, the data obtained has similarities between the center and those under it. The errors in the data received will greatly impact the policies that will be issued by the government itself. In accordance with the vision of the Government, which is to make information technology to improve the quality of services for public use, it is mandatory to be regulated in that regional regulation.

CONCLUSION

Government information system is the use of information technology by the Government in the state governance process to make it easier to determine policies, such as using the intranet and internet, which has the ability to connect the needs of residents, businesses and other activities, such as the process of business transactions between the public and the government through an automation system and internet networks as well as monitoring activities carried out by the government towards its citizens in implementing regulations that have been established by the Government itself. The Bali Regional Regulation has regulated several clauses regarding the development of information systems. This is very important for the Bali Provincial Government in the context of utilizing information technology in running the

government. The government should maximize the use of information technology. A more optimal use will have a good impact on the running of the government. However, if it is not maximized, it will result in confusion of data and policies issued that are not as expected. Regulations that have been made must be immediately realized so that they have a legal basis in the implementation of the employment sector. Apart from being realized, it is necessary to provide counseling to related agencies regarding the delivery of information regarding employment.

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QUOTE

Resources are hired to give results, not reasons.

Amit Kalantri, Wealth of Words

Published by Postgraduate Program, Master of Laws, Faculty of Law, Universitas Negeri Semarang, Indonesia

Journal of Law and Legal Reform (2021), **2(1)**, *pp.* 15-38.
DOI**https://doi.org/10.15294/jllr.v2i1.40905** ISSN (Print) 2715-0941, ISSN (Online) 2715-0968

RESEARCH ARTICLE

ROLE OF REGIONAL AUTONOMY IN THE INDONESIAN NATIONAL DEFENSE AND SECURITY SYSTEM (SISHANKAMRATA)

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CITED AS
Fauzi, R. D. (2021). Role of Regional Autonomy in the Indonesian National Defense and Security System (SISHANKAMRATA). *Journal of Law and Legal Reform*, *2*(1), 15-38. https://doi.org/10.15294/jllr.v2i1.40905

ABSTRACT

As one of the efforts to maintain the existence of a country, the presence of the military in an order of national and state life is absolute. The determination to protect and defend the country from all threats - both symmetrical and asymmetrical - that can disturb the sovereignty and peace of the nation is an obligation of all citizens without exception. The purpose of this study is to determine the basis of authority for local government in the field of national defense and security and to determine the contribution of regional autonomy in maintaining national defense and security. Based on the problems examined by the authors, the authors use the normative legal research method. Normative juridical legal research methods are methods or methods used in legal research conducted by examining library materials from existing law books and regulations. The basis of authority for regional governments in the field of national defense and security is Article 1 number 2 of Act Number 3 of 2002 and Act Number 20 of 1982 concerning Basic Provisions of National Defense.

Keywords: *Regional Autonomy; Indonesian National Defense and Security System*

Submitted: 17 September 2020, Revised: 11 November 2020, Accepted: 21 December 2020

TABLE OF CONTENTS

INTRODUCTION

The realist view of international security is pessimistic, therefore realists safeguarding and maintaining national security are the government's top priority for sustaining the life of the state and its population (Akmal & Pazli, 2015). One way to protect the country's defense is to maximize the potential of human resources. Indonesia's abundant human resources can be used as a defense force, but must be supported by an adequate defense industry for the availability of effective weapons technology. Professionalism of defense human resources is also needed by involving civilians in managing future defense (Sebastian, 2018). Meanwhile, according to Nasution, one way to defend the country is by improving economic, social and cultural structures in the region. These improvements will be able to strengthen national defense. The improvement was carried out by increasing public awareness to defend the Unitary State of the Republic of Indonesia, increasing security and public order, as well as increasing the performance and professionalism of the government apparatus (Nasution, 2009).

Another way to safeguard the country is by simplifying rules and institutions and utilizing technology as a precise, effective, efficient, and applicable strategy that can maximize all strengths and take advantage of opportunities and minimize weaknesses (Kurnia, *nd*). To maintain national defense, especially to protect the sovereignty of Indonesia's territory, it is also necessary to standardize islands in Indonesia. The efforts to standardize the islands in Indonesia in accordance with international law and the efforts made by the Government to standardize the names of islands in Indonesia are very important to be realized. Standardization of the names of islands in Indonesia must be done so that islands which are part of Indonesia's sovereign territory, by de jure, gaining international recognition will add legal force. Nevertheless, there are obstacles faced by the Indonesian government in standardizing island names such as, lack of coordination between the relevant authorities, the number of ethnic groups and various regional languages and limited funds (Ardiansyah, 2011).

As one of the efforts to maintain the existence of a country, the presence of the military in an order of national and state life is absolute. The determination to protect and defend the country from all threats - both symmetrical and asymmetrical - that can disturb the sovereignty and peace of the nation is an obligation of all citizens without exception. National defense in its definition according to Law Number 3 of 2002 concerning National Defense is "all efforts to maintain the country's sovereignty, the territorial integrity of the Unitary Republic of Indonesia, and the safety of all nations from threats and disturbances to the integrity of the nation and state." (Article 1 Number 1). Referring to the law also explained that in addition to the Indonesian National Army as the main element of the state defense tool (striking force), other elements that play an important role in national defense that is outside of military power are natural resources and human resources (Law N0. 3 of 2002 concerning State Defense, *hereinafter as Indonesian State Defense Law*).

National defense is basically the entire defense effort that is universal, in which every implementation is always based on the rights and obligations of all spilled Indonesian blood accompanied by confidence in the ability of one's own strength to defend and fight for the survival of the sovereign Republic of Indonesia, united and independent (Department of Defense, 2008: 44). It was further explained that national defense was not only focused on war but was more on efforts to bring about peace, maintain national integrity, secure and guarantee the implementation of national development. The national defense is located to give birth and fortify every inch of the territory of the Republic of Indonesia along with all its contents (DPR RI, 2008).

From the description above, it is known that maintaining national integrity and security is very important. Researchers will analyze the important role of regional autonomy in the universal defense and security system (SISHANKAMRATA) as an effort to defend the country. This research will discuss the basis of authority for regional governments in the field of national defense and security and the contribution of regional autonomy in maintaining national defense and security.

THE CONCEPT OF DEFENSE AND SECURITY OF THE INDONESIAN GOVERNMENT

The most effective effort amplified to maintain the existence of a country, the presence of the military in an order of life as a nation and a state is absolute. The determination to protect and defend the country from various forms of misinterpretation, both symmetrical and asymmetrical, which can disrupt the nation's sovereignty and order, is the obligation of all citizens without exception. State defense in its definition according to Law Number 3 of 2002 concerning State Defense is "all efforts to defend the sovereignty of the state, the territorial integrity of the Unitary State of the Republic of Indonesia, and the safety of the entire nation from threats and disturbances to the integrity of the nation and state." (Article 1 number 1). Referring to this law, it is also explained that in addition to the Indonesian National Army, the main actor is positioned as a means of the defending state (striking force), apart from that which also plays a crucial role in the framework of national defense is the state's resources: nature. and the people. Both of these things are outside military power but have an important role in it.

All efforts made which are universal are a form of national defense. it must be holistic and comprehensive known as universal defense. Where in every implementation, it is always based on the rights and obligations of all the blood of Indonesia, accompanied by a belief in the ability to maintain and fight for the survival of this country so that it ends in an order that is sovereign, united, and free of independence (Ministry of Defense, 2008: 44). It was further explained that national defense does not only focus on war but more on efforts to create peace, maintain the integrity of the country, secure and guarantee the implementation of national development. State defense is positioned to give birth and fortify every inch of the territory of the Republic of Indonesia and all its contents (Departement Pertanahan RI, 2008).

National defense is not an independent territory but must be embedded in the development agenda to ensure the welfare of the people. The defense approach must be combined with the welfare approach. National security issues, which are dealt with through a military or authoritarian strategy by using a rifle butt, are no longer popular, because they will damage the direction of people's welfare that must be achieved. The concept of defense and security used as a reference by the Indonesian government which is used as a basic foundation for the development of the country's defense force is known as the Universal People's Defense and Security System (SISHANKAMRATA).

As a system that becomes an important guideline in policy making in the defense and security sector, SISHANKAMRATA is considered to be still relevant to be maintained until now, despite significant changes in the political constellation both at home and abroad, at least in terms of the spirit of national defense. In the

beginning SISHANKAMRATA was used as a defense strategy to deal with aggression carried out by outsiders based on collaboration between armed forces and society in carrying out guerrilla fighting when facing conventional superior force (Sebastian, 2006). Then in the next development as stipulated in Article 1 number 2 of Law Number 3 of 2002 developed into a "universal defense system that involves all citizens, territories and other national resources, and prepared early by the government and held in a total, integrated, directed and continuing to uphold national sovereignty, territorial integrity, and the safety of all nations from all threats.

When examined further SISHANKAMRATA has two roles, namely as military defense and non-military defense (Soedjono, 1979). Military defense in this matter covers military operations and military operations other than war. Whereas non-military defense includes, among others, the empowerment of national resources in which one component is civil power. So that in the implementation of the national defense strategy, military and non-military approaches are used as a defense unit that cannot be separated. Both are hand in hand in combating every danger that lurks in the country's security. In this case, the state defense institution must have a strong base in order to be able to cultivate all the defense potential it possesses and be able to connect directly in all regions of the country. Ideally, a country has a defense mechanism where the power it has is equal or greater than the threatening force. If the mechanism has not yet been reached, it will usually form a partnership to maintain a balance of power, but even if it cannot be implemented then there is no choice but to "fight the people". For Indonesia, creating a perfect defense entity is far from feasible due to budget constraints. Meanwhile, to make a defense alliance agreement with other countries will be constrained by the concept of a free and active foreign policy. Therefore, the practical step, which is a rational decision, is total defense (SISHANKAMRATA).

Although the authority of defense development is the absolute responsibility of the central government, but as a form of implementation of the implementation of SISHANKAMRATA, local governments need to be included because it has a strategic position. In the explanation of Law No. 3/2002 it is stated that "the problem of defense becomes so complex that its resolution does not only depend on the department (ministry) that deals with defense, but also the responsibility of all relevant agencies, both government and non-government agencies." Whereas based on the explanation above, we can draw two questions that can serve as the basis for the formulation of problems regarding the important role of regional autonomy in supporting the Universal People's Defense and Security System (SISHANKAMRATA), namely: a) What is the background of the distribution of regional autonomy in Indonesia; b) The nature of security and defense in government affairs; c) Assistance Tasks as a framework for regulating the defense and security of the whole people by local governments; d) What is the basis of authority for local governments in the field of national defense and security ?; e) How does regional autonomy contribute to maintaining national defense and security?;

I. BACKGROUND OF GRANTING REGIONAL AUTONOMY IN INDONESIA

In the framework of regional government, the state can be seen as an organization in which the implementation of its performance is made to delegate part of the authority to regional governments with the aim that government affairs between the center and the regions can run more effectively, reduce the workload of the center, and certainly as an absolute goal of decentralization is increasing democratization (Huda, 2009).

Decentralization developed rapidly around the world during the 1980s and 2000s. Various forms of decentralization are applied in both industrial and developing countries. In developing countries the central government tries to play a role in the effort to redefine what the role of regional government is so that the government as a whole can be seen as democratic and towards good state administration, especially since the 1900s when the practice of decentralization reform began to be intensified (Saito, 2008).

Massive reforms and an ideal state were characterized on the basis of ongoing democratization. To achieve this ideal condition, decentralization is usually considered to be implemented. This is because the local government is felt to be more able to reach the community and therefore can easily distribute the required public services. W. Arthur Lewis in his book Politics in West Africa states that in a country that imposes decentralization, the leader of the state must give local governments a limited degree of autonomy (Lewis, 1995).

Politically, with the end of the Cold War towards the end of the 1980s, democratization became an international trend. Decentralization, particularly by increasing citizen participation in decision-making, is seen as a driving force towards democratization. Continued by Dennis A. Rondinelli and G. Shabbir Cheema, decentralization is a way to improve the responsiveness of the government in the field of public services Bagir Manan states that decentralization is a process of dispersing power carried out through autonomy and assistance tasks. . In other words, decentralization has two distinguishable forms, namely autonomy and duty of assistance (Manan, 2001).

Amar Muslimin distinguishes decentralization into three types, namely decentralization given in the political sphere, given in the functional sphere, and given in the cultural domain. The handover of affairs in politics results in the transfer of authority from the top leadership of the government to take care of their own household interests so that representatives elected by the people in the area can take care of their own households. Then the delegation in the functional realm means that the central government gives authority to certain community administrators to be able to take care of the interests of the people. while the delegation of authority in the realm of midwifery has the central point of giving not to minorities so that they can carry out their culture (Muslimin, 1986).

Bgagir Manan in the Relationship Between the Central and Regional Governments, this division of authority is a necessity because Indonesia's vast territory and high socio-cultural heterogeneity causes the Central Government to need a division of authority to local governments so that the dynamics of governance can run effectively (Manan, 1994). This effort to share authority is an embodiment of the desire to involve the regions in real participation in developing regional potential and improving regional welfare.

The relationship of authority is a form of relationship created by the distribution of government affairs and this directly determines the parameters of the functions that are regulated by the central government and can or must be submitted to the regions. Furthermore, the division of authority will affect the pattern of financial relationships. The division of functions to local governments will result in a sharing of revenues and expenditures between the center and the regions. The third implication of this decentralization process is the emergence of the need for the amount of institution needed to carry out these functions. Fourth, is the supervisory relationship which is a pattern to ensure that local governments carry out their affairs in accordance with the agreed regulations (Yusdianto, 2015).

This authority relationship is related to the method by which the administration of government is given benchmarks to be carried out. This method of determination will reflect the form of autonomy in a country adhering to a limited autonomy system or adhering to broad autonomy. Classification of a country can be said to be limited autonomy if: first, the functions delegated to the regions are categorically defined and very rigid regarding the development of functions. Second, the supervision from the center to the regions is carried out in such a way that the autonomous regions are not truly autonomous because they no longer have the independence to determine their own way of carrying out their affairs, third, the existence of rigid financial structures so that the regions do not have the ability to have income.

This division of authority by regional government legal experts is referred to as government affairs. Ni'matul Huda argues that in essence, the division of government affairs is carried out into two main groups, namely: those that are fully implemented by the central government without any separation and indeed these matters should be exclusively regulated by the center in various forms of government, both federal and unitary. with de-concentration and co-administration. Second, functions that can be implemented through the decentralization process, but these functions do not belong to the autonomous region.

This authority relationship is related to the way in which governmental affairs are divided or determined. This method of determination will reflect the form of autonomy in a country whether it is limited autonomy or broad autonomy. It can be classified as limited autonomy if: first, regional government affairs are determined categorically and their development is regulated in certain ways; second, if the supervision and supervision are carried out in such a way that the autonomous region loses its independence to freely determine the ways to organize and manage the

regional household; third, the system of financial relations between the center and the regions, which causes things such as limited financial capacity of the region which will limit the space for regional autonomy.

In this connection the division of authority is known as government affairs. according to Ni'matul Huda, governmental affairs are essentially divided into two groups. First, government affairs are fully carried out by the Central Government without being dispersed. This is possible because exclusively these matters should fall under the authority of the Central Government both in the unitary and federal states which are carried out by means of deconcentration or co-administration. Second, other functions that could have been carried out on the basis of decentralization, but these functions were never exclusively owned by the autonomous regions.

According to Dennis A. Rondinelli in his book Decentralization, Territorial Power and The State: A Criical Response, not all matters must be regulated by the central government. theoretically, the central government only needs to regulate essential affairs in the form of agriculture, macroeconomics and other matters requiring a strong network (Huda, 2005). The procedure for the division of tasks, responsibilities and authorities in regulating government affairs is known as the Household System, this system is divided into three parts, namely formal, material and real.

First, is the formal system of regional households which states that there is essentially no distinction between central and regional affairs. In all matters that can be carried out by the central government, mutatis mutandis can be implemented by the regions. In this system the division is based on the assumption that an affair will be more effective and efficient if it is carried out by a particular government. The only limitation in this system is that the regions are not allowed to carry out functions that have been designated by law as central affairs.

The material household system has divided in detail what has become central and regional affairs. So conceptually this system brings awareness that there are indeed material fundamental differences between central and regional government affairs. Furthermore, this system argues that functions can be sorted according to government units. The real household system delegates functions and authorities to the regions based on real factors in the field and looks at whether there is a need from the region and assesses the regional capacity. A government unit with attention to the growth of people's lives. This system is also said to be a real autonomous system. These systems as discussed earlier will determine the extent of a country's autonomy by referring to how many functions are rigidly determined as the affairs of a government unit.

This article certainly discusses whether the agreement of the experts which states that regional autonomy should not regulate defense issues can be ruled out? Or is there a new understanding emerging about the role of the regions in implementing the defense and security sector? Although autonomy must be implemented broadly where the regions must be independent and free. Central intervention must be limited to matters that are closely related to efforts to maintain a balance between the

principle of unity (unity) and difference (diversity). On this basis, decentralization is limited, limited through the division of functions in the Regional Government Law. This means that the limitation of autonomy is mainly fixated on the principles of unity and diversity. These two principles are used to judge whether certain functions threaten unity and difference?

In the next section, we will discuss the tools that can be used by local governments regarding their participation in the defense and security domain. In the framework of decentralization, apart from those mentioned above, namely territorial decentralization, political decentralization, functional decentralization, and cultural decentralization. There are also other forms of co-administration and de-concentration. The extent to which the implementation of SISKAMHAMRATA can be taken over by local governments. By what means can it be fulfilled? However, long before entering into it, it is necessary to first describe the nature of SISHAMKAMRATA so that its characteristics can be read so that theoretically it can be identified through what kind of effort SISKAMHAMRATA can be amplified in accordance with the theory of regional governance.

II. SECURITY AND DEFENSE PROPERTIES IN GOVERNMENT AFFAIRS

Defense affairs in Law Number 23 of 2014 are described as "establishing and forming an armed force, declaring peace and war, declaring the state or parts of the country in danger, building and developing a state defense system and weapons, establishing policies for conscription, defending the state for every citizen, and so on "

In Article 67 letter f of the Regional Government Law it is explained that regions and deputy regional heads have the obligation to carry out national strategic programs. Which this program aims to maintain security and resilience in order to maintain the improvement of people's welfare. within the conceptual framework of national resilience is an engine that integrates aspects of national life. This is done by collaborating with all layers of various levels of life to enable the nation's resilience (Dirwan, 2011). Based on this concept which involves various layers of society in various aspects of life, then the *Trigarta* and *Pancagatra* system is formulated (Dephan, 1998). *Trigarta* consists of three natural aspects and *Pancagarta* consists of five social aspects. These eight aspects are then reviewed to measure the resilience of a country.

Regarding the *Trigatra*, the natural aspects contained in it are inherent aspects that cannot be changed or manipulated. *Trigatra* aspect is relatively fixed such as geography, natural resources, and population. Geography as an aspect of the first *Trigatra* provides a visualization of the character of a specific region. Geographical aspects encompass in and out geography. The internal aspect visualizes the spatial layout, geographical features, and geographical features of an area. Meanwhile, the natural resources aspect covers the natural resources and potentials that are within the scope of space, up to the earth's surface (including the atmosphere). This natural wealth is divided into animal, vegetable, soil, minerals in the soil such as coal, gold,

nickel, and others, air such as sunlight and oxygen and others, energy in the form of gas, as well as water, water, and sea flows. Meanwhile, the population aspect includes humans who occupy certain areas. Population problems are generally associated with the economy, security, distribution, and development.

Next is *Pancagatra* which is a social aspect in the resilience of a country. This social aspect is dynamic, which includes: first, ideology, namely the philosophy of the nation as the foundation of the life of the nation and state of a social community. This philosophy is an ideal that the country aims to aim at. It is a set of principles that form the basis of direction for achieving the ideals of a country in a concurrent manner. It should be noted that the endurance of a country's ideology is very dependent on the flow of values in it. Can ideology fulfill, guarantee, and respect the aspirations and needs of the people broadly and fundamentally? As the nation's ideology, Pancasila still needs instruments so that it can always be in line with new emerging values and aspirations.

Second, political resilience which discusses the strength and power of a centralized state. The political life of a country is very much determined by two crucial sectors, namely the government and non-government sectors. The non-governmental sect is a political infrastructure which has a function as a connector for the people's aspirations in the form of demands, attitudes, desires and others. Meanwhile, the government sector is positioned as a political superstructure that makes policies, determines policy directions, and articulates non-governmental aspirations in its policies. the stability of political resilience is very dependent on the synergy of the two sectors.

Third, economic resilience. It is an effort made by Nefara to minimize the economic gap between rich and poor. This happens because economic democracy has not been fully implemented. Economic stability is carried out by leveling the gaps in various industrial sectors, regions and groups and individuals. This is because economic resilience will bring stability to defense and security in a country. Fourth, is socio-cultural resilience. Socio-cultural resilience is reflected in the quality of human resources in terms of education level and work ethic, which are currently considered relatively low. Another problem in socio-cultural resilience is the low level of control of science and technology by Indonesian resources. Whereas ideally, diversity in Indonesia can be used as an effort to increase knowledge. Weak elements of culture and the social environment can greatly affect the quality of national resilience as a whole because no matter how good the system is if it is not accompanied by the quality of human resources it will be a mere waste.

Fifth, namely defense and security. The crucial problem in this aspect is the valley of state defense which should be actualized in SISHANKAMRATA. Weak payments create instability in this area. Therefore, appreciation is considered capable of contributing to the strength of national defense. In essence, all of the above aspects have struggled to strengthen the state of resilience in Indonesia. People's aspirations are very important to be heard, especially in democracy. Protection of individual rights is a catalyst for the establishment of a strong state resilience and security. The

feasibility of living is still a big scourge in Indonesia. Lack of fulfillment of these basic things can be a potential split both horizontally and vertically. Moreover, the state has used people's land by exploiting its geographical resources. This becomes unfair if the state is negligent or even negligent in fulfilling the most basic needs of its citizens.

State security and security cannot be carried out by using violence or even killing in order to create fear in the community. The democratization efforts in Indonesia must not be hurt by the ambition of creating false security. The country cannot be said to be safe just because the crime statistics are decreasing, a massive overhaul of the system is needed. For what good is the serenity that lies amidst the fear of the rifle. Efforts to strengthen national resilience must emerge from the human rights paradigm by means of: security stability must depart from the roots of the supremacy of law and human rights; second, to take preventive measures against subversion efforts from various parties which are very likely to occur considering Indonesia's vast territory; third, an adequate budget for military spending such as defense equipment in order to be able to improve performance in maintaining national security and defense; fourth, is to utilize national resources in carrying out development without neglecting environmental sustainability (Sudarmanto & Sudibyakto, 2011).

This defense strategy prohibits Indonesia from going to war unless attacked, and therefore Indonesia desperately needs strength in the form of synergy of all elements of society (Suryohadiprojo, 2005). In the framework of this defense strategy, it is necessary to formulate a policy containing the vision, mission and strategy of a concurrent defense that is universal in the country for a period of five and ten years. By knowing the characteristics of defense and security which are also amplified in SISHANKAMRATA as a universal defense model, we will find out how many regions must take part and what is the ideal form of synergy between the central government as the owner of defense and security authority, regional government as a vertical institution that is only can run a business if given the delegation of authority by the center, and civil society as an element that cannot be separated. SISHANKAMRATA components include trained people, ABTRI, community protection components, natural and natural resources, and integrated and comprehensive infrastructure.

The threat to defense and security does not only come from threats with a militaristic nature. As mentioned earlier, another threat that cannot be separated from regional development is non-military threats. as previously mentioned earlier that threats to security and defense do not only threaten something related to the military. It is solely on the basis of this phenomenon that the meaning of security and defense is expanded. The main actors of defense issues are no longer the central government and military issues alone. However, it is increasingly penetrating into other sectors such as social, cultural, economic, political and environmental. In the discovery of this phenomenon, the state is not used as the main actor of defense.

The phenomenon of the expansion of the meaning of defense and security has a consequence, that in order to establish security, it is necessary to have subjects and objects that are close to the people and grounded. This means that if the state really

wants to establish a security and defense, it must also include individuals or community groups as actors. The concept fits — what I previously described as the Copenhagen school of thought. This is because non-military security is currently increasing and hindering the rate of regional growth. Of course, the inhibition of the rate of regional growth will have a negative impact and this can seriously cause democratization to slowly retreat. Instead, democratization is an effort of reform. It cannot be done. It is necessary to remember that the formation of welfare is not only seen from one point of view, namely the economic aspect, but also cannot be separated from the aspects of national defense and security. This multi-dimensional approach will provide solutions and preventive policies that are more comprehensive and still accommodating.

Moreover, at present there are many aspects that can weaken Regional Development such as aspects of the social environment of juvenile delinquency, identity politics, which threaten national integration and can lead to disintegration. Ryamizard Ryacudu stated that threats to non-military defense manifested in 8 forms in terms of state defense or S*ishankamrata*, namely: 1) cyber-attacks; 2) terrorism; 3) separatism; 4) violation of border sovereignty; 5) cultural infiltration; 6) infectious diseases; 7) natural disasters; and 8) drugs (Kompas, 2016).

Even worse, these non-military threats actually come from within the country and are perpetrated by Indonesian citizens. Although there are cases where non-military threats come from non-Indonesian citizens (WNA). The impact of this non-military defense attack will be especially damaging in all aspects, be it ideology, economy, politics, culture, social security, and of course defense. Therefore, it is necessary to have a mechanism to defend national defense. It is carried out by emphasizing defense values that are not only militaristic in view but also defense values from a non-military aspect. Emphasizing the military aspect to maintain the *status quo* of national defense is not an abstract thing. Of course, it is understood that the task of maintaining national integration and warding off threats from outside is not merely the task of the army or the police. All people have the obligation to defend the state, to contribute to maintaining the stability of national defense through non-military aspects. Because it is very close to the social dynamics of society. The community is very close to juvenile delinquency, narcotics, prostitution, to become players in identity politics.

Therefore, it is hoped that through SISHANKAMRATA, all levels of society work to fight against efforts to undermine national defense, both through military and non-military aspects, as explained by the Ministry of Defense of the Republic of Indonesia. This is because the obligation to maintain defense and security is not solely a military task. In this effort to destroy security, the war of interests, ideology and capability has become a milestone. The actors who play are often not seen carrying rifles or wearing camouflage uniforms. Actors in the demolition of national defense currently play more behind the scenes and slowly but surely use their various resources to destroy the defense of a country (Thornton, 2007).

III. ASSISTANCE TASKS AS A FRAMEWORK FOR REGULATING DEFENSE AND SECURITY OF THE UNIVERSAL PEOPLE BY THE LOCAL GOVERNMENT

The involvement of local governments is solely for the purpose of synergies to be carried out in a structured, orderly, planned, controlled manner and is actually carried out in accordance with legal limits based on the principle of limiting authority determined by the 1945 Constitution of the Republic of Indonesia. The change from an authoritarian regime to a more democratic one has certain serious consequences. This shift in political practice is due to the free will of the people because naturally humans refuse to be restrained. People who live a life under state repression will tend to harbor anger and one day like a time bomb will explode. The uncontrolled explosion caused many impacts such as vulnerability in the economy, politics, social, security and defense. A country with a new system that is still weak will tend to be aggressive in maintaining its integrity (Mansfield & Snyder, 1995). Therefore, it can be imagined that with its geographic breadth and long coastline amidst democratization efforts, Indonesia is experiencing an astonishing and busy transition. Fears of external political attack are very likely to occur. The characteristics of a country's regime will greatly affect the resilience and security of the country, the more democratic it is, the less threat it poses (Lynn-Jones, 1998).

So what about Indonesia? Has Indonesia reached the point of mature democratization? With Indonesia's defensive defense strategy coupled with weak synergy, the current democratization which is predicted to be the most ideal system still looks half-hearted. The region has a strategic location in order to coordinate the defense and security sector. This section will discuss regional defense strategies (Mujono & Arnawi, 2011).

Empowerment of the defense area is carried out by the Department of Defense, which is carried out by each Regional Command. This task is carried out by the Indonesian Army. In order to reach the parameters of a strong state defense, the state has absolutely the authority to use all elements of the state with the condition that it considers the rights of the people as stated in the Law on State Defense that "All Indonesian territories can be utilized for the development of defense capability by taking into account the rights of the people and regulations. legislation"

It is further elaborated in the same regulation that "National defense is prepared by taking into account Indonesia's geographical conditions", as an archipelagic country this means that defense arrangements must pay attention to Indonesia's geographical conditions. As discussed earlier regarding the mainland river line and so on. To reach a strong national defense parameter, the state is absolutely authorized to utilize all elements of the state. With the condition that considering people's rights.

To answer how regions can perform in national defense agreements, the author will first describe the understanding in the historical context that has existed in Indonesia. It should be noted that the SISHANKAMRATA concept is actually an old

concept that was carried out during the New Order era. However, at that time the implementation of SISHANKAMRATA was not effective. Because the state is very strong and the community is very weak, the state is in control to carry out the hegemony of national defense.

The state can force it to fulfill its will in actualizing SISHANKAMRATA. At that time there was no known democratic, transparent and open process of how SISHANKAMRATA should actually be carried out. People's criticism of the state defense mechanism becomes closed, the people are deliberately silenced by an undemocratic state. The concept of SISHANKAMRATA is only used as political jargon and has never really been implemented correctly. As a result, when the people saw the weak points of the state and then in fact the state was actually getting weaker, they felt the need to make changes, among which the most phenomenal was the implementation of reforms starting with the separation of ABRI's dual functions through TAP MPR No. 6 of 2000 followed by a revision of legislation. regarding defense which emphasizes that the TNI is a means of defense and the police are a means of security. This is actually a fundamental state effort to make the people believe that the weapons owned by the Military and Police are not intended to frighten the people and therefore it is hoped that the people will synergize for universal defense (Samego, 2015).

Due to the close relationship between defense and geographical aspects of an area, assistance from the regions is urgently needed. In the theoretical development of defense and security has another meaning deepening. Ole Weaver and Barry Buzan introduced the Copenhagen School, which stated that the security sector is currently being widened and its meaning deepened. So where does not only talk about matters relating to the military, namely positioning the state as the main actor but involving other actors such as individuals or communities. Buzan et al stated that the conservative paradigm regarding traditional defense and security must change. Currently, security and defense are no longer relevant to using a state-centric or military-centric approach, but other sectors are introduced in this theory, namely the military, environment, economy, social and politics (Buzan, 1983).

One of the five sectors above involves political, social and environmental issues, which definitely need support from local governments. This will explain why regional autonomy has a central role in being national integration in the concept of SISHANKAMRATA. The relationship between the development of regional autonomy and national integration is becoming very strong. This can be described as follows: the relationship of democracy as previously described with the tug of war of integration - disintegration is very tight. Guarding against disintegration is carried out in various ways which are wrapped in conflict management. This accurate method of conflict management is carried out through various forms including national and local reconciliation, bringing the introduction of the nation-state concept, integration efforts through nationalism, and decentralization (Yasin, 2007).

Therefore national resilience is closely related to the loyalty of the people both vertically and horizontally. What is dangerous about democratization and is rarely

realized is the tug of war between economic prosperity and territorial defense. On the one hand, massive economic development is very likely to cause gaps that make people dissatisfied with government performance and this will certainly affect disintegration efforts, for example what happened in Aceh Province (Sholeh, et.al., 2016).

Because the disintegration effort comes from the regions, it becomes logical that the paradigm of "centering" on defense and security affairs should be shifted. Conflict management that has occurred over disintegration efforts in Indonesia has always been clashed with national interests that use violence instead of dialogical efforts. For example, we see military operations by killing people who are considered separatist. Whereas disintegration problems arise because of regional dissatisfaction with the central performance, especially in the realm of welfare, so the approach that must be taken is to understand that the threat of disintegration comes not from autonomous regions but from the center (Fernanda, 2002).

Consequent decentralization was first introduced in 1999 through the first Regional Government Law - establishing a legitimate precondition by which regions can autonomously utilize their regional resources. One of the great ambitions of decentralization has a logical line, that is, it is hoped that with decentralization there will be even development, this will bring regions that have their own specialties, are stronger and improve the standard of living of people in the regions (Hariani RS, 2018). This increase in living standards should narrow social jealousy due to inequality and end the maintenance of Indonesia's unity and integrity (Syawie, 2011). Because inequality creates jealousy and seeds of hatred are treated unfairly (Sukmana, 2005). Resilience in the regions can be measured through the realization of economic stability, security, and internalization of state defense within the heart of the people. To realize this, it is necessary to have an integrated system that works as a supervisor, evaluator, and continuous development of conditions of resilience in the regions.

The intensity of regional autonomy that he has promoted has made the empowerment of regional capabilities more optimal. Regional geographic, social and political aspects are at the forefront of the implementation of resilience and security through SISHANKAMRATA. Then what is the relationship between the level of resilience and regional security with the principle of co-administration as stated in the title of this section. We have agreed that even though defense and security are primarily central affairs, in an effort to boost prosperity and democratization, synergy is needed by all levels of state society. The author argues that this will can be amplified through the principle of assistance tasks in the framework of regional decentralization.

Theoretically, according to Koesomaatmadja, the assistance task or *zelfbestuur* is a mechanism that can be carried out by the central government to request assistance from local government units to carry out certain household affairs which are actually the affairs of the central government (Koswara, 1999). *Zelfbestuur* in English is known as self-government, which means that all government activities are carried out by representatives given the delegation. In the task of assistance, functions carried out by the local government are still the matter of the central government and do not mean

that they are transferred to regional government affairs. However, the regions can fully carry out these assigned tasks (Wasistiono, et.al., 2006). So in this principle, if the central government asks for assistance from the regional government, this does not mean that defense affairs are a concurrent affair of the regional government.

In Dutch legal regulations regarding assistance tasks, they are categorized into two parts, namely mechanical and facultative ones. In the task of mechanical assistance, the center provides in detail the procedures for the implementation of the tasks being assigned. Furthermore, in the central facultative assistance task, it gives wider freedom to the regions to carry out the assigned tasks (Koswara, 1993). Then it should be noted that through this *zelfbestuur* mechanism, the Center provides the regions with the financing needed to implement SISHANKAMRATA. Joeniarto argues that the task of assistance is a way of exercising the absolute authority of the central government to make it more effective and efficient (Joeniarto, 1979). The striking difference between co-administration and deconcentration is that deconcentration means that the central government provides central representatives in the regions to carry out a particular function. This is different from the assistance task, because in the assistance task where when the Center uses the assistance task in an affair to the regions, it is not a representative from the center - but the regional government. The task of assistance is different from decentralization, because in decentralization the regional government carries out functions that are really its affairs concurrently. however, the assistance task carried out is not a concurrent affair for a particular region. In short, the implementation of the assistance task remains the matter of the central government, but it is the regional government that executes the matter.

The extent to which local governments can execute SISHANKAMRATA must be determined by the Central Government. for example, as an example that has been implemented in the city of Bandung. The city of Bandung has the authority to coordinate with the Bandung Kodim and has institutional relationships and commitments. This begins with efforts to even out welfare and development both nationally and regionally. The problems that arise in the city of Bandung which are considered to be hindering the pace of national development are: due to a lack of understanding of the orientation of development; the existence of sectoral barriers that hinder the efficiency and effectiveness of the actualization of urban development affairs in the city of Bandung; then this led to miscoordination between the regions and the center regarding the development of the city of Bandung.

For this reason, the Department of Defense, which has the authority to determine general policies in national defense, then embraced the Bandung City government to coordinate all parties in the development of the city of Bandung. It is hoped that this can empower all resources in the city of Bandung. If visualized, the relationship between the Ministry of Defense and the city of Bandung is a coordination relationship where the city government of Bandung will provide a report to the Ministry of Defense. In this framework, both the Bandung City Government and the Department of Defense have the same convenience. Because as we know that

in carrying out its duties the Department of Defense does not have a Regional Office. For example, the Ministry of Religious Affairs has regional offices in the regions, namely the offices of religious affairs in each district and city. It can be used to clean up the coordination relationship between Department of Defence and the City Government. This form of utilizing the Bandung City Government to establish coordination regarding defense and security in the region is an efficient step in the realm of defense and security (Armawi, 2011).

In practice, the work program between the City of Bandung and the Kodim RTRW of Bandung is carried out in five stages, namely: first, the initiation of the coordinating actor in this case is the Indonesian Ministry of Defense; second, compile an activity plan previously agreed upon between the city government and the regional Kodim; third, prepare technical plans and technical operational and administrative implementation instructions; fourth; fifth, implementing plans in the field based on mutual agreement; and sixth, supervising to evaluate the performance of the coordination team on work programs that have been implemented and will be implemented later.

The coordination policy covers three main aspects for the success of the SISHANKAMRATA coordination work program. Namely policies in geographical aspects, policies in demographic aspects, and policies in aspects of social conditions. Policies in the geographic aspect mean that coordination must align the Kodim with the city's RTRW in order to balance the interests of defense and security welfare in the area of each city. Then next is the policy in the demographic aspect which means preparing reserve and supporting components. Then finally in the aspect of social conditions, it means that this coordination must be implemented in a work program that is close to people's lives and touches the economy of urban communities in Indonesia, community participation is needed in order to empower the defense area in the city.

The pattern of giving assistance from the central government of the city government has been determined theoretically. first, the central government will assign certain tasks to the Regent / Mayor. Furthermore, from the regent / mayor the order is handed over to the regional secretary. Then the regional secretary can directly submit to the relevant agency or other technical institutions, or first submit it to Bappeda to then be transferred to the related agency. Next is implementation by technical institutions. In carrying out the task of assisting the regent or mayor in coordination with the governor and the local government offices, it can coordinate with Bappeda. The reporting line is carried out by the office then reports to the regional secretary and by the regional secretary the report is submitted to the regent or mayor. Then, in the final stage, the regent or mayor reports it to the Central Government.

IV. JURIDICAL BASIS OF REGIONAL GOVERNMENT AUTHORITY IN THE FIELD OF NATIONAL DEFENSE AND SECURITY

The fall of the New Order paved the way for the birth of Law Number 22 Year 1999 concerning Regional Government which completely changed the relationship between the center and the regions. Regions have the authority to determine the course of government, except for foreign policy, defense and security, justice, monetary and fiscal, religion, and authority in other fields. The latest legal basis regarding regional autonomy emerged in 2014 with the passing of Law Number 23 of 2014 concerning Regional Government. Through this law it is stated that the highest responsibility for the administration of government remains with the central government. So that monitoring, empowerment, supervision and control will still be carried out by the central government, with the aim that regions can carry out maximum autonomy (F Isnaeni, 2020).

As discussed comprehensively in the first sub-section of this article, regional autonomy itself is a condition in which regions have the authority to be based on legal provisions to make optimal use of everything they have. This authority is used as a tool to exploit the potential, make the people welfare, and maintain social, cultural and regional economic stability (Hamid, 2015).

The current regional autonomy regulatory policy has an impact on the management of various kinds of resources and results in changes in the functions of existing institutions in the regions (Rodiyah, 2012). Article 22 of Law Number 32 Year 2004 concerning Regional Autonomy states that "in implementing autonomy, the regions have the obligation to protect the community, maintain national unity, unity and harmony, as well as the integrity of the Unitary State of the Republic of Indonesia". The provisions of Article 22 can actually be interpreted as the responsibility of local governments to participate in the development of national defense. Then Article 27 paragraph (2) letter e of Law Number 23 Year 2014 concerning Regional Government confirms the obligation of local governments to "participate in defending state sovereignty". However, it seems that the authority to participate in national defense is only owned specifically by local governments that have certain specialties, for example, areas directly adjacent to neighboring countries. In addition, local governments also have limitations when compared to the policies that have been taken by the Ministry of Defense and the Indonesian's Army on the posture of national defense development, this is because local governments do not have the power to own and use armed forces.

However, considering that threats to state sovereignty do not only come from armed invasion of other countries, but have far developed into an asymmetrical threat, the responsibility of local governments in providing protection to citizens is an important point in itself. The asymmetrical threat that began to spread after 9/11 was a non-military threat targeting the characteristics of a country's conflict and the opponents it faced could take the form of state, non-state, or hybrid actors. When

viewed from the design, asymmetric threats have three aspects, namely: 1). Asymmetrical interests; 2). Ideological asymmetry; and 3). Capability asymmetry. So it can be concluded that the asymmetric war tells the story of the war between actors who have asymmetric ideologies, capabilities, and interests (Alfajri, et.al., 2019). Today, the threat of asymmetry still dwells on the problems of terrorism, separatism, riots, and provocations of racism, which if not addressed wisely will seriously disturb the authority and sovereignty of the state. These security disturbances occurred almost evenly throughout Indonesia. The role of local government control in dealing with this problem is very important. Therefore, the position of an institution that is fully responsible for defense and security, both the military and the police, requires local governments to coordinate. In this case, the President also gave orders to the Governor to always create and maintain security in the regions (Presidential Instruction Number 2 of 2013 concerning Handling Domestic Disturbances).

Moreover, if you look further, the asymmetric threats that are non-military at this time are far more dangerous than just a military aggression of a country which is carried out in secret and ends up having such a massive impact. Strong cooperation between the central and regional governments in forming synergy to become a universal defense benchmark in order to anticipate all threats to the life of the state and nation (Singh, 2010).

V. CONTRIBUTION OF REGIONAL AUTONOMY IN MAINTAINING NATIONAL DEFENSE AND SECURITY

Indonesia's massive and strategic landscape and rich natural capital are opportunities to become a great nation and, at the same time, have great potential to jeopardize the sovereignty of the Republic of Indonesia. The threats that may occur in all regions in Indonesia can be multidimensional, ranging from religious, financial, environmental, social and cultural issues or aspects of protection and security (Panjaitan, 2017). If referring to the provisions of Article 1 number 2 of Law Number 3 of 2002 it is explained that "the universal defense system which involves all citizens, territories and other national resources, and is prepared early by the government and is carried out in a total, integrated, directed and continuous manner to uphold national sovereignty, territorial integrity, and the safety of all nations from all threats. " It seems that when juxtaposed with the old definition of SISHANKAMRATA version of Law Number 20 Year 1982 regarding Basic Provisions of National Defense, it still has a similarity where in the old Law, SISHANKAMRATA is explained as "the order of all defense and security forces of the State which consists of basic components of trained people, Indonesian's Army's main components, special components of community protection, and supporting components of natural resources, artificial resources, and national infrastructure, as a whole, integrated and directed "(Article 1 Number 5 UU Hankam). So that the principles which are the basis for determining the direction of defense political policy in Indonesia have not changed drastically even though the

1945 Constitution has been amended several times and the National Police has left the Indonesian's Army because of differences in duties and authority.

In relation to the context of this discussion, if you only rely on the Indonesian's Army as the sole force of national defense without the support of other elements, it is certain that Indonesia's defense capability will look very fragile.

The fragility can trigger the nation's self-esteem to collapse to its lowest point and be harassed by neighboring countries. Even more so if we reflect on the lack of budget provided by the state for military power it is difficult to expect the INDONESIAN'S ARMY to carry out its duties, principles and functions optimally. There is a need for support from all citizens, including the resources they have to use for the sake of national defense and security. In the context of national defense, more specifically in the effort to deal with non-military threats, requires commitment and involvement as well as the obligation of all citizens to deal with each threat that is present in accordance with current laws and regulations.

The position of the regional government has an important correlation to the national defense system because although the authority in the defense sector is in the hands of the central government, its resources are in the regions. Local governments have the authority to utilize national resources in an effort to strengthen national security priorities. Management of national resources in the regions is intended to build a universal defense system. Starting from preparing human resources through fostering awareness of the defense of the recorded state and the issuance of supporting components and the formation of a state reserve component that is ready to be used to strengthen the main components (Setiajid, 2019).

Regions can also be allowed to be access to non-military threats that have a multidimensional nature. Therefore, it is important to develop non-military defense postures in areas that have capacities for early vigilance, national defense, technology, social, morals (Kementerian Pertahanan, 2017). One example that can be used as a reference for positive synergy between the central government and regional governments in the field of defense and security is about how the East Kutai District Government is contributing and participating in efforts to increase defense and security in the eastern part of Kalimantan. Among them helped the construction of the Joint Training Command Headquarters (Makolatgab) along with tens of thousands of hectares of land to be used as a joint military training location. Then build Lanal Mako and Kodim 0909 Sangatta, Kutim Regional Police, and other FKPD offices (coordinating forums for regional leaders). Supporting the improvement of regional waters security by patrol boats operated by the Navy and other matters (Tribun Kaltim, 2015). Or as the South Manokwari District Government gave land and building grants for use by the Kasuari Military Region Command (Kodam) XVIII as the Military District Master Regiment office (Kompas, 2020).

From the two examples above it can be concluded that to support the resilience of the Unitary Republic of Indonesia requires good coordination, synergy, and synchronization between the regional government and the agencies that overshadow national defense. There are three elements that can be utilized by local

governments to support the creation of a strong national defense. First, local government policies that complement and promote the development of national resilience. Any initiative taken by the local government must not conflict with the direction of the central government. Second, local governments must make appropriate planning related to the allocation of human resources and facilities for the purpose of national defense. Third, develop the knowledge and character and interests of the community, specifically to support national defense. In addition, local governments must always be able to ensure the welfare of their regions. Local governments must be able to function as a driving force for all entities to improve and fight for the welfare of their citizens (Kompas, 2020; Tribun Kaltim, 2020).

CONCLUSION

This article highlighted and concluded that the implementation of regional autonomy if it is not managed effectively and without adequate support from all stakeholders of the national power will be able to generate negative excesses, including: demands for regional expansion without the support of comprehensive studies, vertical conflicts, which lead to separatist movements. In order for the benefits of regional autonomy to have a positive effect on citizens, it is necessary to build public awareness regarding the national paradigm and supporting elements of the Republic of Indonesia starting from the 1945 Constitution, Pancasila, Unity in Diversity, National Insight, and Indonesian National Resilience. must be given the opportunity to channel their aspirations properly as long as they do not violate the law. Apart from that, reforming legislation in the field of national defense must be a priority and remain sustainable. This is a commitment that must be held seriously by leaders as an attitude to uphold the principles of good governance in the realm of administration and for the country's democratization process. So far, the idea of the Defense of the People of the Universe (SISHANKAMRATA) cannot be implemented as a whole, apart from the problem of budget supply, also because basically, the government, especially the military, is concerned that the military-capable citizens will use their skills to oppose the government.

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Journal of Law and Legal Reform (2021), **2(1)**, *pp.* 39-50.
DOI: **https://doi.org/10.15294/jllr.v2i1.42723** ISSN (Print) 2715-0941, ISSN (Online) 2715-0968

RESEARCH ARTICLE

FOREST FIRES AND LAW ENFORCEMENT: THE CAPTURE OF INDONESIAN CONTEMPORARY CONDITION

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CITED AS
Ryadi, A., & Masyhar, A. (2021). Forest Fires and Law Enforcement: The Capture of Indonesian Contemporary Condition. *Journal of Law and Legal Reform*, *2*(1), 39-50. https://doi.org/10.15294/jllr.v2i1.42723

ABSTRACT

Forest is an invaluable natural resource because it contains biodiversity such as timber and non-timber forest products, water control, flood and erosion prevention and soil fertility, protection of biological nature for the benefit of science, culture, recreation, tourism and so on. however, recently forests in Indonesia are experiencing degradation in the form of forest fires. The government has also issued several regulations related to forest destruction. Among others, Law No. 41/1999 on Forestry. Article 49 of the Forestry Law states that rights or permit holders are responsible for forest fires in their working areas. However, unfortunately the law does not explain the criminal provisions regarding Article 49.

Keywords: *Forest Fire; Forestry Law; UUPPLH; Law Enforcement*

Submitted: 27 September 2020, Revised: 10 November 2020, Accepted: 15 December 2020

TABLE OF CONTENTS

INTRODUCTION

The 1945 Constitution of the Republic of Indonesia states that a good and healthy environment is a human right and constitutional right for every Indonesian citizen. Therefore, the State, government and all stakeholders are obliged to protect and manage the environment in implementing sustainable development so that the Indonesian environment can continue to be the source and life support for the Indonesian people and other living creatures.

A good and healthy environment is very important in supporting human survival. In addition to everyone having the right to a good and healthy environment, they also have the obligation to protect and manage the environment. A good and healthy living environment is not only a right, but within it must also have the responsibility to protect and protect and manage or preserve it so that it is getting better and healthier every day and in it a good and healthy society is also created. Therefore, it is clear that the environment is an important thing that should be maintained, protected, managed and preserved, one of which is the forest (Sri, 2012: 15).

Forest is an invaluable natural resource because it contains biological diversity such as timber and non-timber forest products, water management, flood and erosion prevention as well as soil fertility, protection of biological nature for the benefit of science, culture, recreation, tourism and so on. The importance of these resources is increasing because forests are a source of livelihood for many people. Law Number 41 of 1999 concerning Forestry, is contained in Article 1 point 2 which reads:

> "Forest is a unified system in the form of a stretch of land containing biological natural resources dominated by trees in their natural environment, which cannot be separated from one another".

However, recently forests in Indonesia have been degraded in the form of forest fires. Forest fires are a form of disturbance that is increasingly occurring. The negative impacts caused by forest fires are quite large, including ecological damage, decreased biodiversity, decreased economic value of forests and land productivity, micro and global climate change, and the smoke disrupts public health and disrupts transportation both land, river, lake, sea, and air. More than three months of smog hit nearly two-thirds of Indonesia's territory due to land and forest fires that occurred in parts of Sumatra and Kalimantan.

The haze disaster has damaged the air quality to become unhealthy and even dangerous. As a result of this haze disaster, the impact was not only felt in the territory of Indonesia, but also the impact was also felt by neighboring countries such as Singapore, Malaysia, and Brunei Darussalam. Of course, the problem of this haze disaster is a serious disaster, so it needs serious handling as well in terms of stopping the smog disaster and in terms of law enforcement.

Companies that should have had a positive impact on society and the state have turned into actors that directly or indirectly harm society and the state. In addition to their negative impacts on forest ecosystem functions, forest and land fires have caused loss of lives, property, health problems, and further affected national and regional economies. Another negative impact is the effect of forest fires on increasing global warming.

In other words, law enforcement against perpetrators of forest and land fires is very necessary, in addition to providing a deterrent effect on perpetrators as well as to compensate for any losses that arise from burning forests and land. The PPLH Law recognizes three law enforcement mechanisms against perpetrators of pollution and environmental destruction, namely the administrative sanctions approach, the civil sanctions approach and the criminal sanctions approach. However, so far, law enforcement using the Forestry Law, the Plantation Law and also the most common with the PPLH Law, apart from not giving a deterrent effect nor fulfilling a sense of justice. For further discussion, the discussion section will discuss how to take legal action against perpetrators of land and forest fires using the approach of the Forestry Law, the Plantation Law and the PPLH Law (Irwandi, 2016: 9).

METHOD

The type of research in this writing is Normative (literature) which comes from statutory regulations, books, official documents, and research results which are solely

used to obtain complete data as the basis for writing this scientific paper. This research is descriptive analytical, which reveals the laws and regulations relating to legal theories as the object of research. The data collection technique is done by means of library research (Library Research). This method is carried out by conducting research on various sources of written reading from scholars such as theoretical books on law as well as lecture materials and laws and regulations regarding abortion by rape victims. In addition, in this writing is via the internet, then Indonesian, legal dictionaries and encyclopedias.

FOREST PROTECTION IN INDONESIAN LEGAL SYSTEM

I. FOREST PROTECTION UNDER LAW NUMBER 41 OF 1999

In articles 46 and 47 of Law No. 41 of 1999 explained that the implementation of forest protection and nature conservation aims to protect forests, forest areas and their environment, so that the protection function, conservation function, and production function can be achieved optimally and sustainably. Protection of forests and forest areas is an effort to:

a. Prevent and limit the destruction of forests, forest areas and forest products caused by human actions, livestock, fires, natural forces, pests and diseases.
b. maintain and protect the rights of the state, communities and individuals over forests, forest areas, forest products, investments and instruments related to forest management.

The prohibition against forest destruction is listed in article 50:

a. Everyone is prohibited from destroying forest protection infrastructure and facilities.
b. Everyone who is granted an area utilization business permit, environmental service utilization business permit, timber and non-timber forest product utilization business permit, and timber and non-timber forest product collection permit, is prohibited from engaging in activities that cause forest damage.
c. Everyone is prohibited from:
    1. Working and or using and or occupying forest areas illegally.
    2. Exploring forest areas.
    3. Logging trees in forest areas with a radius or distance of up to:
        a) 500 (five hundred) meters from the edge of a reservoir or lake.
        b) 200 (two hundred) meters from the edge of the springs and either side of the river in a swamp area.
        c) 100 (one hundred) meters from either side of the river bank.
        d) 50 (fifty) meters from the left and right of the river bank.
        e) 2 (two) times the depth of the ravine from the edge of the ravine.

f) 130 (one hundred and thirty) times the difference between the highest and lowest tides from the shore.

4. Burn down the forest.
5. Cut trees or harvest or collect forest products in the forest without having the right or permission from an authorized official.
6. Receiving, buying or selling, accepting exchange, receiving custody, keeping or possessing forest products which are known or reasonably suspected to have originated from forest areas that were illegally taken or collected.
7. Conducting general investigation or exploration or exploitation of mining materials in forest areas, without the Minister's permission.
8. Transporting, controlling, or owning forest products which are not accompanied by a certificate of legality of forest products.
9. Herding livestock in forest areas not specifically designated for this purpose by an authorized official.
10. Carrying heavy equipment and or other tools that are customary or reasonably suspected to be used to transport forest products in forest areas, without the permission of the authorized official.
11. Bringing tools commonly used to cut, cut, or chop trees in forest areas without the permission of the authorized official.
12. Dispose of objects that can cause fire and damage and endanger the existence or sustainability of forest functions into the forest area.
13. Remove, carry, and transport wild plants and animals that are not protected by law originating from forest areas without the permission of the authorized official.

d. Provisions regarding removing, carrying and or transporting protected plants and or animals shall be regulated in accordance with the prevailing laws and regulations.

In order to guarantee the implementation of forest protection, certain forestry officials in accordance with the nature of their work are given special police powers, namely:

a. Conducting patrols / tracing in the forest area or its jurisdiction;
b. Checking documents or documents relating to the transportation of forest products within the forest area or its jurisdiction;
c. Receive reports of criminal acts involving forests, forest areas and forest products;
d. Looking for information and evidence of the occurrence of a criminal act concerning forests, forest areas and forest products;
e. In the case of being caught red-handed, it is obligatory to arrest the suspect to be submitted to the authorities; and
f. Making reports and signing reports on the occurrence of criminal acts relating to forests, forest areas and forest products.

II. LEGAL ACTION AGAINST PERPETRATORS OF FOREST BURNING IN INDONESIA ACCORDING TO THE FORESTRY LAW AND THE LAW ON ENVIRONMENTAL PROTECTION AND MANAGEMENT

Article 1 paragraph (1) of the PPLH Law states that the environment is a spatial unit with all objects, forces, conditions, and living things including humans and their behavior that affect nature itself, the continuity of life and the welfare of humans and other living creatures. Therefore, the assumption that humans are the most powerful creatures is not true.

The case of forest and land fires is proof that humans are the main actor contributing to the damage to nature that threatens the survival of life. The increasing need due to the increasing number of human population will have an impact on the efforts to have personal ownership, especially regarding the needs of the community at large. The issuance of permits for the management and use of forests and land is an economic step in order to meet the needs of many communities carried out by corporations. However, in the process of forest management and utilization starting from the pre-licensing stage, when the permit has been issued and after the permit's validity period has expired, clear boundaries are given (Arief, 2019: 11).

These limits are provided through the prevailing laws and regulations in order to minimize all forms of threats and risks to environmental pollution and destruction in order to maintain the sustainability of life and the ecosystem. However, the fact cannot be denied when the haze disaster that hit Indonesia, especially in Sumatra and Kalimantan, was contributed by large companies. With an area exposed to a vast haze disaster that exceeds national borders, of course it takes a concrete effort to end the haze disaster caused by burning land and forests. One of them is by conducting criminal law enforcement against perpetrators of forest and land burning, both individuals and companies.

As an authorized institution, the police have carried out legal proceedings against individuals and companies that perpetrate forest burning. The police action at least has shown that there is an effort to enforce the law against the perpetrators of forest and land burning. The question then arises what legal instrument will be used in prosecuting the perpetrators of forest burning when there are two laws regulating? For further information, it can be seen how the criminal provisions for perpetrators of forest and land burning are in accordance with these two laws (Hero, 2018: 5):

a. Law Number 41 of 1999 concerning Forestry

   Article 49 of the Forestry Law states that rights or permit holders are responsible for forest fires in their working areas. And Article 50 paragraph (3) letter d states that everyone is prohibited from burning the forest. But

unfortunately, the law does not explain the criminal provisions regarding Article 49. The criminal provisions as regulated in Article 50 paragraph (3) letter d are regulated in Article 78 paragraph (3) which states whoever deliberately violates the provisions referred to in Article 50 paragraph (3) letter d, is punishable by a maximum imprisonment of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah).

Meanwhile, if the perpetrator is a business entity, Article 50 paragraph (14) states that the criminal act as referred to in Article 50 paragraph (1), paragraph (2), and paragraph (3) is committed by and or on behalf of a legal entity or business entity. , the charges and criminal sanctions imposed on the management, either individually or collectively, are subject to punishment in accordance with the respective penalties plus 1/3 (one third) of the sentence imposed.

b. Law No. 32 of 2009 concerning Environmental Protection and Management

Referring to the explanation of Article 21 paragraph (3) letter c of the PPLH Law, it states that what is meant by "environmental damage related to forest and / or land fires" is the effect of changes to the environment in the form of environmental damage and / or pollution related to forest and / or land fires caused by a business and / or activity.

Although the PPLH Law specifically contains articles on burning land in Article 108 which is as follows:

> Article 108
> Anyone who burns the land as referred to in Article 69 paragraph (1) letter h, shall be sentenced to imprisonment for a minimum of 3 (three) years and a maximum of 10 (ten) years and a fine of at least IDR 3,000,000,000.00 (three billion rupiah) and a maximum of Rp.10,000,000,000.00 (ten billion rupiah).

However, if the explanation of Article 21 paragraph (3) letter c is used, then the perpetrators of forest and land burning can use Article 98 and Article 99 which are as follows:

> Article 98
> Anyone who deliberately commits an act which results in exceeding ambient air quality standards, water quality standards, seawater quality standards, or environmental damage standard criteria, will be sentenced to imprisonment for a minimum of 3 (three) years and a maximum of 10 (ten) years. and a fine of at least Rp.

3,000,000,000.00 (three billion rupiah) and a maximum of Rp. 10,000,000,000.00 (ten billion rupiah).

If the act as referred to in paragraph (1) results in a person being injured and / or a danger to human health, the punishment shall be imprisonment for a minimum of 4 (four) years and a maximum of 12 (twelve) years and a fine of at least IDR 4,000,000,000.00 (four billion rupiah) and a maximum of Rp 12,000,000,000.00 (twelve billion rupiah).

If the act as referred to in paragraph (1) results in a serious injury or death, the person shall be punished with imprisonment for a minimum of 5 (five) years and a maximum of 15 (fifteen) years and a fine of at least IDR 5,000,000,000.00 (five billion rupiahs).) and a maximum of Rp. 15,000,000,000.00 (fifteen billion rupiah).

Article 99
Anyone who due to their negligence results in exceeding ambient air quality standards, water quality standards, seawater quality standards, or environmental damage standard criteria, shall be punished with imprisonment for a minimum of 1 (one) year and a maximum of 3 (three) years and a maximum fine. a minimum of IDR 1,000,000,000.00 (one billion rupiah) and a maximum of IDR 3,000,000,000.00 (three billion rupiah).

If the act as referred to in paragraph (1) results in a person being injured and / or a danger to human health, the punishment shall be imprisonment for a minimum of 2 (two) years and a maximum of 6 (six) years and a fine of at least IDR 2,000,000,000.00 (two). billion rupiah) and a maximum of Rp. 6,000,000,000.00 (six billion rupiah).

If the act as referred to in paragraph (1) results in a person being seriously injured or dead, the person shall be punished with imprisonment for a minimum of 3 (three) years and a maximum of 9 (nine) years and a fine of at least IDR 3,000,000,000.00 (three billion rupiah) and a maximum of Rp. 9,000,000,000.00 (nine billion rupiah).

Meanwhile, if the perpetrator is a business entity or is related to work in a business entity it is regulated in Article 116 to Article 119 which is as follows:

> Article 116
> If an environmental crime is committed by, for, or on behalf of a business entity, the criminal charges and criminal sanctions are imposed on: the business entity; and / or the person giving the order to commit the criminal act or the person acting as the activity leader in the criminal act. (2) If the environmental crime as referred to in paragraph (1) is committed by a person, who is based on a work relationship or based on other relationships acting within the scope of work of a business entity, the criminal sanction is imposed on the person who gave the order or leader in the criminal act regardless of the criminal act being committed alone or together.
>
> Article 117
> If a criminal charge is filed against the order giver or the leader of the criminal act as referred to in Article 116 paragraph (1) letter b, the punishment imposed is in the form of imprisonment and a fine heavier by one third.
>
> Article 118
> For criminal acts as referred to in Article 116 paragraph (1) letter a, criminal sanctions are imposed on the business entity represented by the management authorized to represent inside and outside the court in accordance with the statutory regulations as functional actors.
>
> Article 119
> In addition to the crimes referred to in this Law, business entities may be subject to additional penalties or disciplinary measures in the form of:
> a) Deprivation of profits from a criminal act;
> b) The closure of all or part of the place of business and / or activity;
> c) Correction due to criminal acts;
> d) Obligation to do what was neglected without rights; and/or

e) Placement of the company under supervision for a maximum of 3 (three) years.

The concept of a cause-and-effect relationship in criminal law is a form of proof whether it is true that a certain action is categorized as a criminal act, either causing harm (material offense) or not causing harm (formal offense). The three laws only adhere to the teaching against material law where there is a crime when there has been a loss. This teaching is not only an obstacle in ensnaring the perpetrator because there is only a crime when an error occurs (material offense). Whereas the impact of forest and land fires is massive and crosses national borders (Fachmi. 2014: 17).

CONCLUSION

Protection of forests and forest areas is an effort to prevent and limit the destruction of forests, forest areas and forest products caused by human actions, livestock, fires, natural forces, pests and diseases. The haze disaster that hit Indonesia beyond national borders, especially in the Sumatra and Kalimantan regions, was contributed by large companies. The case of forest and land fires is proof that humans are the main actor contributing to the damage to nature that threatens the survival of life. Authors suggest that forest protection aims to obtain optimal benefits for the welfare of the entire community in an equitable manner while maintaining its sustainability. For this reason, harmony is needed between the government and the people in preserving the forest. Forestry officers and the police carry out their respective duties in accordance with the law. The community must also participate in supporting and taking actions in efforts to protect forests. Most of the forest fires that occur in Indonesia are the act of large companies and corporations. For this reason, the authorized government must be firm and immediately impose criminal sanctions against the corporation concerned.

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Quote

Humanity should not remain insensitive to the forest fire or wildfire every year. Unless we act, the loss of biodiversity and extinction of herbs, birds and animals and the pains of the trees, birds, animals and the poor is also alarming signal for the extinction of humanity itself.

Amit Ray, Nuclear Weapons Free World Peace on the Earth

Published by Postgraduate Program, Master of Laws, Faculty of Law, Universitas Negeri Semarang, Indonesia

Journal of Law and Legal Reform (2021), **2(1)**, *pp.* 51-64.
DOI: **https://doi.org/10.15294/jllr.v2i1.39041** ISSN (Print) 2715-0941, ISSN (Online) 2715-0968

REVIEW ARTICLE

How Nigeria Deals with Environmental Damages? An Environmental Legal Perspective

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CITED AS
Abila, S. (2021). How Nigeria Deals with Environmental Damages? An Environmental Legal Perspective. *Journal of Law and Legal Reform*, *2*(1), 51-64. https://doi.org/10.15294/jllr.v2i1.39041

Abstract

The paper carries out a review of the environmental problems associated with atmospheric pollution, air quality emissions and applicable control mechanisms in the detection and evaluation in the Niger Delta region of Nigeria in the light of global trends and best practices given the magnitude of gas flaring taking place in Nigeria's Niger Delta daily. This is flowing from the findings that gas flaring continues to be a major health hazard to humanity, domestic and global environment. Also considered are the Challenges facing air quality and carbon management in Nigeria and the place of the ongoing National Space Research and Development Agency (NASRDA) funded research on air quality and carbon management and the recent release of the twin regulations of: the Flare Gas (Prevention Of Waste And Pollution) Regulations, 2018 and the Nigerian Gas Flare Commercialization Programme (NGFCP) by the Federal Government Of Nigeria aimed at stopping gas flares in the year, 2020. The paper adopts an admixture of the historical, comparative, the law and development and empirical approaches in appropriate cases.

Keywords: *Reappraisal; Environmental Problems; Applicable Control Mechanisms, Detection, Evaluation; The Flare Gas (Prevention of Waste and Pollution) Regulations*

Submitted: 15 June 2020, Revised: 10 September 2020, Accepted: 11 November 2020

TABLE OF CONTENTS

BACKGROUND

According to the United Nations Environmental Programme of Ogoni land, "Nigeria is one of Africa's largest countries and it's most populous [and] situated in West Africa. The country covers an area of 923,768 km2, with an estimated 4,049 km of land boundaries, shared with Cameroon in the east, the Republic of Niger in the north, Chad in the north-east and Benin in the west. In the south, Nigeria's 853-km long coastline opens onto the Atlantic Ocean. The southern lowlands merge into the central hills and plateaus, with mountains in the south-east and plains in the north. The country's largest river is the Niger, which joins with the Benue River to form a confluence at Lokoja. The Niger Delta, located in the southernmost part of Nigeria and covering an area of some 70,000 km2, is the largest river delta in Africa and the third largest in the world.... From a coastal belt of swamps, stretching northwards the land becomes a continuous rainforest which gradually merges with woodland and savanna grasslands in central Nigeria. The swamp, forest and woodland areas occupy about 12 per cent of the delta's land surface" (UNEP 2011; UNDP 2006; Moffat & Linden 1995; ERML 1997; Abam 2001).

INTRODUCTION

It is no longer news that gas flaring and other sources if air pollution constitute a veritable hazards on human beings, plants and wildlife as same cause acid rain which acidifies the lakes, streams, damages, crops and vegetation. Atmospheric pollution have also being discovered to reduce farm yields, harms human health, lives and livelihood;

increases the risk of respiratory illnesses, asthma and cancer and often causes chronic bronchitis, decrease lung function, blindness, impotency, miscarriages and premature deaths. Gas flares have also being established to impoverished entire human populations (Abila, 2018).

A proper starting point in attempting to define the term 'pollution' is to consider a definition offered by the European Union 1996 Council Directive on Integrated Pollution Prevention and Control (IPPC) which defined concept as:

> "The direct or indirect introduction as a result of human activity, of substances, vibrations, heat or noise into the air, water or land which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment" (IPPC, 1996).

There is no gainsaying the fact that both organic, inorganic and other air pollutants have been established to bring about injurious healthiness and ecological impacts ranging from untimely demises, breathing disorders. Recent scientific findings clearly show that deaths caused by air pollution around the globe has risen to an estimate of about 2 million persons yearly (WHO, 2002). Several other negative impacts of air pollution include loss of plant and animal life, soil and water toxicities.

It is worrisome that, in modern day Nigeria studies on air quality valuation studies appear concentrated almost exclusively in cities in Nigeria (probably because of the fact that it is in the cities that manufacturing processes, domestic undertakings, road traffic overcrowding etc., form major causes of air pollution (Taiwo, 2005; Ajao & Anurigwo, 2002; Baumbach, Vogt, Hein, Oluwole, Ogunsola, Olanivi, & Akeredolu, 1995) and not in the rural areas where majority of the citizens of Nigeria are concentrated. Additionally, majority of the said studies have been undertaken independently and so bereft of any systematic measurements of air quality by the Federal Government of Nigeria or any of its agencies (Taiwo, 2005). It has been demonstrated through several evaluations conducted on manufacturing estates, selected landfill-sites and heavy stream of traffic locations in and around Lagos, for example, showed that typical "concentrations of carbon monoxide (CO) in heavy traffic stations was 49.32ppm, while at industrial estates showed 36.75ppm and at dumpsites, 10.76ppm. Sulphur dioxide (SO2) averages were 0.166ppm at the traffic stations, while 0.670ppm levels were detected at both industrial and dumpsites. The NOX concentrations were 0.220ppm at the dumpsites and 0.333ppm at both industrial and traffic stations" (Taiwo, 2005). It must be appreciated that the World Health Organization (WHO) ideals for CO, SO2 and NOx are 5ppm for 8-hour regular, 0.45ppm for 24-hour regular and 0.25ppm for 24-hour regular correspondingly (World Bank, 1995). The above results give the clear impression that air quality difficulties arising from waste dumping in Nigeria, manufacturing and domestic operations and conveyance is prevalent. The same is true of the prevalence of gas flaring in Nigeria

(Isuwa, 2008) it is a well-known fact, for example, that air pollution in relationship with oil and gas extraction occurs, in different ways, which include: blowouts, geothermal steam and gas flaring. Different types of air pollution in relation to oil and gas extractions namely: blowout, geothermal steam along with other impacts of gas flaring and its impacts on the atmosphere in the Niger Delta region in Nigeria, Africa and the world as a whole are known and well documented (Isuwa, 2008).

Blowouts refer to sudden and violent "escapes of gasses into the atmosphere". Such escapes occur when the pressure built around oil/gas wells become heavier than the wells' hydrostatic weights (Elsom, 1992; Squillace, 1992; Wild, 1996). The composition and character of the atmosphere is thereby altered to the detriment of the entire ecosystem including man. Yet, blowout is a very common feature associated drilling daily in the Niger Delta region of Nigeria (UNEP, 1992). On the other hand geothermal steam refers to "the steam which is emitted into the atmosphere in the normal process of drilling. The steam so emitted consists of hydrogen sulphide, methane and ammonia. And on reaching the earth surface, the hydrogen sulphide is converted into sulphur dioxide with its attendant harmful effects on plants and animals including man. Amonia is known to combine with other compounds in the atmosphere in bringing about acidic rain (UNEP, 1992). However, "Shell Petroleum Development Corporation (SPDC) in its 2006 Annual report stated that the oil industry submitted a proposal to the oil industry regulatory body, the Department of Petroleum Resources (DPR) for air quality assessment in the Niger Delta only in 2006. This effort to assess air quality in the Niger Delta came after five decades of oil exploration, and gas flaring, in the region" (Shell Nigeria Annual Report, 2006).

Most of the ongoing gas flaring and atmospheric pollution in Nigeria take place in the Niger Delta region of Nigeria. It is without doubts that the Niger Delta is located in the southern part of Nigeria. It is also a well-known fact that the region suffers from human and environmental issues of both national and international concern, in terms of the environmental pollution; impoverishment of the local people despite the wealth being generated from the region; security of human lives; property and infrastructure due to militancy; community agitations and youth unrest. This paper, however, gives a brief description of the Niger Delta environment and also highlights the major anthropogenic activities resulting in air pollution in the Niger Delta which include transportation, burning of fossil fuels for industrial and domestic use and waste disposal.

ENVIRONMENTAL PROBLEMS OF THE NIGER DELTA REGION OF NIGERIA ARISING FROM OIL/GAS OPERATIONS

There exists a large literature from various intellectual divides on the negative impacts of oil pollution in the oil producing communities in the Niger Delta region in several

ways (Chijioke, Onuoha, Ebong, Bassey & Ufomba, 2018). "Environmental problems of the Niger Delta region of Nigeria arising from oil/gas operations have been graded to include: (a) Socio-Economic Impacts which signposted by the destruction of traditional means of livelihood, the destruction of the ecosystem and biodiversity, the depletion of fish population. (b) physico-health impacts which include the health risks, the destruction of zinc roof, water pollution, (c) socio-culture Impacts etc. (d) a replication of erosion, flood and climate change adversely which affect the environment and threatened an imminent collapse of the ecosystem.

Oil spillage that occurred daily in the Niger Delta region with the attendant problems causing the people to face severe suffering from the advent of oil exploration in the area till date are numerous (Chijioke, Onuoha, Ebong, Bassey & Ufomba, 2018; Abila, 2018a; Abila, 2018b). Suffice it to reiterate that some of the negative effect of activities of multinational oil companies include air pollution, soil pollution, soil degradation, health risk among others (Abila, 2018). Furthermore, the destruction of zinc roof, one of the increasing socio-economic costs to most oil producing communities resulting from oil pollution is the rapidity with which zinc roofs are easily corroded. Houses with zinc roofs that are close to the locations of the flare stacks do not last for two years before they become corroded. This is different from other areas where zinc roofs last for at least ten years. This is a common trend that is also observed in other parts of the Niger Delta where oil extraction is presently taking place. Zinc corrosion has added another dimension to the increasing socio-economic costs. It is a common knowledge that acid rain oxidizes zinc through the process of oxidation to form zinc oxides. This oxidation process is traced to be responsible for the corrosion. This has led homeowners to resort to purchase of the expensive asbestos with its obvious potential health hazards" (Chijioke, Onuoha, Ebong, Bassey & Ufomba, 2018).

AIR QUALITY, EMISSIONS AND APPLICABLE CONTROL MECHANISMS IN THEIR DETECTION AND EVALUATION

Although emissions of CO2 and other greenhouse gases (GHGs) are recognized as contributing to climate change problem in Nigeria (Adeyinka, Bankole, & Olaye, 2005). However, an existing report indicates that the issue of air quality is not recognized as an environmental problem in Nigeria. This is perhaps, because there are no consistent emissions inventory for the country. Although there has been some independent research into air quality assessments in different part of Nigeria has stated earlier above (Baimbach, Vogt, Hein, Oluwole, Ogunsola, Olaniyi, & Akeredolu, 1995), it is submitted that, it is incumbent on regulatory authorities in Nigeria to enforce existing laws and regulations directed at improving air quality in Nigeria. The

Federal Environmental Protection Agency (FEPA) was originally established under the amended Decree No. 58 in 1992 as contained in the 2004 version of the Laws of the Federation of Nigeria to undertake the following functions, amongst others (Federal Republic of Nigeria, 1999).

a. Prepare a comprehensive national policy for the protection of the environment and conservation of natural resources, including procedures for environmental impact assessment for all development projects.
b. Prepare, in accordance with the National Policy on the Environment, periodic master plans for the development of environmental sciences and technology and advice the Federal Military Government on the financial requirements for the implementation of such plans.
c. Promote co-operation in environmental science and conservation technology with similar bodies in other countries and with international bodies connected with the protection of the environment and the conservation of natural resources.
d. Co-operate with Federal and State Ministries, Local Governments, statutory bodies and research agencies on matters and facilities relating to the protection of the environment and the conservation of natural resources.

It is unfortunate, however that, this law has since been abrogated by Section 36 of the National Environmental Standards and Regulation Enforcement Agency (Established) Act of 2007 which provides that "The Federal Environmental Protection Agency Act is [now] repealed." This author has, elsewhere criticized the abrogation as misguided (Derri & Abila, 2007). It is important, at this stage to examine the criminal sanctions under the criminal code and the harmful waste (special criminal for provisions etc.) Act respectively to see how these laws have strengthened the legal regime against atmospheric pollution.

CRIMINAL SANCTIONS UNDER THE CRIMINAL CODE AND THE HARMFUL WASTES (SPECIAL CRIMINAL FOR PROVISIONS ETC) ACT NO. 42, 2004

Under Section 234 of the Criminal Code, the offence of "Common Nuisance" is committed "where a person does anything, which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all members of the public." This offence correlates with the common law offence of "Public Nuisance. It can be also raised to punish unlawful discharge of pollutions on public land as well as waters due to the inconveniences and damage to the public in the enjoyment of these rights, likely to be cause. Also under Section 245 of the Criminal Code, the offence is committed where there is "fouling" (corruption) of waters. For example, under Section 245 of the Criminal Code, it is on offence on the part of any person who corrupts or fouls any spring, stream, well tank, reservoir or place so as to render it less fit for the purpose for which it is ordinary use. The offense is a misdemeanor, carries

punishable under Section 247 of the Criminal Code. It is doubtful whether this provisions in the Criminal Code still serve any important purpose in the Niger Delta region of Nigeria, for example. However, under Section 247 of the Criminal Code, any person who commit "noxious acts which affect public health may be punished. This provision is particularly important if applied to gas flaring going on abated in the Niger Delta region.

It is necessary at this point to note, apart from the above law, however that, there exists several other local legislation enacted ostensibly to protect the environment. However, in the context of air pollution control, the following matters may constitute a statutory nuisance if they are either prejudicial to health or a nuisance:

a. Any premises in such a state so as to be harmful to health or a nuisance; smoke, fumes or gas emitted from premises so as to be prejudicial to health or a irritation;
b. Any dust, steam, smell or other effluvia arising on industrial, trade or business premises.

Let us now consider the legal regime against air pollution under international environmental law.

INTERNATIONAL PROTECTION AGAINST AIR POLLUTION

Global interest against atmospheric pollution is founded on the fact that, far from been a local problem, it has trans-boundary impacts. This can be illustrated from the fact that air pollution in the territory in one nation may also cause environmental damages and impacts in another country (Weiss, 1988). References are often made, for example, to the fires which originated in Indonesia, several years ago which brought about haze smoke and particulate pollution which did not only affect Indonesia but caused severe negative impacts in Thailand, Philippines, Singapore, Brunei and Papua New Guinea (Dudley, et.al., 1997). Worthy of note also, is the fact that an estimated $1^1/_2$ % of the entire acid deposited on Canada originates from the United States of America. On the other-hand, Canada is also credited with the generation of 20% acid deposition in the United States. The point to note in all this, however, is whether International Law can be applied as an instrument to regulate trans-boundary air pollution. In other words, the question one can ask, is whether, a particular country from which air pollution originates can be sued by another country for negative impacts caused by trans-boundary pollutions to a different nation?

Amokaye G. Oludayo has, in his book, Environmental Law and Practice in Nigeria, succinctly examined the current position of trans-boundary air pollution in the light of developments in the advanced nations vis-à-vis African Nations, admirably, as follows: "International response to long-range trans-boundary air pollution is elaborately expressed in customary law and treaties negotiated bilaterally

or at regional levels to address the issue of air pollution. Incidentally, while efforts are being made by developed countries of West to address the issues of long-range trans-boundary air pollution at bilateral and regional levels in Europe and America, which cumulated in the negotiation of the Long Rang Trans-boundary Air Pollution Convention and the 1991 US-Canada Bilateral Air Quality Agreement, there appears to be no significant effort by African States to address the problem. The absence of such Convention may not be unconnected with the fact that African countries are more preoccupied with social, economic and political problems. It is equally not unconnected with the fact that there is no credible scientific evidence to trigger continental action on the problem. Consequently, the discussion on international treaties on air pollution discussed here is not particularly relevant to Africa. But African States should draw inspiration from them when confronted with the need to negotiate air pollution convention either at regional or continental level" (Oludayo, 2004). This is an unfortunate lacuna in our anti-air pollution laws not only in Nigeria but also in Africa which must be given urgent attention.

I. CUSTOMARY LAW

In the well-known Trail Smelter's Case the tribunal in applying, the existing international law, in the area held, amongst other things that:

> "Under the principles of international law….. no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes or into the territory of another or the properties or person therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."

Hunter, Salzman and Zaelke (2011), in their book: International Environmental Law and Policy argued that though, the Trail Smelter Arbitration did not technically constitute a legal precedent for similar disputes, in the light of the fact that it was a decision which was based on a relatively restrictive settlement on an agreement amongst the two parties; all the same, the thinking in Trail Smelter is still persuasive today, not only in cases involving trans-boundary air pollution but also applies to international environmental law generally. This is clear as it has found expression in Principle 21 of the Rio Declaration which have received global acceptability.

II. TREATIES

It is appropriate to discuss this part of the paper by stating that the drive to curtail the incidence of atmospheric pollution at global level started in the year 1979 upon the conclusion of the 1979 convention on Long-Range Trans-boundary Air Pollution. It is worthy of note however that, before then, the nations in Europe have continued to monitor the emission of SO_2 and NO_X pollution budgets for most countries and that

the earlier before then, the said treaty was negotiated among the States in Europe. However, the United States of American and Canada also subsequently ratified same. Amodaye G. Oludayo further asserted that: "The Treaty was the first environmental treaty signed by both East and West apparently as a result of the end of the Cold War between Europe and USA. The objective of the convention is to protect man and his environment against air pollution and to striving to limit and, as far as possible, gradually reduce and prevent air pollution, including long-range trans-boundary air pollution".

Contracting States are required inter alia to initiate policies and strategies for exchange of information, consultation, research and monitoring as a means of combating the discharge of air pollutions. The Convention also sought for cooperation among members states in the areas of research and development of existing and proposed technologies for reducing emission of sulphur compounds and other major air pollutants, including technical and economic feasibility and their environmental consequences. It also seeks to study the effects of sulphur compounds and other major air pollutants on human health and the environment. These include research in the areas of agriculture, forestry, material aquatic and other natural ecosystems and visibility, with a view to establishing a scientific basis for dose and effect relationship designed to protect the environment. It also has its objective capacity development through education and training programmes in related aspects to air pollution and long-rang trans-boundary effect. The treaty has been followed by a number of other protocols (Protocols of 1984 (Geneva), (1985) (Helsinki) 1988 (Sofia) 1991 (Geneva) and 1994 (Oslo). The Protocol institutes a clear target and timetable, by freezing emissions at 1987 levels. Is also specifies certain technology-based standards, including, for example, a requirement to make unleaded gasoline available. Finally, the NO_X protocol requires parties to begin gathering information for a critical load approach, which as of 1997 parties were still negotiating.

EMERGING RECENT DEVELOPMENTS

In winding on this paper it is in important to refer to the recently – developed The Flare Gas (Prevention Of Waste And Pollution) Regulations, 2018 and the Nigerian Gas Flare Commercialization Programme (NGFCP) of the Federal Government of Nigeria which is ostensibly developed to "curb gas flaring—with the issuance of the Flare Gas (Prevention of Waste and Pollution) Regulations, 2018 (the Regulations), which is the latest in a long line of legislation and policy measures aimed at reducing and ultimately eliminating gas flaring in Nigeria. Prior to the issuance of the Regulations, the 2017 National Gas Policy (NGP) had articulated the Federal Government of Nigeria's (FGN) commitment to achieve a flare out date in 2020, by adopting a combination of targeted policy interventions such as requiring oil companies to mandatorily include viable and executable gas utilization plans in their field development plans. The NGP had also buttressed the need for upstream

companies to maximize utilization of their associated gas; and expressed the FGN's intention to work collaboratively with industry, development partners, providers of flare-capture technologies and third party investors towards ensuring that flare capture and gas utilization projects are developed and the (NGFCP) which was also developed to provide "a market-led mechanism aimed at attracting competent third party investors to commercialize Nigeria's flared gas." The Regulations sets out the legal and commercial framework for the commercialization of flared gas by the FGN through Permit Holders (The Flare Gas Regulations, 2018). It is only hoped that the above mentioned regulations will be implemented to the letter since the ultimate intention behind the said regulations is to phase out gas flare in Nigeria in the year 2020. Based on the above the following recommendations are made.

CONCLUSION

Air pollution in Nigeria's Niger Delta region and other parts of the globe is an issue that request urgent attention by the Nigerian authorities and multinational oil companies operating in the area because gas flaring and atmospheric pollution has being occurring for a long time without the needed application of existing laws, rules, treaties, international conventions and international customary law dealing with trans-boundary atmospheric pollution and its control and management. It is a cheering news that The Nigerian government, has repeatedly expressed, its desire, to phase out gas flaring in the Niger Delta in the near future. In view of this, the Nigerian National Space Research and Development Agency (NASRDA) is reportedly funding the research titled, "applying remote sensing and GIS techniques to air quality and carbon management, a case study of gas flaring in the Niger Delta." The research, which commenced in January 2008 at the University of the West of England, aims to integrate in-situ measurements of ambient concentrations and emissions with satellite remote sensing data to assess air quality emissions and CO2 concentrations resulting from gas flaring in the Niger Delta. The available satellite technology resources at NASRDA will combine with the European expertise in air quality studies available at UWE to proffer solutions to air pollution and air quality management in the Niger Delta.

RECOMMENDATIONS

Finally, the paper suggest that:

1. The authorities in Nigeria must now fully explore the potentials for gas utilization in Nigeria. It is proposed that Nigeria make concerted efforts to ensure that henceforth flared gas is utilised to provide adequate power generation for the nation.
2. It is also recommended that government lay gas pipelines across the major industrial areas of Nigeria to supply gas for the purpose of running of industries.

This will reduce manufacturing reliance on burning of liquid and solid fossil fuels for energy and ensure the use of cleaner gasolines to run manufacturing operations in Nigeria.

3. More than ever, there is now an urgent need to develop a vigorous intensive care and management system, which ensure that high quality information on the extent and impact of air pollution can be used as the basis for legislation to curtail the pollution and develop a mechanism that will enhance clean air when gas flaring ends in Nigeria.

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Journal of Law and Legal Reform (2021), **2(1)**, *pp.* 65-82.
DOI: **https://doi.org/10.15294/jllr.v2i1.39036** ISSN (Print) 2715-0941, ISSN (Online) 2715-0968

REVIEW ARTICLE

COMPARISON OF THE LAW OF CONTRACT BETWEEN ISLAMIC LAW AND INDONESIAN LAW

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CITED AS
Puneri, A. (2021). Comparison of The Law of Contract Between Islamic Law and Indonesian Law. *Journal of Law and Legal Reform*, *2*(1),65-82. https://doi.org/10.15294/jllr.v2i1.39036

ABSTRACT

In every legal transaction, contract is the crucial things that must be made between all the parties. Because the contract is the realization of the agreements between the parties. and that contract are binding the parties inside the agreements. The purpose of this paper is to analyze the law of contract from two different laws, which are Islamic Law and Indonesian Law. It can be found that there are some similarities as well as differentiation between Islamic Law and Indonesian Law when it comes to governing about contracts.

Keywords: *Contracts Law; Islamic Law; Indonesian Law*

Submitted: 15 June 2020, Revised: 11 September 2020, Accepted: 16 November 2020

TABLE OF CONTENTS

INTRODUCTION

In every legal transaction, contract is the crucial things that must be made between all the parties. Because the contract is the realization of the agreements between the parties. and that contract are binding the parties inside the agreements. Or it is safe to say that the contract can be said as the "rule of the game" between all the parties. In a business, contract is one of the vital importance to a business organization. Most of their business performed by the making of contracts, be they with the customers, suppliers, or employees.

A contract may be defined as an agreement, enforceable at law, between two or more persons to do or refrain from doing some act or acts; the parties must intend to create legal relations and must have given something or promised to give something of value as consideration in return for any benefit derived from the agreement (Lucas, 1998).

Charles L. Knapp and Nathan M. Crystal defined law of contract as Our society's legal mechanism for protecting the expectations that arise from the making of agreements for the future exchange of various types or performance, such as the competence of property (tangible and untangible), the performance of services, and the payment of money (Knapp & Crystal, 1993;Nachatar, Hussin, & Omran, 2010; Smits 2017; Khairandy 2011; Ningsih & Disemadi, 2019; Mahmod, Azmi, Islamil, Daud, & Napiah, 2019; Sulistyarini, Budinono, Winarno, & Koeswahyono, 2018; Muhammad, Saoula, Issa, & Ahmed, 2019; Ilmih & Zulkarnain, 2019).

The definition from Charles L. Knapp and Nathan M. Crystal on above is defining the law of contract from the mechanism aspect or the law procedure point of view. The aim from this mechanism is to protects the hopes that arise from the making of an agreement between the parties, such as on the performance of services.

In a sum, contract can be defined as an act of law, where one or more people are binding himself or binding himself to the other person to do something or to give something (Hernoko, 2018). And there are rights and obligation for the parties to be fulfill which are arise from the contract.

No matter which law is being applied, contract is still one of the vital importance in legal transaction, even in Islamic and Indonesian law. Because without contract, every legal transaction can be considered as an illegal act. So, in this paper I will writes about how Islamic and Indonesian Law regulating the contract, what are the comparison between the Islamic Law and Indonesian Law in terms of the law of contracts and also reviewing one case about the dispute in contract which happens in one of the Syariah bank in Indonesia.

THE LAW OF CONTRACT IN ISLAMIC LAW

I. DEFINITION OF CONTRACT IN ISLAMIC LAW

At least there are 2 terms on Al-Qur'an which are related to agreement, the first one is *al-'aqdu* (Akad) and the other one is *al-'ahdu* (promise). From the terminology point of view, Akad means bond, or binding. It was said bond (*al-rabth)* because it was means to gather two of the end of the ropes and binding one end to another end so both of them can be united and becomes like a complete rope (Mas'adi, 2002). The word *al-'aqdu* is being mentioned in Surah *Al-Maidah: verse (1)* which said:

يا أَيُّهَا الَّذينَ آمَنوا أَوفوا بِالعُقودِ...

that means "O you who have faith! Keep your agreements..." From the translation we can get explanation that human (especially for those who have faith) are being asked to fulfill their *Akad."*

Meanwhile for the word *al-'ahdu* it was being stated on Surah *Ali Imran verse (76)* which have said:

بَلىٰ مَن أَوفىٰ بِعَهدِهِ وَاتَّقىٰ فَإِنَّ اللَّهَ يُحِبُّ المُتَّقينَ

That means "Yes, whoever fulfills his commitments and is wary of Allah —Allah indeed loves the Godwary." From the translation, we can get the explanation from that verse is Allah is like people who are keeping their promise and being devoted.

All of the *jumhur ulama* or the Islamic law scholar defined *akad* as: "connection between *ijab* and *qabul* which can be accepted by *syara*' and it caused legal consequences to the object" (Mas'adi, 2002). Abdoerraoef (1970) said that contract is happens through three stages, which are:

1. *Al- 'Ahdu* (promise), which are statement from someone to do or not to do something and have no connection with someone else's will. This promise is binding someone who are stated that he or she will fulfill their promise.
2. Consent, which is the statement from the second party to do or not to do something as a reaction to the promise that was being stated by the first party. Those consent must be according to the promise from the first party
3. If there are two promises already runs by both parties, then something that called '*akdu*' from Surah *Al-maidah* is being happens.

II. ELEMENTS OF THE CONTRACT

From the definition of *Akad* which are described previously, we can get that there are 3 elements in *Akad* as emphasized by Mas'adi (2002), which are:

1. Binding between *Ijab* and *Qabul*
   Ijab is the statement of will from one party (*mujib*) to do or not to do something. *Qabul* is the statement from the second party (*qaabil)* to accept or approve *mujib*'s will.
2. Can be accepted by *syara*'
   The *Akad* which are being conducted can't be against the things that are being arranged by Allah SWT in Al-Qur'an and also can't be against the things that are being arranged by Prophet Muhammad SAW in Hadits. The implementation, goals even the object of the *Akad* can't be against the *syara*'. If the *Akad* is against the *Syara*', then that *Akad* is invalid.
3. Having legal consequences to the object
   Akad is one of the legal action or it was called *tasharruf* in Islamic Law terms. The existence of an *Akad* causing legal consequences to the legal objects which are being promised by the parties and also giving some rights and obligations which are binding all the parties.

III. THE SOURCE OF THE LAW OF CONTRACT IN ISLAMIC LAW

As a part of Islamic Law, so the source of the law of Contract in Islamic Law is same as the sources of the Islamic Law. Islamic Law is originated from 3 law sources as emphasized by Dewi, et.al (2013), which are consist of:

1. Holy Quran

As one of the main sources of Islamic Law, most of the law inside the Holy Quran only regulating about the general rules, for examples:
Surah Al-Baqarah verse 275:

...وَأَحَلَّ اللَّهُ البَيعَ وَحَرَّمَ الرِّبا...

which means: "...While Allah has allowed trade and forbidden usury..."
Surah Al-Maidah verse 1:

يا أَيُّهَا الَّذينَ آمَنوا أَوفوا بِالعُقودِ

which means: ""O you who have faith! Keep your agreements..."

2. Hadith
As the second main sources of the Islamic Law, Hadith can be defined as one of various reports describing the words, actions, or habits of the Islamic prophet Muhammad. In a hadith, the law of *Muamalat* is being more detail if we compare with the law in the Holy Quran, but still regulating the general rules. For example:
Hadith of Ahmad Ibn Hanbal that said:

> "It is not just for a man to sell his merchandise without disclosing its defects. It is proper for the vendor to tell the buyer of any defects of which he is aware. "

3. *Ijtihad*
In English, the word *Ijtihad* can be translated as an attempt to drive the legal ruling from Koran/Holy Quran. *Ijtihad* must be done using *ar-ra'yu* or human minds. Mohammad Daud Ali defined *Ijtihad* as truly effort or *ikhtiar* which being done by using all of someone's (usually a legal scholar) capabilities which passing all of the requirements to regulating rules which are not being regulated clearly or not being regulated yet in Holy Quran or in *Hadith* (Hasan, 2003). For example of *Ijtihad* is in Indonesia, since April 2000 there are new body emerge that called Dewan Syariah Nasional (DSN) as a part of Majelis Ulama Indonesia (MUI). This body has the responsibilities to making a fatwa[1] which are related to the activities of the Islamic Financial Institution in Indonesia. So, all the *fatwa* that are made by the DSN in Indonesia can be called as the results from *Ijtihad*.

IV. THE PRINCIPLE OF THE CONTRACT IN ISLAMIC LAW

Fathurrahman Djamil said that there are at least 5 Principle that are known for Contract in Islamic Law, as explained by Harso (2007), which consist of:

1. *Al-Huriyyah* (Freedom)

[1] According to the definition from https://en.oxforddictionaries.com/definition/fatwa, the word *fatwa* means a ruling on a point of Islamic law given by a recognized authority.

This is the basic principle for Contract in Islamic Law, which means that everyone has the freedom to make a contract or *Akad*. There cannot be element of force, mistakes and scam in a contract. This principle is according to the *fiqh* that said:

الأَصْلُ فِي المُعَامَلَةِ الإِبَاحَةُ الاَّ أَنْ يَدُ لَّ دَلِيْلٌ عَلىَ تَحْرِيْمِهَا

which means that all of transaction is permitted, except there are law that makes the transaction becomes *Haram.*

2. *Al-Musawah* (Equality)
   This principle means that all the parties have the same position in order to determine the terms and condition of an *Akad*.
3. *Al-'Adalah* (justice)
   Implementation of this principal in a contract is demanding all the parties to do the right thing in order to implementing the contract and also all of the parties must fulfilling their obligation in the contract. This Principle is according to *Surah Al-Maidah verse 8*, which said:

   ...وَلا يَجرِمَنَّكُم شَنَآنُ قَومٍ عَلىٰ أَلّا تَعدِلُوا ۚ...

   which means "...and ill feeling for a people should never lead you to be unfair. Be fair..."
4. *Al-Ridha* (Willingness)
   This principle stated that all the transaction that being made must be based on the willingness from all the parties.
5. *As-Sidq* (Honesty)
   This principle means that a contract or an *Akad* must be made based on the honesty from all the parties and must avoids what the Islamic Law call as a *Gharar* or scam.

V. LEGAL REQUIREMENTS OF A CONTRACT IN ISLAMIC LAW

There are 3 Legal requirements of a Contract in Islamic Law, which consist of:

1. Two or more Parties who are conducting the Contract or *Akad* (Subject of the contract)
   Two or more parties in here are two people or more who are directly involving in the contract. Both parties must be passing all the requirements so that they can be considered having the capacity in order to make their contract becomes legitimate in the eye of Islamic Law. Some of the requirements to be considered having the capacity to make a contract are:
   i. The ability to differentiate which one is bad and which one is a good thing. It means that the person already having their minds works and also already *akil baligh* (or passing the puberty).

ii. Free to choose. Contract will not be legitimate if that contract are being made under force, if that force can be proven
iii. Contract can be considered happens if there are no *khiyar*. Like *Khiyar Syarath* or *Khiyar ar-ru'yah.*

2. The Object of the contract
It means that the things that are made as an object inside the contract, it can be the things that are being sell in the selling-and-buying contract or it can be the things that are being rented in a rent contract. There are some requirements for the object of the contract, which are consist of:
i. The object of the contract must be in a holy condition, or if the object are in a profane condition, that things must can be cleaned. So, we can make an proven object, such as a dead body, as the object of our contract.
ii. The object of the contract must be useful and according to *syariah*. Because the legal function of that object will be the based to measuring the value of that object.
iii. The object of the contract must be available to handed over. The contract will not being legitimate if the object of the contract can't be handed over to the other party because that can categorized as *Gharar*[2].
iv. The party in the contract must have the (legitimate) ownership of the object of the contract.
v. All the parties must know the form of the object of the contract
3. The statement of the *Akad* or Contract (*shighat*)
It can be defined as the statement from the parties in the contract to shows ther willingness to the contract. It was known as *Ijab* and *Qabul*. *Ijab* is the statement of will from one party (*mujib*) to do or not to do something. *Qabul* is the statement from the second party (*qaabil)* to accept or approve *mujib*'s will. The requirements of *Ijab* and *Qabul* are:
i. At least *Ijab* and *Qabul* must be stated by someone who are reaching *tamyiz* who are realizing and knowing what they said so they can really declare their willing. Or in other words, it should be done by someone who are having the capacity to make a legal action.
ii. *Ijab* and *Qabul* must be fixed to the object that becomes the object of the contract
iii. *Ijab* and *Qabul* must be done in one place where all the parties are attending.
iv. *Shighat al-aqad* is the way that the statement or agreement are being made. For example it can be written or orally.

[2] based on the article from https://en.wikipedia.org/wiki/Gharar, *Gharar* literally means uncertainty, hazard, chance or risk.

v. *Al-Ma'qud alaih / mahal al'aqad* or the object of the contract. Object of the contract will be so much depending on the contract that will be made. For example, in a contract of selling-and-buying the object are usually goods and services.
vi. *Al-Muta'aqidain/al'-awidain* or the parties who are involved in the contract. All the parties must be having the capacity to make a legal action or in in other word the parties must be old enough (mature enough) and have healthy mental and mind to make a contract.
vii. *Maudhu' al'aqd* or The aim or goal of the contract must be according to the *syaria*' or otherwise that contract can't be legitimate.

THE LAW OF CONTRACT IN INDONESIAN LAW

I. DEFINITION OF CONTRACT IN INDONESIAN LAW

In Indonesian Law, the law of contract is regulated under the *Kitab Undang-Undang Hukum Perdata* (KUHPer or Indonesian Civil Code, *hereinafter as KUHPer*). KUHPer is the adaptation from Dutch's old civil code or called *Burgerlijk Wetboek* (BW). KUHper or BW is divided in four categories, which are:

1. Buku I: Perihal Orang (Book I: About individual)
2. Buku II: Perihal Benda (Book II: About property)
3. Buku III: Perihal perikatan (Book III: About Obligation)
4. Buku IV: Perihal Pembuktian dan Daluarsa (Book IV: Concerning Evidence and Prescription)

From the categories mentioned above, The Law of contract is being regulated on Book III.

According to the article 1313 BW or KUHPer (Mas'adi, 2002) defined contract or engagement as an act pursuant to which one or more individuals bind themselves to one another. Meanwhile, Subekti, one of the law scholars from Indonesia defined contract or engagement as an event where someone is promise to another person where both of them are promising to do something (Subekti, 1996). Another law scholar, KRMT Tirtodiningrat defined that contract and engagement as an act of law which based on n agreement between two or more people to cause legal consequences which can be enforced by law (Meliala, 1985).

A lot of legal scholars in Indonesia thinks that the definition of contract on the article 1313 BW is not complete or can't describe what is contract in detail. One of the scholars that agree to this is Suryodiningrat, (1985), he thinks that Article 1313 BW is not enough to describe contract because:

1. Law is have nothing to do with every engagement
2. The word "acts" can be interpreted in so many way, so it can cause a legal consequences without even being mentioned.

3. The definition from article 1313 is only about the unilateral agreement, only one party that have the obligation to do or give something
4. Article 1313 BW is only about *obligatoir* agreement and cannot be use for other type of agreements.

Setiawan (1987) thinks that Article 1313 BW not only not complete but also too wide to be interpreted. Not enough because it only mentioning about unilateral agreement. And too wide to be interpreted because by using the word "acts" it also containing the acts against the law and voluntary representation. According to that he recommends:

1. The word of "acts" must be defined as an act of law, which is an act that was aim to causing a law consequences
2. Adding the words "or to binding each of themselves" to the article 1313 BW
3. So, the article should be written as "engagement is an act of law, where one or more individuals bind or binding themselves to one individual or more.

Nowadays in Netherland they already made a change in their old BW in form on *Nieuw Burgerlijk Wetboek* (or NBW). So, article 1313 BW also have some changes, which are regulated in Book 6, Chapter 5, Article 6:213 that said "a contract in the sense of this title is a multilateral juridical act whereby one or more parties assume an obligation towards one or more parties" (Haanapel & Mackaay, 1990). Based on that NBW perspective, Hartkamp & Tillema (1995) assumed that contract is one of the species from act of law genus. Generally, they are defined contract as "a juridical act, established – in compliance with possible formalities, required by the law – by the corresponding and mutually interdependent expressions of intent of two or more parties, directed at the creation of juridical effects for the benefit of one of the parties and to the account of the other party, or for benefit and to the account of both parties."

Even though in the Netherlands, the origin of the BW already had some changes in the old BW, but in Indonesia, they are still no changes to the old BW. That means Indonesia still using the old Civil Code with all of its shortcomings, especially the shortcomings in the law of contracts.

II. THE ORIGIN OF THE LAW

Hadisoeprato (1984) explained concerning to the origin of the law—Indonesian Contract Law— that can be reviewed from many subjects, such as historically, material or formally. The origin in this topic is meaning where are the rule of law is coming from.

From the historically subject, law can be found from the old rules that being applied in the past, but that law still included in deciding the formation of the law that being applied in a specific place and at a specific time. Or it can be found from the old documents which contains the law that being applied in the past.

Material subject is the factors that deciding the contents of law, which actually being determined by *Idiil* Factor and *Maatschappelijk* factor. *Idiil* factor is the base of the law which never change, which being followed by the body that responsible to making constitution. Meanwhile *maatschappelijk* factor is the reality in the society which is really happens.

Formally, law can be found inside the constitution, jurisprudence, treaty and custom. Constitution can be defined as the law that are made by government and the legislation (in a narrow sense). Or constitution can be defined as a regulation that binding the public (in a broad sense). Jurisprudence or Caselaw is the decision of the judge which already being a law. Treaty is an agreement between the countries who are making engagement so the results from that treaty is being applied by the law of the country which made that treaty. Custom that mentioned in here is means all of the regulation which are not being made by the government, but still being obey by the public because they are believe that regulation can becomes a law that protecting the public interests.

From the explanation above, we can see that both historically and formally the law of contract in Indonesian law is based on Dutch Law which are expressed in the form of BW. Because historically, we are being colonized by the Dutch for 350 years and all of our law is being adopted from the Dutch law. And Formally speaking, for the law of the contract is still being regulated under the old Dutch BW or called KUHPer in Indonesia.

III. THE PRINCIPLE OF THE CONTRACT IN INDONESIAN LAW

There are a lot of arguments between the law scholarship in Indonesia about the principle of the law of contract, but main principle of the law of contract in Indonesian Law are:

1. Consensualism

   Consensulism are often defined as that consent (between the parties) is needed to make an agreement/contract. It means that if there is an agreement that reach between the parties, so contract is born, even though that contract is not yet started at that time (Miru, 2007). In BW, this principle is mentioned in the article 1320 paragraph (1) that said:[3] "There must be consent of the individuals who are bound thereby"

2. Freedom of Contract

   In BW, this principle is mentioned in the article 1338 paragraph (1) that said: "All valid agreements apply to the individuals who have concluded them as law." This principal is a principle that are giving the freedom for the parties to:

   1. Whether the parties are making or not making the contract

[3] The translation of *Burgerlijk Wetboek* or Indonesian Civil Code in 3 languages, according to the translation from http://www.kuhper.com/Trilingual%20Indonesian%20Civil%20Code.pdf, Article 1320.

2. Making contract with anyone
3. Deciding the content, the execution and the terms of the contract
4. Deciding the form of the contract, whether in form of written or orally.

3. *Pacta Sunt Servanda* (The binding power of the contract)

The binding power of the contract is appeared along with the Freedom of Contract principle which are the manifestation of the patterns of human's relationship which are showing the value of trust inside. Substantially, turns out the binding power of the contract not only binding the parties for the things that are expressly stated inside the contract, but also for everything that are being required by the custom, norms or the law (Hernoko, 2018).

In BW, this principle is mentioned in the article 1315 and article 1340. Article 1315 said: "In general, an individual may only commit to or agree to something for and on behalf of himself." Article 1340 said: "An agreement applies only to the parties thereto."

Both of article 1315 and article 1340 above are showing that the binding power of the contract is only reaching to the parties who are made the agreement. So, this principle is focusing on "who are being bind by the contract" not "what is the content of the contract".

4. Good Faith

In BW this principle is mentioned on Article 1338 paragraph (3) that said: "They must be executed in good faith." Black's Law Dictionary defined good faith as: "Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it compasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. ... In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and generally means being faithful to one's duty or obligation" (Garner, 2009).

IV. LEGAL REQUIREMENT OF CONTRACT IN INDONESIAN LAW

The legal requirement of the contract in Indonesian law are regulated based on Article 1320 BW, which are said:

In order to be valid, an agreement must satisfy the following four conditions:

1. There must be consent of the individuals who are bound thereby
2. There must be capacity to enter into an obligation
3. There must be a specific subject matter
4. There must be a permitted cause

The first and second requirements can be said as the subjective requirements or the requirements which regulating about the parties in the contract. And for the third and fourth requirements can be said as the objective requirements or the requirements which are regulating about the object of the contract.

If the parties in the contract can't fulfill the first and second requirements, so the contract can be cancelled or one of the parties can ask for the contract to be cancel. But the contract that already being made still binds the parties as long as judge didn't cancel the contract (Wicaksono, 2008; Nachatar, Hussin, & Omran, 2010; Smits 2017; Khairandy 2011; Ningsih & Disemadi, 2019; Mahmod, Azmi, Islamil, Daud, & Napiah, 2019; Sulistyarini, Budinono, Winarno, & Koeswahyono, 2018; Muhammad, Saoula, Issa, & Ahmed, 2019; Ilmih & Zulkarnain, 2019)..

Meanwhile, if the parties in the contract cannot fulfill the third and fourth requirements, so the contract becomes *Void ab initio*. It means that the contract is never be made and there is no engagement between the parties since the beginning. So, the parties didn't have the legal standing to make a sue in front of the court (Wicaksono, 2008).

1. Consent

   Wicaksno (2008) explained that consent in a contract is a feeling of willingness between the parties who makes the contract about the things that are mentioned in the contract. Consent can never be acclaimed if the contract was being made based on scam, mistake, force, and misuse of the condition.

2. Capacity

   Capacity means the parties in the contract must be approved by law as a subject of law. Basically, everyone has the capacity to make a contract. People who did not have the capacity to make a contract is people who are appointed by law which are:

   i. Those who aren't mature

      In Indonesian law, there are difference in terms of "mature", which are in a condition where someone already passed all the requirement to be called "mature" by law and those who are "maturity" which basically they are not mature yet, but by the law they can be announced as mature.

      Based on Indonesian BW, someone is not mature when they are not yet reach 21 years old and yet to be married. For those who are yet to reach 21 years old, but they already married and then already divorced, they cannot go back to the condition where they are called not mature.

      Based on Indonesian criminal code, someone can be called mature if they are already reach the age of 21 years old or they are already married before they are reach the age of 21 years old.

      Indonesian Customary law (*Hukum Adat Indonesia*) did not recognize any age for someone to be called mature. Indonesian Customary law only can recognize someone's maturity based on case by case. Capacity in

Indonesian customary law means that someone can calculate and protecting their own interests (Wicaksono, 2008).

ii. Those who are under guardianship

Someone who are under the guardianship means that based on law assessment, someone is considered cannot protecting their own interests, so they need someone to be their guardian (Wicaksono, 2008).

iii. Women, under some certain things that are being mentioned on the law, and everyone based on law who are banned to make some certain contracts.

A long time a go, women is considered not have the capacity to make a legal action. But, as the time progress and also the improvement of the gender equality movement, that law has being withdrawn and now women have the right and capacity to make a legal action (Wicaksono, 2008).

3. Specific Subject Matter

Specific Subject matter means that the objects that are being ruled in the contract must be clear or at least it can be determined. This is very important to do for giving a guarantee (or certainty) to all the parties and to do perform the contract. Besides that, it also important to prevent the emergence of fake contracts (Wicaksono, 2008). This requirement is mentioned on article 1333 BW which said: "An Agreement must at least have as a subject a matter property whose nature is determined.

The quantity of the matter needs not be ascertained, insofar such quantity can be determined or calculated at a later date."

4. Permitted cause

Permitted cause means that the agreement which are stated inside the contracts can't be against the law, public order and decency (Wicaksono, 2008). This requirement is being mentioned on article 1336 BW which said: "In the event that no cause is specified but that there is an existing permissible cause, or if there is a permissible cause other than one specified, the agreement shall be valid."

V. LEGAL CONSEQUENCES OF THE CONTRACT

A birth of a contract is emerging a legal relationship between the parties in form of rights and obligations of the parties. Fulfillment of those rights and obligations is the legal consequences of the contract. Those rights and obligations are the reciprocal relationships between the parties of the contract. The obligations of first party is the rights of the second party, *vice versa* the obligations of second part is the rights of the first party. In other word, the legal consequences of the contract is the fulfillment of that contract itself by the parties (Wicaksono, 2008).

COMPARASION BETWEEN THE LAW OF CONTRACT IN ISLAMIC LAW AND INDONESIAN LAW

I. COMPARISON ON THE PROCESS OF MAKING THE CONTRACT

According to Dewi, et.al (2013), the differences between Contract in Islamic Law and in Indonesian Law is happens in the engagement process. On Islamic Law, the promise from the first party is separated from the promise from the second party (it is a two different stages of engagement), and then after that the engagement between the parties was made. Meanwhile, in Indonesian Law, according to the *Burgerlijk Wetboek*, the promise between the first and second party is happens at the same stage, which later the engagement between those party was being made based on that promise. The most critical point that differentiate contract in Islamic law with contract in other law is the importance of *Ijab* and *Qabul* in every transaction or every contract. When the promise from the parties are being agreed and continue with *Ijab* and *Qabul*, then the '*Aqdu* (or engagement) was made.

II. COMPARISON BETWEEN THE LEGAL REQUIREMENTS OF THE CONTRACT IN ISLAMIC LAW AND IN INDONESIAN LAW

A. The Subject of The Contract

There are differences between the requirements of the subject of the contract if we see from Islamic Law and from Indonesian Law. The differences is how Islamic Law and Indonesian Law define the 'capacity' of the subject of the contract. In Islamic law, the age restriction for someone to be recognized having the 'capacity' is based on *'urf*. But In Indonesian Law, someone is recognized having the capacity if they are reaching the age of 21 years old, or they already married before 21 years old.

Besides those differences, both Islamic law and Indonesian Law are obligating for all the parties in the contract must having the 'capacity' in order to make the contract.

B. The statement of Will

Both of Islamic Law and Indonesian Law are obligating mutual consent between all the parties to make a contract. And based on that mutual consent, there must be

statement of will from both of the parties. In Islamic Law this term is called *Ijab* and *Qabul*. Generally, both of Islamic Law and Indonesian Law have the same criteria if we are talking about the statement of will from both of the parties in the contract, but in Islamic Law there are some extra requirements to make the statement of will becomes perferct. Those extra requirements are:

i. Both of *Ijab* and *Qabul* must stated the aim of both parties clearly
ii. Both of *Ijab* and *Qabul* must be aligned to each other
iii. Both of *Ijab* and *Qabul* must be *muttashil* (must be continuous), which must be done in the same place (or in one *Majlis 'aqd*).

C. Object of the Contract

Basically, both of Islamic Law and Indonesian law have the same substance in order to regulating the object of the contract. But in Islamic Law, the object of the contract cannot be against the *Syaria*.

For example, in Indonesia Law we are allowed to make a selling-buying contract which the object of the contract is an alcoholic drink. But in Islamic Law we are not allowed to make the same contract, because Alcohol is being prohibited under Islamic Law. Other than that, there are some requirements in Islamic Law that regulating about the object of the contract, which are

i. Can be handed over
ii. Can be determined
iii. Can be transacted

Meanwhile in Indonesian Law, object of the contract can be determined as the rights and obligations between the parties, which are consist of:

i. To give something
ii. To make something
iii. To not to do something

D. The Aim of the Contract

About the aim of the contract, in Indonesian Law it was recognized as the permitted cause. Permitted cause in here is meaning that the aim of the contract can't be against the law, public order and decency. Meanwhile in Islamic Law the aim of the contract are recognized as *Maudhu' al-'aqd*. It is one of the most important things that must be there in every contract. According to Islamic Law, the aim for the contract is *al-Musyarri'*. Or in other word, every legal consequences which are made from the contract must be known by *Syara'* and can't be against the *Syara'*, or it must be followed all the rules in Holy Quran and Hadith.

Table 1. The differences between the legal requirements of contract in Islamic Law and in Indonesian Law

No	Variable	Islamic Law	Indonesian Law

1	Subject	The capacity of the parties is based on *'Urf*	The capacity of the parties is decided based on maturity or aged. In *Buergelijk Wetboek*, someone is mature and have the capacity when they are reach the age of 21 years old or they already been married before that age
2	Statement of Will	According to *Ijab* and *Qabul*	Mutual consent or statement of agreement
3	Object	a. Can be handed over b. Can be determined c. Can be transacted	a. To give something b. To make something c. To not do something
4	The aim of the contract	every legal consequences which are made from the contract must be known by *Syara'* and can't be against the *Syara'*, or it must be followed all the rules in Holy Quran and Hadith.	the aim of the contract can't be against the law, public order and decency.

Furthermore, the main difference on the principle of contract between Islamic Law and Indonesian Law is the origin of the law. In Islamic Law, the law of contract is come from Holy Quran and *Hadith.* Meanwhile the law of contract in Indonesian Law is come from the Indonesian Civil Code which are the same exact with the Dutch's *Burgerlijk Wetboek* (The old BW) (Nachatar, Hussin, & Omran, 2010; Smits 2017; Khairandy 2011; Ningsih & Disemadi, 2019; Mahmod, Azmi, Islamil, Daud, & Napiah, 2019; Sulistyarini, Budinono, Winarno, & Koeswahyono, 2018; Muhammad, Saoula, Issa, & Ahmed, 2019; Ilmih & Zulkarnain, 2019).

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[...] Holy Quran.

Journal of Law and Legal Reform (2021), **2(1)**, *pp.* 83-96.
DOI: **https://doi.org/10.15294/jllr.v2i1.41007** ISSN (Print) 2715-0941, ISSN (Online) 2715-0968

REVIEW ARTICLE

SECURITY AND HUMAN RIGHTS UNDER THE REGIME

A Critique on the Jurisprudence of National Security Challenges and Human Rights Regime Under the Constitution of the Federal Republic of Nigeria, 1999 as amended

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CITED AS
Tariye, O. A. (2021). Security and Human Rights Under the Regime. *Journal of Law and Legal Reform*, *2*(1), 83-96. https://doi.org/10.15294/jllr.v2i1.41007

ABSTRACT

This paper reappraises national security challenges, human rights provisions, derogations under the 1999 constitution of the Federal Republic of Nigeria and the place of human rights in conflict situations between national security and human rights under Nigerian law. In achieving its aim, this paper adopts an admixture of the historical, comparative, empirical, the law and development approaches, in relevant areas. The paper ends with a conclusion and set of recommendations.

Keywords: *National Security Challenges*, *Human Rights*, *Derogation under the 1999 constitution of the Federal Republic of Nigeria*, *National Security*, *Conflict situations*

Submitted: 15 August 2020, Revised: 11 September 2020, Accepted: 15 December 2020

TABLE OF CONTENTS

STATE OF NATIONAL SECURITY CHALLENGES IN PRESENT-DAY NIGERIA

President Muhammadu Buhari, the Head of State and Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria, on the 22nd day of November, 2018 in Abuja, acknowledged that there were serious National Security challenges in Nigeria saying that the numerous challenges facing Nigeria were rooted in internal and external factors, which his administration was tackling. The President made the said acknowledgement while receiving a security report from course participants at Nigeria's National Institute for Policy and Strategic Studies (NIPSS) during a visit to the presidential villa, Abuja.

After stating the fact that his government inherited sundry security issues in 2015, which were and still posing serious threat to lives and property of citizens; he expressed the desire to surmount the problems which, according to him, informed the commissioning of NIPSS in 2017 to work out a holistic framework for the purpose of strengthening the nation's internal security framework through community policing by proposing borders, policy, offence, and strategy. He stated further as follows: "in November 2017, I tasked the management of the National Institute for Policy and Strategic Studies with the decision of government [because government was driven] by a sincere desire to find sustainable solutions to the many security challenges inherited by this administration. These challenges not only threaten the security of lives and property of our people, but also the sovereignty and territorial integrity of our country (Pearce, 2012; Pearce, Albritton, Grant, Steen, & Zelenika, 2012; Zelenika & Pearce, 2014). We are confronted by Boko Haram insurgency in the North East, worrisome conflict with respect to farmers and herdsmen which has resulted in

wanton destruction of lives and property across the country. Furthermore, there is the crisis of separatist agitation in the South East and militancy in the South.

Government is convinced that these security challenges are rooted in both internal and external factors. Most importantly, government is also convinced that finding sustainable solutions to these challenges will require the support and collaboration of security agencies and communities." Buhari submitted that the report was timely, as it came at a time his administration was reviewing security strategies and promised to study the document and mark recommendations therein. He also assured the institute that the Ministry of Budget and National Planning would work towards providing necessary funding for it (The Guardian, Nov 2018; Allen, 2007; Magee, Scerri, James, Thom, Padgham, Hickmott, Deng, & Cahill, 2013; James, Magee, Scerri, Steger, 2015). As brilliant as the above statement appear, it is sad that it took the presidency of the present government, this long to, after spending more than three years to appreciate the grave security challenges that have be-devilled Nigeria for years now (Abila & Ebobrah, 2017; Abila, 2018; Abila & Abiodun, 2018; Grober, 2007; IUCN-UNEP-WWF, 1980; United Nations, 1982; Scerri & James, 2010).

The more disturbing dimension, however, was the promise of the Federal Government "to study the document and the recommendations therein" and the assurance that "the Ministry of Budget and National Planning would work towards providing necessary funding for it". The above quoted portions of the President's remark do not portray any quick readiness on the part of the Federal Government of Nigeria to tackle headlong the security challenges in plaguing Nigeria which has led to the widespread killings of Nigerians by Boko Haram, Herdsmen, several militia groups etc and widespread destruction of properties (Abila & Ebobrah, 2017; Abila, 2018; Abila & Abiodun, 2018). Even-though "the 1999 Constitution of the Federal Republic of Nigeria (1999 CFRN) guarantees the right of Nigerians to enjoy a safe and orderly society just as it assures respect for their liberties and freedoms [since] the Constitution asserts that the *primary purpose* of government (the State) is to ensure 'the security and welfare of the people'.[1]

It is also worthy of note that addressing the Nigerian Bar Association in the 1988 NBA conference in Abuja, President Buhari stated, amongst other things, that the rule of law must be in subjection to constitutional human rights provisions under the constitution of Nigeria. The said position attracted wide criticisms and support from various strata of the Nigeria society. Later in this article the constitutionality and States' practice in light of decided cases in Nigeria are also examined.

[1] For more comprehensive explanation, please also see Sec 14(2)(b) of the 1999 CFRN. Emphasis added.

SCOPE OF HUMAN RIGHTS JURISPRUDENCE GLOBALLY

One of the outstanding developments in international human rights law from the time, the 2nd World War, ended till date, is the growing interest over the protection of human rights, worldwide. This signpost a growing awareness of the human rights phenomenon, the worldwide concern over the treatment of persons in many nations of the world below broadly acceptable standards especially where such treatments do not meet up with expected civilized human behavior (Hamilton & Clemens, 1999; Le Kama, 2001; Stavins, et.al., 2003; Castillo, 2016; Goldman, 2005; Pezzey & Toman, 2002; Abubue, 2000).

Speaking globally therefore, emerging rules of law reflect the social standards and the prevailing interest in the protection of human rights in the international plain and the surging interest in the light of the very notable changes in both governmental and personal approaches which are clear signs that the issue of human rights practice and observation are attracting more global attention. This follows a familiar pattern observable in the first half of the 19th century following the growth of the consciousness which heralded the detestation of slavery trade leading which in turn, led to the development of the rules of law outlawing the trading on slaves as an institution (Robertson & Merrills, 1992; Falk, 2013; Meadows, et. al., 1972; Arrow, et.al., 2004; Dasgupta, 2007; Heal, 2009). Human rights in its present-day usage is recognized as the inherent value, equivalent and immutable rights of all participants in the human family to a dignified survival. It should be noted that appreciating the reality of the need to observe, human rights, in the context of promoting social progress and better standards of life for humanity is paramount to ordered human development (Onyekpere, 1993; Fainstein, 2000; Bedsworth & Hanak, 2010). The pursuit for the observance of human rights and dignity of the human person are phenomenal to modern-day life.

Perceptions about human rights, as stated above, have become a notable concept of world order. It can be described as are solve for reforming the globe that every individual's human value is appreciated and that every person's human rights are based on international consensus. The envisaged rights embrace: the right not to be subjected to torture, to cruel, inhuman, and degrading treatments/punishments, arbitrary arrests, unlawful imprisonments, or executions. Others include the right to fair, prompt, and public trial, right to life etc (Halem, 1988; Buehler & Pucher, 2011; Nnaemeka-Agu, 1992; Nwabueze, 1974; Murdoch, 1993).

It is obvious that the notion of human rights falls within the frameworks of constitutional law, international human rights law and some aspect of private and public international law, operating in their different spheres, to defend through institutionalized means, the rights of human beings against abuses carried out mostly by powers authorized by the organs of the State; and at the same time to encourage the institution of human living conditions and the transnational advancement of

human disposition (Szabo *in* Vasak, 1982). The notion of human rights is a norm acceptable and recognized internationally by the community of nations, the world over as a peremptory norm of international law also referred to as *jus cogens*, derogations, of which are not permitted. It limits the rights of nations of the world to enact any law which are in consistent with the peremptory norms. With the modern-day global dispensations, the human rights agenda has received unparalleled focus and has grown tremendously from consular adumbrations (Gye-Wado, 1995; Manning, Boons, Von Hagen, & Reinecke, 2012; Reinecke, Manning, & Von Hagen, 2012).

THE BACKGROUND TO THE DEVELOPMENT OF HUMAN RIGHTS

The concept of human rights has been traced to the old doctrine of natural rights that were always considered as inalienable rights. The dimensions of these rights extended from social, economic, political, and cultural rights (Smith & Rees, 1998; Daly, 1981; 1992; Barbier, 1987; 2007; Faber, 2008; Stivers, 1976). It is stating the obvious that almost all modern nations around the globe have made provisions in their various constitutions protecting the above and other rights. This remains the position, though there appears to be, no generally accepted definition of the term '*human rights*'.

This occasioned the emergence of several definitions leading to several schools of thought and positions showing the various backgrounds of the holders of the various view in line with their own perspectives. In the same vein, there are also different perspectives and conflicts in the mechanisms, priorities and approaches for the enforcement of human rights in the light of the different cultural patterns, ideological inclinations, socialist societies, western and non-western societies etc (Dhokalia, 1993; Martins 1993; An Nalm & Deng 1990; Shepherd & Ankpo, 1990; Eze 1984; Adaba 1993; Aduba, Dakas & Gye-Wado, 1995; Gye Wado, 1995; Zhang & Babovic, 2012).

Other writers trace the history of human rights concepts to the period in the light of its national growth and attention to the year, 1948 when the United Nation Declaration of Human Rights and subsequent conventions on human rights drafted as a model to all nations that were signatories came into operation.[2] Taking a retrospective look at the emergence of the law and practice of human rights in Nigeria, it is a well-known fact that, it has its ancestry in the commission that was setup to protect the minorities in Nigeria and headed by Sir Henry Willink which recommended certain critical provisions of Universal Declaration of Human Rights. The same provisions were adopted in the 1963, 1979, 1989, 1995 Draft Constitution and

[2] For example, international covenant on civil and political rights 1966, European Convention for the protection of Human Rights and Fundamental Freedoms 1950. American Convention of Human Rights 1989. African charter on Human and People's Rights 1981.

the 1999 Constitution of the Federal Republic of Nigeria, as amended (Nnaemeka-Agu, 1992).

DEROGATIONS OF HUMAN RIGHTS PROVISIONS UNDER THE 1999 CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA

Given the present widespread abuses, it is imperative to question whether the said abuses of human rights in the light of the ongoing killings and massive destruction of properties in Nigeria can situated as derogations of human rights provisions and permitted under the 1999 Constitution of the Federal Republic of Nigeria from a purely jurisprudential view point it has been asserted the first limitation to human right is the theory of law and freedom which supports the view point that obedience to the law by everyone remains the pivotal for the enjoyment of whatever human beings may have in society. In the words of Cicero "we must all be slaves to the law in order to be free". The concept of freedom in any society is freedom according to the law or within the law (Oputa, 1990).

Furthermore, taking at section 45 of the 1999 Constitution of the Federal Republic of Nigeria, as amended there are provisions dealing with the derogation from certain human rights provisions as found in sections: 37, 38, 39, 40 and 41. There are also similar provisions under the African Charter on Human and Peoples' Rights, but the permitted derogations and restrictions are applicable only in the interest of public safety, public order etc. Under Article 5 of the European Convention on Human Rights, for example, the following grounds can operate to deprive a citizen of liberty (Murdoch, 1993; Shaker, 2015; Kahle & EdaGurrel-Atay, 2014; Campbell, 1996; Hazeltine & Bull, 1999).

First, Detention after conviction by a competent court. "This provision justifies detention imposed following a finding of breach of a distinct legal obligation by a court. It thus covers loss of liberty after conviction but pending appeal, detention imposed as an alternative to the original sentence and detention classified as a disciplinary rather than criminal matter by domestic law. The sub-paragraph may also justify subsequent loss of liberty after release, but any recall to prison must result directly from the original sentencing by a court of law."[3] Others include the following:

a) Detention for the non-compliance with the lawful order of a court.
b) Detention to secure the fulfilment of any obligation prescribed by law.
c) Detention on reasonable suspicion of having committed an offence.
d) Detention to prevent commission of crime.

[3] *See* case Van Droogenbroeck V. Belgium (1982). A 50. Para 40. Van Droogenbroeck v Belgium, Merits, App No 7906/77, A/50, (1982) 4 EHRR 443, IHRL 34 (ECHR 1982), 24th June 1982, European Court of Human Rights [ECHR]

This second ground is to be interpreted restrictively. The sub-paragraph must be read restrictively and not meant to authorize a policy of general prevention directed against an individual or a category of individuals who... Present a danger on account of their continuing propensity to crime; it does no more than afford (States) a means of preventing a concrete and specific offence.

a) Detention to prevent a suspect from absconding.
b) Detention of minors for educational supervision.
c) Detention of minors to allow them to be brought before the competent legal authorities.
d) Detention to prevent spread of infectious diseases.
e) Detention of person of unsound mind.
   It is submitted that, to come under this heading there must be proof of the existence of 'unsound mind' must be reliably established on objective medical grounds. Secondly, the actual mental state of the victim must be ascertained to justify detentions.[4] Thirdly, continuing detention can only be supported by the continuing need for such conditions based on the victim's current mental condition.[5] Generally speaking, "no deprivation of liberty can be considered as justified under this heading if the opinion of a medical expert has not been sought."[6]
f) Detention of vagrants.
   The definition of 'vagrant' is primarily a matter of domestic law as long as this reflects the generally accepted meaning of the term for the purposes of the convention.[7] A state may not seek to apply the label for an improper purpose.[8]
g) Detention of alcoholics and drug addicts.
   "The detention of 'alcoholics' could not be restricted merely to persons medically so diagnosed but had to include detention of individuals 'whose conduct and behavior under the influence of alcohol pose a threat to public order or

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[4] That is the assessment must be based on the current state of mental health and not solely on events taking place in the past if a significant period of time has elapsed: Varbanov v. Bulgaria, (5 Oct. 2000), para 47. (Application No. 31365/96).

[5] *See* case Cf Luberu v. Italy, (1985) A 75, paras 27-29, Ashingdane v. United Kingdom, (1985) A 93. Paras 40-42, 48-49 (Application No 8225/78)

[6] *See* case Varbano v. Bulgaria (5 Oct 2000), paras 46-49 [detention ordered by a prosecutor to obtain a medical opinion to assess the need for proceedings with a view to the psychiatric internment of the applicant: the court observed (at para 47) that urgent cases or where a person is arrested because of his violent behavior a medical opinion should be obtained immediately following the start of the detention; in all other instances prior consultation should be necessary and even where there is a refusal to appear for medical examination, a preliminary medical assessment on the basis of the file is required.

[7] *See* case De Wilde, Ooms and Versyp v. Belgium (the 'Vagrancy cases'), (197 1) A 122, para 68.

[8] *See* case Guzzardi v. Italy (1980) A 39, para 98 [the fact that Article 5[I] (e) justified detention in part to protect the public could not be extension be made to apply to individuals who are considered still more dangerous.

themselves,' and where detention is 'for the protection of the public or their own interests, such as their health or personal safety'.

h) Detention of a person to prevent his effecting on unauthorized entry into a country.
i) Detention of person against whom action is being taken with a view to deportation or extradition.

Apparently, the rationale for limiting or allowing for derogation from human rights provisions in constitutions is to recognize the collective interests of the society as superior to the individual right of the members of the society. This collective interest of the society can manifest itself in many ways.

NATIONAL SECURITY AND HUMAN RIGHTS

"The problem of human rights vis-a-vis national security has been a subject of so much discussion, attention and even litigation in Nigeria during its so many years of military rule. The principal preoccupation of military regimes was with national security. Under this, the military in Nigeria have used so many draconian laws and tactics to silence perceived 'enemies' of the nation. The military was always willing to subordinate the rights of individuals to national security anytime they felt that individual rights conflict with national security.

The judiciary has done a lot, in spite of the draconian legislations passed by the successive military administrations in Nigeria, to stifle the fundamental rights of citizens, by reaffirming the fundamental human rights of persons whose rights have been encroached upon by military decrees to circumscribe the rights of Nigerians (White, Stallones, & Last, 2013). The 1999 Constitution of the Federal Republic of Nigeria, as stated earlier, providing for fundamental rights has also provided for the way and manner of the realization of these rights. These rights enumerated in Chapter IV of the constitution are not absolute however, and may be derogated from in certain circumstances:

a. In the interest of defense, public safety, public order, public morality, or public health; or
b. For the purpose of protecting the rights and freedom of other persons".

Under section 45(1) of the said constitution, it is provided that the right to privacy and family life; Right to freedom of thoughts. Conscience and religion; Right to freedom of expression and the press; right to peaceful assembly and association; and right to freedom of movement; can be derogated from the circumstances mentioned above i.e. in the interest of defense, public safety, public order, etc. The constitution talks of defense, public safety, public order and not to national security. However, the view is that interest of defense, public safety, public order, etc. Considered also in the constitution, are aspects that touch on national security according to Nwabueze (1974) and Fawcett, Hughes, Krieg, Albertcht, & Vennström (2012).

Though public security may require an act in derogation of a guaranteed right; the courts held that, it still cannot be lawfully done unless authorized by a law. "It is a rule of interpretation that to take away a right given by common law or statute, the legislature should do that in clear terms devoid of any ambiguity. Accordingly, if the legislature had intended to take away the right, it recognized under section 30(1) of the 1979 constitution by section 31(i) (a) of the same constitution it would have done so by clear terms and not by implications."

The constitution, however, allows for a declaration of a state of emergency. During any period of emergency proclaimed in accordance with section 205 of the 1999 constitution, the National Assembly is empowered by section 45(2) of the constitution to make laws that may allow for measures that derogate from the provisions of Chapter IV. Those measures that may be taken must be reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency. According to Nwabueze "the measures to be taken during the period of emergency or necessity that will warrant the executive to act or interfere with the rights guaranteed under Chapter IV of the constitution must (a) be inevitable in the sense of being the only remedy; (b) be proportionate to the necessity, i.e. it must be reasonably warranted by the danger which it was intended to avert; and (c) be of a temporary character, limited to the duration of the exceptional circumstances" (Nwabueze, 1974).

The 1999 Constitution did not provide that the fundamental rights in it are absolute and we have seen that it has enumerated instances where the rights can be derogated from. "The courts in Nigeria have held in so many decisions from the decisions of the High Courts of the States to those of the Supreme Court that these rights are not absolute. The courts have said, the right to life prescribed under section 30(1) of the 1979 Constitution (same with section 33 1999 Constitution) is clearly a qualified right. It is not unqualified. The imposition or execution of the death sentence in Nigeria is not subjected to any form of arbitrary, discriminatory or selective exercise of discretion on the part of any court or any other quarters whatsoever." In *the case of Trucks (Nigeria) Limited v. Ayo Pyne*[9] the court of Appeal said that by virtue of section 37 of the 1979 Constitution (same as Section 40 of 1999 Constitution), every person shall be entitled to assemble freely and associate with other persons, and in particular he may "form or belong to any political party, trade union or any other association for the protection of his interests. It said further that the phrase 'for the protection of his interest' does not give the citizen an unrestrained freedom to join any association. It is not a freedom at large but rather it is one that is certainly restrictive."

In the case of *Agbakoba v. The Director SSS*;[10] the Court of Appeal said, admittedly, however that "no freedom is absolute as there may be circumstances of derogation. However, where an infringement of a right is alleged, the issue of derogation cannot be wielded as an omnibus shield by the authority against whom the infringement is

[9] *See* case (1999)6 NWLR (Part 507)514 C.A. At pp. 532-533

[10] *See* case (1998) IIILRA 253 at p. 278

located within the specific circumstances of derogation permitted by law." Again, the Supreme Court in the case of *The Director SSS v. Agbakoba*,[11] pointed out that "the rights to freedom of movement granted by section 38(i) of the 1979 Constitution are not absolute." The same supreme court in the case Of *Fawehinmi v. Abacha*[12] held that "where a statute tends to encroach on or curtail the freedom of liberty of an individual, that statute is generally construed very strongly and narrowly against anyone claiming benefit there from", while the Court of Appeal in the same case,[13] held that "where the freedom of an individual is curtailed, or abridged, it must be shown that such an act is brought within the confines of the law."

What these cases seem to recommend is that if the judiciary accepts a generous interpretation of the provisions of the constitution a just equilibrium might be hit which would allow for the satisfaction of individual freedoms and liberty as well as allow the state to uphold peace, order and security for the general interest of the nation. Pats – Acholonu JCA in *Abacha v. Fawehinmi* said, "*...since the end of the Second World War when legal positivism or judicial formalism was made nonsense of by the despotic regime of the Third Reich and Fascist Italy, and the United Nations Universal Declaration of Human Rights was enthroned, there is growing tendency in most jurisdictions to protect as much as possible the fundamental rights of the people in times of pace in particular. There is no doubt that in times of war or emergency of some sort like earthquake or internal insurrection, the public might close their eyes to an enactment of laws that appear draconian on their face. Such laws if made are to secure or protect the state in times of emergency... it must be stated that liberty in the context of modern times has now assumed a far broader conception than before and it increasingly demands protections.*"

CONCLUSION

This paper has attempted to reappraise national security challenges, human rights provisions, derogations under the 1999 constitution of the Federal Republic of Nigeria and the place of human rights in conflict situations between national security and human rights under Nigerian law. Based on the said reappraisal, the following recommendations are made.

RECOMMENDATIONS

1. It is sad that it took the presidency of the present government, this long to, after spending more than three years to appreciate the grave security challenges that

[11] *See* case (1999)3 NWLR (Pt595)314 S.C.

[12] *See* case (2000)6 NWLR (Pt. 660)228 SC at pp. 325 – 6

[13] *See* case (1998)1 HRLRA at p.610

have be-devilled Nigeria for years now is worrisome and calls for an emergency of the security delivery system in Nigeria.

2. The statement credited to the President Buhari that he was reviewing security strategies and promising to study the document and make recommendations therein does not paint the picture of a serious government working to protect the lives and properties of it citizens.
3. Assuring the National Institute for Policy and Strategic Studies (NIPSS) that the Ministry of Budget and National Planning would work towards providing necessary funding for its findings is dilatory as the present Federal Government has sufficient funds, in form of security votes, allocated to the presidency each month to deal with the security challenges in Nigeria today.

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Journal of Law and Legal Reform (2021), **2(1)**, *pp.* 97-108.
DOI: **https://doi.org/10.15294/jllr.v2i1.40584** ISSN (Print) 2715-0941, ISSN (Online) 2715-0968

REVIEW ARTICLE

TRANSFER FROM LAND RIGHTS BECOME A RIGHT TO BUILDING USE OF LAND FROM STOCK CAPITAL IN THE LIMITED LIABILITY COMPANY

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CITED AS
Powers, M. R., & Nugraheni, P. D. (2021). Transfer from Land Rights to Right of Building Use of Land from Stock Capital in the Limited Liability Company. *Journal of Law and Legal Reform*, *2*(1), 97-108. https://doi.org/10.15294/jllr.v2i1.40584

ABSTRACT

In establishing Limited Liability Company, capital stock in the form of land is usually used. This is because the land has an economic value that continues to increase and has never decreased in certain period time. In this journal, author wants to analyze legal consequences of transfer of ownership rights to land to building rights on land from status of land ownership as result of inclusion of share capital in Limited Liability Company and legal reasons for not permitting ownership of land as condition for establishing Company. In this journal, author uses juridical and normative research method, which is legal writing which is carried out by analyzing secondary legal materials or library materials to find solution to legal problem that arises and uses problem approach based on law statute approach or general legal rules regarding land ownership that currently apply and problem approaches that are based on conceptual basis. The results of writing show that legal reasons do not allow and permit Limited Liability Company to control land with property rights relationship.

Keywords: *Capital Income in Limited Liability Company; Ownership Right; Right to Build*

Submitted: 22 August 2020, Revised: 7 September 2020, Accepted: 11 December 2020

TABLE OF CONTENTS

INTRODUCTION

At present, the State of Indonesia has experienced very large developments in carrying out development and development programs, particularly development and development programs in the business and economic fields. The development process in the development program in the field of business and economy is seen from the increase in entrepreneurs who want to form a company in shape from legal entity or Limited Liability Company for carry out various business activities. This is because company in shape from legal entity or Limited Liability Company has several advantages compared to a company that is not legal entity (Budiarto, 2002). Companies in form from legal entities or limited liability companies are in great demand by entrepreneurs because they have the ability to develop themselves, are able to carry out activities in the form of capitalization capital and are able to obtain their own greater benefits when compared to a company that is not a legal entity or company limited. Therefore, at this time many entrepreneurs want to establish a Limited Liability Company (Hartono, 2002).

Judging from its activities, a limited liability company has a very broad influence in the economic field. Meanwhile, when viewed from an institution, a company in shape from legal entity or Limited Liability Company tends for be attractive to entrepreneurs because of some special characteristics. Some of these special characteristics are as follows:

1) The form of liability that arises in activities within a Limited Liability Company is only charged for assets from legal entity, not to the assets of individuals.

2) Assets and investment assets in Limited Liability Company can be easily transferred from one legal entity to another legal entity so that the assets and investment assets are mobility.
3) The existence of a corporate organ that specifically has certain duties to deal with a business activity that is in Limited Liability Company (Prasetya, 1996).

In process from construct Limited Liability Company, legal actions or agreements carried out by two or more founders not only create a binding nature between them but can also create a binding nature in all founders and all corporate organs in a Company The aforementioned. By the legal actions or agreements that have been made, the founders have the right to receive share capital and have the obligation to make full deposit from capital stock to Limited Liability Company that had been constructed (Tumbuan, 2007).

In connection with activities of a share capital deposit in Limited Liability Company, this matter had been arranged in Article 34 paragraph (1) from Act Number 40 the Year 2007 regarding Limited Liability Company that reads: "Deposits from share capital can be done in form from money and or other forms." Therefore, from this article, it can be explained that the type of share capital in Limited Liability Company does not always have to be in form from money. A deposit of share capital can be done by using movable objects, immovable objects, real objects, or unreal objects that can be rated in real money and can be accepted with Limited Liability Company concerned.

A result of these rules, entrepreneurs in establishing Limited Liability Company always use share capital in form from land. This is because the land has an economic value that continues to increase and has never decreased in a certain period time. Acts or legal events in the form of depositing land as share capital in Limited Liability Company can be referred to *inbreng*. In the case of doing this check-in usually, the deposit of land used as share capital must be adjusted in advance with the price in general or the opinions of scholars who have no legal relationship to a relevant Limited Company.

The use from land that is use as initial capital in constructing Limited Liability Company is also caused by the existence of various kinds of land rights, namely among others: ownership rights, building rights, use rights, and management rights over land. In general, ground ownership status in form from ownership rights can only be owned by individuals or individuals who have Indonesian citizenship. This has been arranged in Article 21 paragraph (1) and (2) from Act Number 5 Year 1960 regarding Basic Regulations on Agrarian Principles which read: "Property rights to land can just be controlled with an Indonesian citizen and various legal unities which has been determined by Government from Indonesia as the holder and ruler of these land rights." This has been arranged in Article 1 from Government Regulation Number 38 of 1963 regarding Appointment from Legal Unities that Can Have Ownership Rights over State Ground and Management Rights are regulated regarding legal entities that can have ownership rights, namely as follows:

1) Bank institutions established by the State.

2) Association groups established by the Agricultural Cooperative. This is specifically regulated in Act Number 79 and Number 139 of 1958.
3) Religious institutions appointed with Minister from Religion or Minister from Agrarian after receiving advice and advice from the Ministry of Religion.
4) Charitable institutions and foundations referred by the Minister of Agriculture after receiving advice and advice from the Ministry of Social Welfare (Santoso, 2011).

Of the four types of legal institutions that have been described, Limited Liability Company cannot be legal entity that can own and control land ownership rights. This can cause problems if the land which is used to share capital in constructing Limited Liability Company still has status from ownership rights. This is because land that has been use in share capital in constructing Limited Liability Company, as a whole has become an asset or has become assets of a relevant Limited Liability Company and separate from assets from company's organs.

METHOD

In writing this scientific journal, the author uses a research method that is normative and juridical. Various legal materials that can be used are Laws and Regulations as the main legal materials or main basic materials and also used other legal materials, such as literature and also scientific works in field from Agrarian Law. While various secondary legal materials or various supporting legal materials that have a function as a complement and to supplement a scientific journal, legal dictionaries and also general dictionaries can provide an explanation of the notions related to what is in this journal. Various legal materials that have been collected and then analyzed descriptively and juridical to provide a general picture from problem to be explained and a conclusion from an explanation of the results to solve various problems in the scientific journals (Soekanto, 2006).

LEGAL CONSEQUENCES ARISING OF TRANSFER FROM OWNERSHIP RIGHTS OF LAND INTO LAND USE RIGHTS FOR BUILDINGS FROM LAND OWNERSHIP STATUS AS A RESULT OF THE INCLUSION OF EQUITY CAPITAL IN LIMITED LIABILITY COMPANY

In process from constructing Limited Liability Company, Limited Liability Company concerned must have its assets and be separated from the assets owned by the company's organs and the founders of the relevant limited company. Assets from Limited Liability Company are obtained from the initial capital investment in the form of shares from its founders. These assets are needed to achieve the

objectives of the limited company concerned. A Limited Liability Company cannot be established if it does not meet the minimum capital requirements. The fulfillment of the minimum capital requirement has several purposes, namely to be used as initial capital, capital to be deposited, and capital to be placed. The three minimum capital requirements must be met to provide a legal guarantee to a third party in a Limited Liability Company (Prasetya, 1996).

A deposit on share capital is usually done by cash, but in Article 34 paragraph (1) from Act Number 40 the Year 2007 regarding Limited Liability Company that reads: "Deposit on a share capital can be done in shape from money and or in other shapes." In general, a handover of authorized capital can be done in form from money. However, at a specific time, a handover from share capital can be done by using movable objects, immovable objects, real objects, or unreal objects that can be rated with money and can be accepted with Limited Liability Company concerned. Deposits to share capital that is not in form from money must be accompanied with specifications or details that explain price, type, status, and place of residence required in the process of depositing capital stock. This has the purpose of providing assets in from form from share capital to Limited Liability Company and separating it from assets owned by company organs and the founders of a Limited Liability Company concerned. Another form of deposit for share capital is capital income or goods/*inbreng* (Budiyono, 2001).

The process of ownership of land that is made into a capital in a company can make the ownership status of the land rights experience a transfer or transfer. The forms of ownership transfer to land are as follows:

1) The switch is the transfer from ownership rights for land from original ruler or owner to another party that does not act as the buyer or renter of the land through an act or legal event. If the landowner dies, the right of ownership of the land concerned is transferred directly and legally to his heirs as long as the heirs are still eligible as subjects of land rights.
2) Transferred is the transfer from ownership rights for land from original owner to another party acting as the buyer or renter of the land through an act or legal event. Examples include act grants, buying and selling, auctions, leases, and exchanges (Santoso, 2010).

In the process of transfer and from ownership rights for land, legal subject of object from the law must be seen first. In the process from transferring ownership rights for land from the original ruler or owner to another party acting as a buyer or tenant of land, for example, that is, among other things: the act of grants, buying and selling, auctioning, leasing, and swapping which is binding on the law governing an agreement. Therefore, process from transfer from ownership rights for land must be linked to Article 1320 from Civil Code which regulates terms from legal agreement in advance.

In the process from transfer from ownership rights to land, legal subject must comply with the requirements as regulated and specified in Act Number 5 Year 1960 regarding Basic Regulations on Agrarian Principles. If these laws are not fulfilled, then

the right of ownership to the said land may be canceled by the State and may change its status to State Land. In Article 104 from Regulation from Minister from Agrarian Affairs or Head from National Ground Agency Number 9 Year 1999 regarding Procedures to Giving and Revocation from State Ground Rights and Management Rights, are regulated and determined as follows:

1) Cancellation from land rights consists from cancellation of decisions on granting of rights, decisions on granting of rights in terms of control from land, and certificates from land rights.
2) Cancellation from land rights described above is due to administrative errors in the issuance of regulations on granting rights, regulations on granting rights in terms of control of land, and certificates of land rights that have been decided by a court decision and have obtained legal force binding and fixed.

In Article 107 from Regulation from Minister from Agrarian Affairs or Head from the National Ground Agency Number 9 Year 1999 regarding Procedures to Giving and Revocation State Ground Rights and Management Rights, is regulated and determined regarding administrative-legal defects, as follows:

1) There are errors in the procedure.
2) There are errors in applying laws and regulations.
3) There are errors in the rights held by legal subjects.
4) There are errors in the rights held by legal objects.
5) There are errors in the rights held by various types of land rights.
6) There are errors in the calculation of land area.
7) There is an overlap with land rights.
8) Physical or juridical data that is not true or false.
9) There are errors in other administrative fields.

The process of canceling land rights can lead to legal actions or events, for example, where the rights for land can be canceled with State and the land can become State Land. If it is associated with the inclusion from land as share capital in a Limited Liability Company, then land rights can be canceled with State and land can become State Land. This is because Limited Liability Company is not by the requirements as ruler or owner of land ownership rights, so changes must be made or decreased to the ownership status of land rights from ownership rights to land to building use rights over land.

Property rights for land can be reduced and increased with interests from holders from these land rights. Decrease in land rights can be done by old land rights holders to meet the interests of new land rights holders who do not qualify as the relevant land rights holders.

Regarding on Decree from State Minister for Agrarian Affairs or Head from National Ground Agency Number 16 Year 1997 regarding Change from Ownership Right into Building Use Rights or Use Rights and Building Use Rights into Use Rights, two types of ground rights can be derived, as follows:

1) Ownership rights for land can be reduced for building use rights over land or use rights for land within grace period of 25 years and 30 years.

2) State Land granted with building use rights over ground or management rights to land owned to individuals or legal entities can be transferred or demoted to land use rights within 25 years for the new holder of land rights.

The activity of submitting application for transferring ownership rights for ground into building use rights for ground or use rights for ground and to transfer building use rights for ground to use rights to ground is carried out a registration process to the Head of Ground Office in the area concerned first accompanied by accompanied some documents, which are as follows:

1) An auction deed made by an authorized auction official if the land rights are owned and controlled by another party in form from legal entity in public tender event.
2) Deed of ownership of land or building use rights on land that has been petitioned regarding the transfer or reduction of its rights or title to the relevant land that has not been registered.
3) The agreement that has been mutually agreed from the party that holds and has a mortgage right on the land, if there is a mortgage right in the land concerned.
4) Curriculum vitae from the applicant for the rights to the land concerned.

LEGAL REASONS FOR NOT ALLOWED TO OWN THE RIGHT TO LAND TO OWN AND CONTROL BY LIMITED LIABILITY COMPANY

One from rights to land that has been regulated in Article 16 paragraph (1) from Act Number 5 Year 1960 regarding Basic Regulations on Agrarian Principles is right from ownership for land. According to Lili Rasjidi, the right to ownership of land is a legal event that is experienced by someone on an item or thing that can give the status of ownership rights to the object or thing concerned. In the regulations governing land law in Indonesia, the understanding of property rights for land has been arranged in Article 20 paragraph (1) from Act Number 5 Year 1960 regarding Basic Regulations on Agrarian Principles, which read: "Property rights for land is hereditary, strongest, and most fully accepted right that can be owned by individuals or individuals by taking into account the regulations contained in Article 6."

Inheritable means that the right from ownership from ground can be valid as long as owner of the ground is still alive and if owner of ground concerned dies, then the ownership rights can be transferred or transferred to his heirs as long as the heirs concerned are still eligible as persons of ownership rights over soil. Strongest means that the ground rights are stronger when contrast for other ground rights, for example, right for build, right for use, right for use, and management rights, do not have a certain grace period set by the Government, right for control land is not easily abolished, and right for control land is easily defended against interference arising from other parties. The most complete means that land rights have broader authority when compared to other land rights and use or control from land from property rights

is also wider when compared to the use or control of land from other land rights (Harsono, 2008).

According to Samun Ismaya, the characteristics of property rights to land are transferable or transferable to other parties, can be released or released legally, can be use collateral to debt with existence from mortgage rights, can be used as collateral, and can be represented (Ismaya, 2011). Meanwhile, regarding for Boedi Harsono, land rights, in general, can only be owned and controlled with Indonesian citizens who have single citizenship or only one. This is included in the scope of the land that was built, the land that was cultivated, the land that was used, and the land that was managed (Harsono, 2008).

The process of transfer from ownership rights to ground is arranged in Article 20 paragraph (2) from Act Number 5 Year 1960 regarding Basic Regulations on Agrarian Principles that read: "Ownership rights for land can be transferred and transferred for other parties." Transfer from title to land concerned must be registered with relevant local Regency or City Land Office and evidence must be in the form from authentic deed that has been issued by the Land Deed Making Officer or the Auction Deed Making Officer if the transition or transfer process ownership rights for land are carried out through an auction process. Apart from individuals or individuals, a legal entity can be the subject of ownership rights for land. This has been arranged in Article 21 paragraph (2) from Act Number 5 Year 1960 regarding Basic Regulations on Agrarian Principles which reads: "Government can establish legal entities that can be subject to ownership rights along with the conditions." So that any individual or legal entity that has ownership rights to land cannot carry out process from transferring ownership rights for land that he owns and conquers.

In Article 21 paragraph (2) from Act Number 5 Year 1960 regarding Basic Regulations on Agrarian Principles, it is explained that only certain legal entities can be subject to ownership rights to land with their conditions that must be fulfilled. In Article 49 paragraph (1) from Act Number 5 Year 1960 regarding Basic Regulations on Agrarian Principles, it was explained that status from ownership from land in form from ownership rights for land can only be owned and controlled with religious institutions and social institutions, as long as right from ownership from land is used as a form of business activity in the religious and social fields which is recognized, guaranteed, and protected by the Government itself (Murjiyanto & Wibawanti, 2013).

In Article 1 from Government Regulation Number 38 Year 1963 regarding Appointment from Legal Unities that Can Have Ownership Rights over State Ground and Management Rights is regulated regarding legal entities that can have ownership rights over ground, as follows:

1. Bank institutions established by the State.
2. Association groups established by the Agricultural Cooperative. This is specifically regulated in Act Number 79 and Number 139 Year 1958.
3. Religious institutions appointed with Minister from Religion or Minister from Agrarian after receiving advice and advice from Ministry from Religion.

4. Charitable institutions and foundations referred with Minister from Agriculture after receiving advice from Ministry from Social Welfare.

According to R. Murjiyanto and Erna Sri Wibawanti, the cause of a legal entity is not permitted and allowed to own and control land rights is to prevent acts of embezzlement against the maximum limit of ownership of the land and to provide equal rights for all citizens Indonesia in terms of owning and controlling land rights. This has also been regulated in Article 17 from Act Number 5 the Year 1960 regarding Basic Agrarian Regulation.

In Common Explanation section II Number 5 from Act Number 5 the Year 1960 regarding Basic Regulations on Agrarian Principles it has been explained that legal entity may not have ownership rights over land. This is because a legal entity does not need to have ownership rights to land and only needs to have other rights to land, for example, right for build, right for use, right for use, and management rights which are also accompanied by guarantees of the right to the relevant land specifically and specifically. So with this, businesses that have the objective to violate regulations concerning the maximum extent of land that can be owned and controlled by property rights can be overcome and prevented. Although initially a legal entity was not permitted and allowed to own and control land ownership rights, because of the need for community institutions that are closely related to the religious, economic, and social fields, a program called the Freeing Clause was implemented. This Escape Clause Program allows a legal entity that has certain specifications to own and control land ownership rights. The granting of ownership rights overland to a particular legal entity is done by the Government by giving dispensation as legal entity that can have ownership rights over the land. In Article 49 from Act Number 5 Year 1960 regarding Basic Regulations on Agrarian Principles, it is explained that the status from ownership from land in form from ownership rights for land can only be owned and controlled by religious institutions and social institutions, as long as the ownership rights to land the person concerned is use as form from business activity in the religious and social fields which the Government itself recognizes, guarantees and protects. If a legal entity concerned does not have business activities in the religious and social fields, then the legal entity concerned is referred for as an ordinary legal entity.

As a company in form from legal entity, Limited Liability Company has rights and obligations that are independent and separate from the rights and obligations of the company organs contained therein. This has been arranged in Article 1 from Act Number 40 the Year 2007 regarding Limited Liability Company that reads: "Limited Liability Company which is generally referred for Company is legal entity in shape from capital or company partnership, carrying out a business activity with authorized capital in the form of shares, and was constructed based on agreement made by the founders from Limited Liability Company concerned by regulations arranged in law and its implementing regulations."

So it can be deduced that Limited Liability Company that become legal subject always can manage finances better when compared to other legal subjects, such as,

individuals or individuals. The ability to manage finances better can make a limited liability company have greater purchasing power when compared to the purchasing power of individuals or individuals. That is what causes a company in shape from legal entity such as Limited Liability Company for permitted and allowed to have ownership status of land in form from land ownership rights.

CONCLUSION

Ownership rights to land used as share capital in Limited Liability Company must be transferred for right for use building on land or use rights for land in advance so that Limited Liability Company concerned can become legal subject by conditions set out in law and its implementation rules as the holder and ruler of the relevant land rights. If the conditions arranged in the law and the implementing laws are not fulfilled, then Limited Liability Company cannot be legal subject that owns and controls the relevant land rights, ownership of the said land rights can be canceled with State, and land's status can be changed from ownership rights to land to State Land. The legal reason is not permitted and permitted ownership of land to be owned and controlled by Limited Liability Company is because Limited Liability Company that become legal subject always can manage finances better when compared for other legal subjects, such as, namely individuals. The ability to manage finances better can make Limited Liability Company have greater purchasing power when compared for the purchasing power from individuals. It is feared that this will lead to a monopoly event in terms from ownership from land rights. Also, the reason legal entity is not permitted and allowed for own and control land ownership rights is for prevent acts from embezzlement against the maximum extent from ownership from land and for provide equal rights for all Indonesian citizens in terms from owning and controlling property rights for land.

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QUOTE

Justice in the life and conduct of the State is possible only as first it resides in the hearts and souls of the citizens.

Plato
A Greek Philosopher

Published by Postgraduate Program, Master of Laws, Faculty of Law, Universitas Negeri Semarang, Indonesia

Journal of Law and Legal Reform (2021), **2(1)**, *pp.* 109-124.
DOI: **https://doi.org/10.15294/jllr.v2i1.44321** ISSN (Print) 2715-0941, ISSN (Online) 2715-0968

REVIEW ARTICLE

POLITICAL DYNASTY IN LAW AND POLITICAL PERSPECTIVE: TO WHAT EXTENT HAS THE ELECTION LAW BEEN REFORMED?

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CITED AS
Luluardi, Y. D., & Diniyanto, A. (2021). Political Dynasty in Law and Political Perspective: to what extent has the Election Law been reformed?. *Journal of Law and Legal Reform*, *2*(1), 109-124. https://doi.org/10.15294/jllr.v2i1.44321

ABSTRACT

A democratic state allows for the birth of a dynastic politics. Indonesia as a democracy must accept these consequences. As long as dynastic politics are in accordance with the constitution and do not violate democratic principles, the state accommodates the birth and development of dynastic politics. In Indonesia, since the opening of the doors of reform and regional autonomy, it has led to a democratization of political power at the center as well as in the regions. Dynastic politics also grows and develops. The growth and development of dynastic politics occurs at the level of political power in the regions. In the Tegal Raya region, dynastic politics led by the Dewi Sri clan had experienced developments and was able to place several members of the Dewi Sri clan in several political powers. But interestingly, the political development of the dynasties in the Tegal Raya region must be reduced. This article analyzes the factors that influence the development and reduction of dynastic politics in the Tegal Raya Region.

Keywords: *Development; Political Dinasty; Reduction; Tegal Raya.*

Submitted: 25 September 2020, Revised: 17 December 2020, Accepted: 15 January 2021

TABLE OF CONTENTS

INTRODUCTION

Indonesia is a country that adheres to democracy. This can be seen from the provisions of the 1945 Constitution Article 1 paragraph (2) which states that sovereignty is in the hands of the people and is exercised according to the Constitution. According to Asshiddiqie (2005), this provision is said to be a *constitutional democracy* (Muhtada & Ayon, 2018).

One of the consequences of constitutional democracy is that every implementation of the life of the nation and state must be based on the sovereignty of the people and the constitution. This applies to the mechanism of state life in the transfer of power which must be carried out with the people's sovereignty and based on the constitution. This mechanism can be done through elections. It is not surprising that Indonesia, which adheres to a constitutional democracy, always conducts elections in transition, especially in the executive branch of power. This mechanism took effect after the amendments to the 1945 Constitution.

In Indonesia, the transfer of power in the executive branch of power has been going on from the central level, namely the President and Vice President to the regional levels of Governors, Regents, and Mayors and their deputies. Normatively, this mechanism can be said to be running well. This is evidenced by the existence of a consolidated electoral system starting from the organizers, supervisors, and legislative institutions in the field of disputes over election results.

Indeed, many influencing phenomena are related to the mechanism for selecting leaders in the executive branch of power, especially at the local or regional level. Dynastic politics is one of the phenomena that occur due to the existence of a democratic and constitutional electoral mechanism.

Normative dynastic politics do not violate democracy and the constitution. This condition is because there are no regulations that prohibit dynastic politics at the time of elections in branches of power both at the central and regional levels.

However, the question is, dynastic politics are often enlivened by pro and contra (Rizan, 2019). Therefore, it is necessary from a different perspective, remembering that from a democracy and a constitutional perspective there are no problems.

Analysis of the quality of dynastic politics in the seizure and exercise of power must be analyzed, how political dynasties can grow and be able to run power and can dynastic politics grow or be reduced? This question is very aptly addressed to dynastic politics in the Tegal Raya region which includes Brebes Regency, Tegal Regency, Tegal City, and Pemalang Regency. The four regions were once (there are still areas) controlled by the dynasty of Dewi Sri's ruling clan. Here in after referred to as the Dewi Sri clan. Idza Priyanti (Regent of Brebes, 2012 -2022), Edi Utomo (Candidate for Regent of Tegal Regency, 2013), Ikmal Jaya (Mayor of Tegal, 2010-2015), and Mukti Agung Wibowo (2010-2015) (Rizan, 2019).

Now practically, only Idza Priyanti is still holding power in Brebes Regency and will end in 2022 for the second period, so that regulations cannot go forward again. Edi Utomo failed to become a regent when he participated in the 2013 contest for regional head elections in Tegal Regency. Ikmal Jaya lost when he ran again in the 2013 election for mayor of Tegal, and even tripped over a corruption case. Mukti Agung Wibowo failed when he faced the *incumbent* in the 2015 Pemalang Regency regional head election (Sinaga, 2016; Nugroho; 2013, KPU, 2015).

This means that the dynastic politics in Tegal Raya driven by the Dewi Sri clan is Idza Priyanti and will end in 2022. The reduction of dynastic politics from the Dewi Sri clan, which only Idza Priyanti left behind raises questions. Who is the next dynastic political administrator from the Dewi Sri's family.

The dynastic politics driven by the Dewi Sri clan will enter a receding period if there are no candidates from the Dewi Sri clan who run for regional head in the Tegal Raya region, especially after Idza Priyanti was unable to run again due to legal regulations that allow only two terms.

However, it can be said that the Dewi Sri clan still strengthens the political existence of the dynasty in the Tegal Raya region. This is evidenced by the re-advancement of Mukti Agung Wibowo, who has re-nominated for Pemalang Regent, after previously being Deputy Regent of Pemalang (2010-2015) and losing the Pemalang Regency Regent Election in 2015 (Basaran, 2020). If Mukti Agung Wibowo succeeds in winning the battle, then the dynastic politics of the Dewi Sri clan will again show its existence in the Tegal Raya region, which previously only left Idza Priyanti. Based on the scientific reasons above, the writer breaks down the problems, namely (1) How did the political development of dynasties in the Tegal Raya region begin? And (2) what are the factors that influence the reduction of dynastic politics in the Tegal Raya region?

THE DEVELOPMENT OF DYNASTIC POLITICS IN THE TEGAL RAYA REGION

Politics in Nasti or politic dynasty in fact there is no legal definition. This is because there are no regulations governing dynastic politics. Agustino and Yusof define dynastic politics as the placement of several family members in a political structure. The family members are based on ancestry or clan (Agustino & Yusoff, 2010). This definition can generalize that several people in a family who are included in the political structure can be said to be dynastic politics. This definition also does not impose limits only on the leadership of the branch of power in the government.

This phenomenon is not taboo in Indonesia. The political definition of a dynasty that has been described is used to observe political conditions and structures in Indonesia. The phenomenon of dynastic politics can be said to already exist. Even before the reformation many have been carried out under the term nepotism. However, nepotism is not limited to family members but can also be friends or relatives. Interestingly, in the current context, dynastic politics with nepotism are very different. Dynastic politics has not been defined in the regulations, so there is no prohibition against doing dynastic politics. The placement of family members in the political structure is also carried out democratically, namely through elections that are regulated by law. The people as the holder of sovereignty then choose and deliver it to the political structure, on the condition that they must win the democratic mechanism.

This is different from nepotism which has been explicitly defined in law and is said to be a prohibited act. Article 1 point 5 of Law Number 28 of 1999 concerning Clean and Free State Administration from Corruption, Collusion and Nepotism states that Nepotism is any act of State Administrators against the law which benefits the interests of their families and / or cronies above the interests of the community, nation, and country. Then Article 5 point 4 and Article 22 in substance states that every state administrator who practices nepotism can be subject to imprisonment and fines.

The definition of nepotism is very clear, namely the existence of acts against the law that use family interests such as the placement of family members in a political structure. This is what makes dynastic politics different. Dynastic politics is not an act against the law because it is carried out with a legal and democratic mechanism. For example, such as the Regional Head Election or Pilkada which was attended by several family members and succeeded in winning the contestation.

This means that legally, dynastic politics is legal and constitutional. The law can be said to provide space for dynastic politics. The provision of space from law to dynastic politics can be said to be the cause of the growth and existence of dynastic politics. Comparative, for example: if the law does not provide room for dynastic potential. Of course, dynastic politics is said to be an act against the law and anyone who practices dynastic politics will be prosecuted according to law enforcement.

In the Tegal Raya as the cause of the growth of dynastic politics, other causes of the growing political dynasty as resources, community support, and access to political parties. The three causes are causes that do not have to be collectively owned but follow the conditions of the area to be addressed in the placement in the political structure. In the Tegal Raya region, dynastic politics have occurred, driven by the Dewi Sri clan. Klan Dewi Sri cannot be separated from t ribs that cause, so that affects the emergence and development of dynastic politics in Tegal Raya.

Resources that can be said to play an important role in bringing about political dinasty in the Tegal Raya. Resources according to Charles F. Andrain are divided into five types, namely physical, economic, normative, personal, and expert (Andrain, 1992). There is only one Dewi Sri clan that is not owned by resources, namely physical (Luluardi, 2013). Physical in this case for example weapons (Andrain, 1992). Others such as economic, normative, personal, and expert resources were owned by the political dynasty in the Tegal Raya region.

The next cause for the emergence of political dynasties in the Tegal Raya region was community support. Strong community support can win democratic battles. It is impossible, without strong community support quantitatively will win a political battle like the Pilkada. Given the democratic system requires the support of the people as sovereignty and must amount to the majority.

This community support seems to have been managed well by the Dewi Sri clan in the Tegal Raya area. Dewi Sri's clan has succeeded in getting support from the grassroots community of entrepreneurs and *grassroots* (Luluardi, 2013). No wonder the Dewi Sri clan gets support from business circles. Given that the Dewi Sri clan comes from business circles. A successful business business is run by the Dewi Sri clan so that becoming a large business clan in the Tegal Raya area will make it easier to be known and close to the grassroots community. Dewi Sri Clan business businesses are very popular in the Tegal Raya area such as PO Dewi Sri which is engaged in transportation services. Bring influence on the level of popularity of the members of the Dewi Sri clan. This means that people will get to know the Dewi Sri clan more because the business they are running has been popular in the community.

The high level of popularity in the Dewi Sri clan will have an impact on the high potential acceptability or liking of the community. The potential for obtaining a high level of bishoprics is greater than that of someone who has low popularity. favorite high level will also provide a potential incidence of high desirability. That is, the potential to be chosen is higher if it has high acceptability. All of that can be done by approaching the community until it gets grassroots support. This is because grassroots people constitute the majority voters in democratic elections in Indonesia such as Pilkada.

The support from entrepreneurs and the grassroots community seems to have been really optimized by the Dewi Sri clan so that they can win competitions in several Pilkada.

Another reason for the emergence of dynastic politics in the Tegal Raya region, driven by the Dewi Sri clan, was access to political parties. Political parties are one of

the pillars of democracy (Muhtada & Diniyanto, 2018). It is hoped that the presence of political parties in democracy can protect the wheels of democracy so that it truly becomes the sovereignty of the people. This condition is not surprising if in the operation of candidacy in elections, support from political parties is often required. In Indonesia, it even requires support and proposals from political parties in the Presidential and Vice-Presidential Election.[1]

This also applies to the Pilkada. However, in the Pilkada process, there is still one option, namely through individual or *independent* channels provided that, it collects support from the community directly, which is usually proven by the identity cards of each person who supports it. Of course, the individual route will be more difficult because it must first gather real community support. The next problem is having to form a support machine that can move the grassroots community to be able to win the Pilkada. Spontaneous formation of support machines will be more difficult and requires relatively large material and non-material resources.

It is not surprising that in the Pilkada process, many candidates for regional heads or deputy regional heads prefer to use support channels from political parties. Not because it is easy to get support from political parties, but because there is a political party machine that can make winning the Pilkada easier. It remains only to optimize the party machine and increase voter support from other sectors.

The Dewi Sri clan seems to fully understand the function of political parties and the benefits of being promoted by political parties in the Pilkada. This is evidenced by members of the Dewi Sri clan who almost always advance using political parties. There was only one time that progressed using the individual route, namely Mukti Agung Wibowo when he was running for the 2008 Tegal City Regional Election. Given that Ikmal Jaya, the older brother of Mukti Agung Wibowo, had no opponent at that time, Mukti Agung Wibowo became a candidate for puppet mayor. It is only part of a political strategy (Luluardi, 2013).

That is not a serious clan Dewi Sri in nominate in elections using individual track. The Dewi Sri clan can be said to be more comfortable using political parties as a vehicle to win the Pilkada. This was proven by members of the Dewi Sri clan who won the Pilkada using political parties as vehicles.

The understanding of the Dewi Sri clan about the importance of political parties in the Pilkada seems to be followed by the ease of gaining access to political parties. The Dewi Sri clan seems to easily get support from political parties. This is evidenced by the various political parties that support the Dewi Sri clan members. The Dewi Sri clan does not always use one political party as a vehicle for candidacy in the Pilkada (Nugroho, 2015; Afif, 2016; Kristyarini, 2013).

These four causes can be said to be the cause of the emergence of the Dewi Sri clan in dynastic politics in the Tegal Raya region. The rule of law is loose for the

[1] See the 1945 Constitution Article 6A paragraph (2) which states that the Presidential and Vice-Presidential candidate pairs are proposed by political parties or coalitions of political parties participating in the general election before the implementation of the general election.

proliferation of dynastic politics as a normative cause. Then resources, community support, and access to political parties are the strengths or advantages possessed by the Dewi Sri clan so that they are able to occupy members of the Dewi Sri clan in the political structure, namely regional heads and deputy regional heads.

FACTORS AFFECTING THE REDUCTION OF DYNASTIC POLITICS IN THE TEGAL RAYA REGION

The discussion related to the factors that influence the reduction of dynastic politics in the Tegal Raya region in this article is carried out normatively and generally. The researcher examines the normative and general aspects that cause the reduction of dynastic politics in the Tegal Raya region. There are at least two main factors affecting the reduction of dynastic politics in the Tegal Raya region, as follows.

Candidate Recruitment Revolution Based on Political Survey

The function of political parties in the recruitment process is an important indicator of the success of democracy at the local level. The maturity of knowledge of political parties is at stake to find militant and productive cadres in this international institution. Instead, the parties will lose money if they choose the wrong seeds to become regional leaders. Governed by Article 29, paragraph 1 Law No. 2 of 2011 on Political Party explained that political parties do the recruitment of Indonesian citizens to become candidates for regional head and deputy head of the Regions. Although since the previous law, namely the Pilkada Law No. 12 of 2008, it has allowed them to run as individuals. Based on *Peraturan Komisi Pemilihan Umum* (PKPU) No. 3 of 2017 Article 8 (1) Requirements for the nomination form of the amount of support for individual candidates for the Election of Regent and Vice Regent or Mayor and Deputy Mayor, as shown on Table 1

Table 1 Support Terms based on the number of voters[2]

Number of Voters[3]	Terms of support
‹250,000	10%
250,000 - 500,000	8.5%
500,000 - 1,000,000	7.5%
› 1,000,000	6.5%

Source: *Data processed from PKPU No.3 of 2017*

[2] The amount of support referred to must be spread over more than 50% (fifty percent) of the number of sub-districts in the regency / city area concerned.

[3] Regencies / Cities with the number of population included in the final voter list during the last election or election.

Rules that support the minimum requirements used as a reference touts individuals submit photocopy E-KTP requisite total number. However, this is the dilemma when individual candidates are required to submit proof of voting support from the people in practice individual candidates buy first photocopies of ID cards from the people. Every citizen has the constitutional right to be elected and to vote, but with the enactment of PKPU regulation No. 3 of 2017, independent candidacy is rare. Some of the factors of the lack of candidates from the independent path include the waste of capital for the succession of winning candidates, the difficulty of the requirements that must be fulfilled by prospective candidates, the considerable competition from competitors who use political party vehicles, the lack of political education for successful teams in winning political strategies, costs more politically borne and there is no solid support base for votes because there are no strong ideology-based ties. Therefore, by these considerations regional head candidates will choose to use political party vehicles as the basis for winning votes.

The rational choice of candidates for regional head prioritizes whether political strategies are more profitable or at least less risky. Practical politics plays in the search for political parties that apply to become potential cadres to become regional heads, but politics does not necessarily seek, because parties also have cadres who have long been loyal to fight together. Age of regeneration or party membership does not guarantee the quality of candidates expected by the community. Its loyalty is the dominant indicator in determining the quality priority of cadres on the other hand parties also need, their existence in politics. In order to survive, they usually make favourable contracts and agreements between the party institutions and the cadres themselves.

This party's chance of survival is read as an opportunity by candidates who do not have party affiliation. The documentary system which is oligarchic only at the level of the party elite and is not professional is presumed to be the failure of party regeneration. Members of the Dewi Sri clan in the Tegal Raya area became predatory for political parties at the regional level. The candidacy for Mayor of Tegal in 2009 is an opportunity for economic resources to be used to deceive and promise the progress of political parties in survival among the onslaught of rivalries of various political parties in the Tegal area. Recommendations issued by the Central Leadership Council (DPP) of Political Parties are considered a breath of fresh air (Johari & Gaharu, 2013).

In a different case, during the 2015 candidacy in Tegal Regency, Edi Utomo was unable to run from the PDIP party because he did not get a DPP recommendation less than 1 month before the registration of a candidate for Regent. The rush to find a replacement for a political party vehicle, and years of preparations for regeneration are considered lost. In the end the mass base also experienced a breakdown of support at the Branch Branch Leadership (PAC) level[4].

The preparedness of the candidate success team was strengthened to prepare for this drastic political change. The split of votes at the PAC level will reduce the

[4] Interview with Marsinggih Marnadi on 21 August 2013.

political power of the candidates, which will actually benefit their political opponents. Sudden "jumping lice" of candidates in political parties overhaul the system of recruitment and regeneration, even buying and selling support packages. Some are in the form of t-shirt campaign attribute packages, banners, flyers, news services, and commercializing political party assets.

Variants of political " *deal* " packages of candidates with political parties are read intelligently by survey institutions. The succession bid of the winning candidate by the survey institute is considered more professional. In addition to survey institutions having data on needs figures, they are more sensitive to community responses. The main source of the response was the response to the rolling of the third democratic wave of developed countries. Demand for "*one man one vote*" democracy opens the door to political marketing promotion. Reflecting on the election 2004, the direct election provided a separate evaluation record, so that the survey pattern began to grow in the 2009 elections.

Parliamentary threshold in 2009 at the national level be milestone standard in government's success in simplifying the political parties. However, on the other hand, the political trend at that time shifted from political narrative to quantitative figures. The trend of modernizing *quick count* calculations has a big impact on the winning process. Survey agencies began to mushroom for electability, voter behaviour, formulating campaign strategies to create winning teams that were donated by candidates (Simarmata, 2017). The results of the survey institute also create an image of political victory as a definite result, which should not be the prediction result as the main measure in the excitement of a democratic party.

Survey institutions in general elections or regional head elections have begun to transform into the modernization of the political party recruitment system. The involvement of academics, marketing and endorsers has also enlivened the celebration of democracy lately. This is contrast to the previous election which only enlivened politicians and the mass media as a means of fighting. They offer surveys to regional head candidates to assess the extent of their winning rate in the Pilkada. In fact, some political parties require surveys with designated vendors. The results of this survey then become a consideration whether a political party makes recommendations or not, even though at that time the regional head candidates had not yet entered into the political party cadres. The survey package menu offered varies from one survey to the winning strategy model package. So that survey institutions not only make research but can also become event organizers in shaping the good image of candidates, preparing political scenarios, and even making political dramas during political campaigns. The results of survey institutes' research are also signaled to shape public opinion (Sobari, 2013).

The more dominant or superior numerical value of the candidates will be published and disseminated to create a good *image* and political image, while the low value of the graph is made in such a way that it will never be recognized by the public. The prediction of a candidate's victory is spread by survey institutions as an image

building (Wahid, 2009). Not only one survey institution, but several survey institutions claim the winning team of the candidate's victory. The election of a survey institution as a research vendor by a political party cannot be denied that this survey institution is also indirectly bound by a political contract. This political marketing strategy is used to reject the success of the candidate winning team.

Popularity is the main reference in taking political surveys, fame is the subject of a research agenda because voters tend not to see the ideological basis as the basis for the candidate's vision and mission but rather the fame of the candidate or even the voters only vote on *Perceived Popularity* (Cillessen & Rose, 2005). In this position, voters tend to be deceived by political imagery. On the other hands politeness and kindness constitute *Sociometric Popularity* (Parkhurst, & Hopmeyer, 1998; De Laet, Doumen, Vervoort, Colpin, Van Leeuwen, Goossens, & Verschueren, 2014; Cillessen & Rose, 2005) used as the ideal universal value that regional head candidates must have. It can be said that the closer you are, the more you know, not the other way around, the more famous you are, the more you are trusted because of your skills. Therefore, the popularity indicator is narrowed down to acceptability to get the best candidate seeds.

The candidates for regional head must have leadership skills, this capability which can then be seen by the general public. The ability to accept (acceptability) also affects the Pilkada victory procession. It could be that the candidate has high capacity and capability, but the community does not accept it because residents find it difficult to translate the candidate's achievements or even these advantages are covered by the shortcomings of the *Black Campaine* war. Pol-Tracking Institute uses 13 aspects in survey assessment namely; integrity, capability, intellectuality, visionary, leadership skills, achievement experience, courage in making decisions, public communication, elite communication, empathy/aspirations, emotional maturity, physical appearance, public acceptability, party acceptability (Sobari, 2013) .

The emphasis of party acceptability is the beginning of the revolution for political party recuit. The acceptance of party members and party cadres also had effect on the survey results. It also avoids the possibility of a breakout of support within the party, a race between healthy cadres in competing for medals for recommendations from party leaders. The party organizational system also forms a bulwark to prevent flea candidates, fairly-high value point in the survey assessment category to buy vehicle people's vote support through political parties.

The challenge of acceptability of political parties is also influenced by the lack of popular cadres, the fight between parties in finding idol leaders is like a boomerang when the robust recruitment system is violated. The existence of political parties in the regions is also questioned when there are no candidates, instead the voters switch support, or the party loses its grass roots. Therefore, the party will not bear a big enough risk, the alternative way is to find cadres who have high electability.

The existence of the electability measurement value of survey institutions was questioned by Wawan Sobari in the journal entitled "Electability and Rational Voter Myths: Debate on Opinion Research Results Ahead of the 2014 Election". This article

makes the public ambiguous about the extent to which survey institutions are able to use the same methods and approaches as their analytical tools while the results of the surveys are much different. It is not only the candidates for regional heads who are taken into account for their electability, but many survey institutions have been contested. Regardless of this, the survey figures are still a barometer of political candidacy, with proverbs soliciting politics behind its uncertainties. The public is often haunted by electability diagrams and figures in the mass media, while the electability context itself is frozen in the campaigns of regional head candidates. The vision and mission of leadership is considered as political promises, which implies a political contract against its supporters. Meanwhile, when they took office, they did not only contract with their supporters but with the entire community being led.

Issues of Political Dynasty Prevention in the 2015 Election Bill (Grand Design Black Campaign)

The rapid development of democracy at the local level is a sign of the harmonization of social and political changes in society in the progress of the life order. This growth is not without problems. Political malpractice is considered a dominant factor that plays a role in improving the political system in Indonesia. The most significant time in this change is the half-decade which is considered suitable for cutting the oligarchic chain of power, the entrance to the election as an official facility regulated by the constitution.

Anthropological studies look at dynastic politics, a cultural system inherited from an *acitocratic legacy* that can destroy democracy in Indonesia (Hijjang & Amelia, 2019). They are symbiotic in the realm of democracy at the local level, are included in the line of the social economy and hegemony at the grass roots (Haboddin, 2015). Dynastic politics is considered to be the culprit in burying the ideals of a superior generation in the regions. Therefore, grassroots, and political parties are also fighting to break the chain of dynastic hierarchies in the government and political system through legal channels by proposing the 2015 Election Bill.

When the drafting of the 2015 Election Law the struggle of the anti-dynastic politics was still considered controversial, they needed to accompany it to the Constitutional Court Ruling. Several provisions regarding dynastic politics that will still be harmonized include: *First* , the abolition of the requirement not to have a conflict of interest with the incumbent; *Second* , the affirmation regarding the meaning of the nomenclature of the Incumbent to avoid multiple interpretations in its implementation; In order to prevent dynastic politics, Article 12 Letter (p) of the Pilkada Bill compiled by the government states that the candidate for governor may not have marital ties, straight line up, down and sideways with the governor, unless there is an interval of at least one year. Meanwhile in Article 70 Letter (p) it is stated that the candidate regent does not have marital ties, straight line up, down, and

sideways with the governor and regent/mayor, unless there is a minimum interval of one term of office.

The dynastic political debate arose when the KPK convicted the younger brother of Banten Governor Ratu Atut Chosiyah, Tubagus Chaeri Wardana in a bribery case against the Chairman of the Constitutional Court, Akil Mochtar (Budi, 2013; Detik News, 2015). The image of the constitution is getting weaker and confined in the nets of dynastic politics. The middle way in preventing dynastic politics which tends to damage and guarantee the political rights of the people. For example, by limiting the requirements for candidates so that there are no candidates from the regional head dynasty, regional heads are also required to leave office if a relative is participating in the regional elections.

The issue of preventing dynastic politics in the draft general election law has become the central theme of the form of resistance by anti-dynastic politics during regional head elections. Those who are free from dynastic politics try to fight by raising the issue of political malpractice and governance of dynastic political actors. The issue became a hot ball that continued to roll until the political claim of the dynasty was forbidden in the land of their struggle. The worst possibility is corruption of regional government budget money, accumulated wealth of regional heads' subsidiaries, nepotism of regional government office structures, abuse of authority, buying and selling of office head offices, monopoly winning project tenders and even political contracts with opposition political parties.

The use of campaign materials by attacking political opponents is considered legitimate if it is to repair a corrupt government system. Moreover, the material used to bring down the character of a candidate who wants to perpetuate dynastic politics. The spread of issues is planned by the winning success team and sympathizers from the regional head or legislative candidates. The print media campaigning against dynastic politics is considered legal and has actually become a pioneer in eradicating dynastic political practices. Academics, researchers, social activists, *stakeholders*, and community leaders also played an active role in filling out the polls in questioning the *neo-patrialism system*. *Dynastic* political *hate speech* uploads *on online* social media and *messenger* services by *cyber army* (campaign team and sympathizers via social media) also flooded in the form of articles, *memes*, anecdotes, *and* short videos. Attacking each other with the issue of dynastic politics between supporters is justified because there is no standard rule that this is a black campaign, but the way to overthrow it by identifying or generalizing dynastic politics with this abuse of power can be categorized as *black campain.*

The abundance of prospective first-time voters for 17 years each year and the TNI-Polri retirement age plus the number of marriages under 17 also increase the number of voting rights users. There is no fixed ideological basis and minimal knowledge which indicates that they are included in the *Swing Voters* category[5].

[5] Swing Voters are voters who choose a party / candidate because most people choose a particular party / candidate.

Tendency for political alienation (Cottam, Mastor, & Preston, 2004) *early* voters became the target of this *black campaign* of novice voters. They are potentially great men - so abstentions (white group) or a market share of *money politics*. Due to this determinant factor, they are easily exposed to *negative campaigns* and *black campaigns* (Hikmawati & Haryadi, 2017), those who tend to vote for dynastic political candidates may change faith instead of *abstaining*. The success team and the participants targeted novice voters as the dominant alternative in documenting the vote acquisition during voting. These *swing voters* consider the information available on social media to be accurate and absolute without looking for the truth.

The difficulty of the KPU, PPU, BAWASLU, and independent election supervisors in monitoring and taking firm action against *posts* on social media as campaign violations is because the perpetrators are only candidates. The biggest finding was from anonymous social accounts that were allegedly made by the winning team, both supporters and opponents. The lack of public knowledge about political campaign violations is also a challenge in itself, it can be seen that many violations of the ASN or PNS code of ethics do not know that supporting or *liking* and *posting* to one of the candidate pairs is considered a violation.

CONCLUSION

Dynastic politics in a democratic country such as Indonesia is certainly contained. Dynastic politics can grow and develop in Indonesia as long as it is in accordance with the constitution. Space for the state and space in society turned out to provide a place for dynastic politics to grow. Dynastic politics in the Tegal Raya region is an example of a family clan capable of becoming a dynasty in constitutional political power. Many factors influenced the political development of the dynasty. In the Tegal Raya region, dynastic politics led by the Dewi Sri clan had experienced a period of development. There are at least four factors that influence the political development of dynasties in the Tegal Raya region which was driven by the Dewi Sri Clan. The four factors include (1) the rule of law that allows the birth and growth of dynastic politics; (2) resources; (3) community support; (4) and access to political parties. Although dynastic politics in the Tegal Raya area have developed, the dynastic politics are in fact currently undergoing a period of reduction. This paper suggest that it is advisable for policy makers to evaluate the regulations that allow dynastic politics in Pilkada. The evaluation is intended to measure the relevance of dynastic politics with regional development and community welfare. It is also recommended that parties affiliated in dynastic politics conduct introspection and reform of the factors that affect dynastic political reduction

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QUOTE

A new dynasty is never founded without a struggle. Blood makes good manure. It will be a good thing for the Rougon family to be founded on a massacre, like many illustrious families.

Monsieur de Carnavant
Émile Zola, The Fortune of the Rougons

Published by Postgraduate Program, Master of Laws, Faculty of Law, Universitas Negeri Semarang, Indonesia

Journal of Law and Legal Reform (2021), **2(1)**, *pp.* 125-134.
DOI: **https://doi.org/10.15294/jllr.v2i1.44525** ISSN (Print) 2715-0941, ISSN (Online) 2715-0968

REVIEW ARTICLE

DETERMINATION OF ADVANCEMENT OF TECHNOLOGY AGAINST LAW

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CITED AS
Said, K., & Diniyanto, A. (2021). Determination of Advancement of Technology against Law. *Journal of Law and Legal Reform*, *2*(1), 125-134. https://doi.org/10.15294/jllr.v2i1.44525

ABSTRACT

The rapid technological advancement cannot be separated from the negative impact. Unfortunately, technological advances that have a negative impact are often determinants of law. This condition is of course very detrimental to society. Law, which is actually an instrument of state policy to prevent and act against the negative impacts of technological progress, is precisely technological progress as a determinant of law. This certainly creates problems that must be resolved. This study examines the determination of technological progress on the law. This study also formulates a legal model that is able to provide determination on technological progress. This research was conducted using a qualitative research approach and normative juridical research. The results of this study are to describe the evidence for the determination of technological progress against the law. In addition, it also formulates a legal model that is determinant of technological progress.

Keywords: *Determination; Technology Advances; Law*

Submitted: 25 November 2020, Revised: 22 December 2020, Accepted: 25 January 2021

TABLE OF CONTENTS

INTRODUCTION

Technology from the past to the present can be said to continue to progress (Wahyudi & Sukmasari, 2014). Humans continue to make innovations that make technological progress even more unstoppable. Everything that was not imagined by many humans is now a reality (Setiawan, 2018). Even things that are considered impossible are often denied by advances in technology. Interestingly, almost all humans on this earth have been or are in contact with technological advances. This condition cannot be denied because many humans cannot even escape technology. The rapid advancement of technology cannot be stopped. Human creativity and innovation in the field of technology has made technological progress even faster. No wonder so many humans then make plans that were never thought of by many humans. These plans were greeted enthusiastically by various groups (CNN, 2020).

Many people then believe that plans beyond rationality that are only imagined can be realized with technological advances (BBC, 2016). There are also many people who do not believe and think that imaginary plans are only limited to seeking sensations and even lead to mere commercial purposes (Azizah, 2016). Finally, time will tell whether technological advances can bring about the plans of the imagination or not. Looking at some evidence, it can be said that technological advances have been able to turn imaginary things into reality.

Technological advances that are able to make the condition of the imagination come true certainly have an impact. The impact of these technological advances can consist of positive impacts and negative impacts. The positive impacts of technological advances include: (1) the world is more effective and efficient; (2) it becomes easier for humans to carry out activities; and (3) many problems have been resolved by technological advances (Azizah, 2020). The negative impacts of technological advances include: (1) increasingly fierce competition; (2) many human

activities have been replaced by technology; and (3) there was a lot of unemployment which led to crime (Ratnaya, 2011). The positive impact of technological advances is certainly an advantage that can be sustained. The negative impact of technological progress is something that must be anticipated so as not to cause problems for humans.

The state as the largest organization that has autonomous power can anticipate or minimize the negative impact of technological advances. The state through policy or legal instruments must be able to control the negative impact of technological progress so that it does not cause problems for mankind. How big the impact of technological advances must be controlled by the state through legal instruments. This is so that there is order and security for the people, considering that the state is the biggest controller in public order and security.

Interestingly, until now, laws that have become technological instruments and are supposed to control technological progress and its impacts, are often determined by technological advances. Technological progress can be said to be the dominant determinant of law. Indonesia as a country can be said to be an example that technological progress is often a determinant of law. Rapid technological advances often make the law slow in responding (Diniyanto & Suhendar, 2020). As a result, the negative impact of technological advances often occurs and causes harm to society (Diniyanto & Suhendar, 2020). This paper examines the determination of technological progress on law in Indonesia. This study also formulates laws that are determinant of technological progress through a model of law formation.

METHOD

This research uses a qualitative research approach. Researchers first capture the phenomena that occur in society and then describe them in narrative form (Hardani, et.al., 2020). The next researcher finds the problem and analyzes the phenomenon and formulates problem solving model. The type of research used in this research is the juridical-normative research type (Sonata, 2014). Researchers will examine the laws and regulations related to this research. Researchers also analyzed statutory regulations with a literature review which contained theories. Sources of data used in the study consisted of primary and secondary legal materials. Primary legal materials, namely laws and regulations related to this research. Secondary legal materials are documents and library sources related to this research.

DETERMINATION OF ADVANCEMENT OF TECHNOLOGY AGAINST LAW

It can be said that technological progress almost always precedes the law (about technology). Laws related to technology follow technological advances. No wonder

the law is often left behind in responding to technological advances (Diniyanto & Suhendar, 2020). As a result, the negative impact of technological advances is difficult to control by law. Another thing that is no less interesting, technological progress is a determinant of the law. How is technological progress a determinant of the law? There is some evidence that technological progress is determinant of law. The first evidence can be seen from Law Number 11 of 2008 concerning Electronic Information and Transactions as amended by Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions hereinafter referred to as the Information Law and Electronic Transactions. This regulation often gets pros and cons in society. This regulation also suspects that there are many rubber articles that can carry out criminalization (Prabowo, 2019). The pros and cons of several articles in the Law on Electronic Information and Transactions often cause injustice to various elements of society. This condition actually reflects that technological progress is a determinant of law so that laws that are formed in regulating technology have pros and cons in society.

The second evidence is Law Number 44 Year 2008 concerning Pornography which in its journey raises various pros and cons in society. The pros and cons that exist in the community towards Law Number 44 of 2008 concerning Pornography are seen from the different interpretations of the material content of Law Number 44 of 2008 concerning Pornography. The multi-interpretation does not mean the fault of the law enforcer, but rather that the content of Law Number 44 of 2008 concerning Pornography is unclear, which creates multiple interpretations. The existence of multiple interpretations of Law Number 44 of 2008 concerning Pornography has the potential to cause harm to society (Briantika, 2021). This condition is very clear that Law Number 44 Year 2008 concerning Pornography is not able to control technological progress so that the established regulations create multiple interpretations and have the potential to harm the community. The existence of content material in Law Number 44 of 2008 concerning Pornography which has multiple interpretations indicates that the law has not been able to clearly interpret technological progress. As a result, the law is floating and has multiple interpretations. Technological advances are determinants of law so that the law cannot provide concrete clarity for no multiple interpretations.

The two evidence namely the ITE Law, Law Number 44 of 2008 concerning Pornography, have indicated that laws, especially those related to technological advances, have pros and cons. The two evidence also illustrate that technological progress is determinant of law. In this situation, of course, a solution must be found so that the law can be determined so that it is able to prevent pros and cons in the law and to prevent the negative impact of technological progress, so that technological progress does not produce negative impacts that harm society. Likewise, with laws which are determinants of technological progress, the law does not contain rubber articles and articles or material with multiple interpretations.

LAW THAT IS DETERMINANT OF TECHNOLOGICAL PROGRESS THROUGH THE LEGAL FORMATION MODEL

Technological progress, which can be said to be a determinant of law, must be balanced so that there is an inter determinant between technological and legal progress. The law must be able to control the rapid advancement of technology. This is necessary so that the negative impact of technological advances can be prevented and minimized through state policy instruments, namely law. Therefore, technological progress should not be a determinant of the law. In this regard, the law should be determinant of technological progress so that the law can control technological progress, especially in relation to the negative impact of technological progress. The question is: can the law be determinant of technological progress? Given the rapid technological advances, while the law in this case the formation of laws seems slow in responding to technological advances. There needs to be a law that is determinant of technological progress. Laws that are determinant of technological progress can be formed through a model of law formation.

The next question is what is the legal formation model that is able to produce determinant laws for technological progress? Answering this question, the researcher proposes that the law formation model that can produce determinant laws of technological progress, namely (1) a model of legal formation quickly; and (2) produce future-oriented laws. The formation of the law quickly is one of the instruments so that the law can control technological progress.

I. The Model of Quick Legal Formation

The slow formation of laws will be lagged behind by fast technological advances. Therefore, we need a model for quick legal formation. The quick law formation model can be done by (a) quickly capturing problems in the public; (b) quickly formulating laws; and (c) quickly approve the law.

A. Quickly Catch Problems in Public

Laws that are not left behind with technological advances and are able to control technological developments can be started with the formation of appropriate laws. Appropriate legal formation is not limited to formal procedural only in accordance with statutory regulations, appropriate legal formation namely the formation of laws that prioritize formal and material aspects. The material aspect in question is the aspect of legal substance. The substance of the law must be appropriate and in accordance with the wishes of the community. Fulfilling the substance aspect in the

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formation of the law can be done by capturing or absorbing problems in the public. Good law is the law in accordance with the needs of society. Therefore, in the formation of laws, we must quickly catch or absorb problems in the public (Diniyanto & Suhendar, 2020). The absorbed problem is then formulated a solution so that the law that is formed can solve the problem. Law is a solution in public settlement because it is in accordance with public needs.

Conformity law as a solution in solving problems in the public, this can make law a solution in dealing with problems due to technological advances. Rapid technological advances can be said to have both positive and negative impacts. The negative impact of technological advances can only be prevented or punished using fast laws. Fast law can be done by forming laws that capture or absorb problems in the public, so that the laws are formed according to the needs of the community. Laws like these are able to prevent and act against the negative impacts of technological advances.

B. Quickly Formulate Laws

The speed in capturing or absorbing problems in the public must also be consistent in formulating laws. Do not let the absorption of problems in the public be carried out quickly, but the formation of laws through the formulation of legal materials is carried out slowly. This condition is tantamount to not solving the problem because there is no quick follow-up after the absorption of the problem. Therefore, lawmakers after absorbing problems quickly must also carry out legal formulation quickly. Quick legal formulation is meant by a formulation that still relies on regulations and prioritizes the quality of substance and is in favour of public justice. Do not let the legal formulation be quick but ignore the substance and harm the public interest. It is the equivalent of hasty legal formulation.

C. Quickly Approve Laws

After quickly catching the problem and quickly formulating the law, you must quickly agree to the law. The approval process for the formation of laws is part of the process in the formation of laws. Without an approval process, the law cannot be enforced. Therefore, as a complete form of legal formation, there must be a legal approval process. Slow legal approval will cause a law to be slow to apply. Laws that are quickly enforced can be done on the condition that they have been approved by lawmakers. This means that speed in approving the law is necessary so that the law can be applied immediately. As previously mentioned, the speed of agreeing to the law must not ignore the substance and pro-public aspects. The speed of approving laws must be in line with alignments with justice and public values, so that laws that have been approved and are ready to be implemented can be in accordance with public needs.

If the formation of the law is carried out at three speeds, namely (1) quickly catching problems in the public; (2) quickly formulating laws; and (3) quickly approve the law. The formation of these laws will produce laws that are fast and able to keep up with technological advances. Laws that are fast and keep pace with technological progress can be determinants of technological progress, at least from the legal aspect in controlling technological progress.

II. Law Formation Produces Future-Oriented Law

In addition to the model of law formation that is carried out quickly, it is also necessary to form laws to produce laws that are future-oriented. Future-oriented laws are needed to predict technological progress. The existence of future-oriented laws can also prevent the negative impact of technological progress. This is because future-oriented laws have been able to map the possible future technological advances and the possible negative impacts, so that the law can be used as an instrument to prevent the negative impact of technological progress. The formation of laws to produce future-oriented laws can be done by forming (1) responsive laws and (2) futuristic laws. Responsive law is open law and integrity. Open is meant to be open to change, integrity namely accountability for the values of justice (Nonet & Selznick, 2003). The formation of laws that are responsive with the nature of being open to change serves to adapt quickly and even more quickly with technological advances. This condition is very important so that technological progress is not always determinant of law. Responsive laws can be created and keep pace with technological advances if they are done quickly to catch problems in the public.

In addition to producing responsive laws, the formation of laws must also produce futuristic laws. Futuristic laws are needed in order to map or predict future conditions. Mapping or predicting the future is needed as part of the steps to adjust to the future and prevent the negative impact of technological advances in the future. Laws that can adapt to the future and prevent the negative impact of technological progress are laws that are determinant of technological progress. This means that if the formation of laws is able to produce responsive and futuristic laws, then technological progress will not always be a determinant of the law. Law can actually be a determinant of technological progress. The legal determination of technological progress is not to hinder technological progress, but rather to prevent the negative impact of technological progress.

CONCLUSION

This paper highlighted and concluded that determination of technological progress against the law is a natural thing, considering technological progress is often faster than the law. Technological advances are already in the future, sometimes the law still dwells on past problems. Technological progress is determinant of the law can

actually be seen from at least two evidences. The evidence referred to is evidence of the pros and cons and the rubber article in the ITE Law. Further evidence can be seen from the content material in Law Number 44 of 2008 concerning multi-interpretative Pornography. These two evidences reflect that technological progress is determinant of law. Technological progress, which is often a determinant of law, is certainly not good. This is because technological advances cannot be separated from negative impacts. Determining technological advances that have a negative impact is certainly a bad thing. The law should be the controller to prevent and act against the negative impact of technological advances. This means that technological progress is not often a determinant of the law on the contrary the law must be a determinant of technological progress. One of the ways to do legal determination of technological advances is by using a model of law formation which includes (1) a model of rapid law formation; and (2) produce future-oriented laws. The quick law formation model can be done by (a) quickly capturing problems in the public; (b) quickly formulating laws; and (c) quickly approve the law, as for producing future-oriented laws, it can be done by forming (1) responsive laws and (2) futuristic laws.

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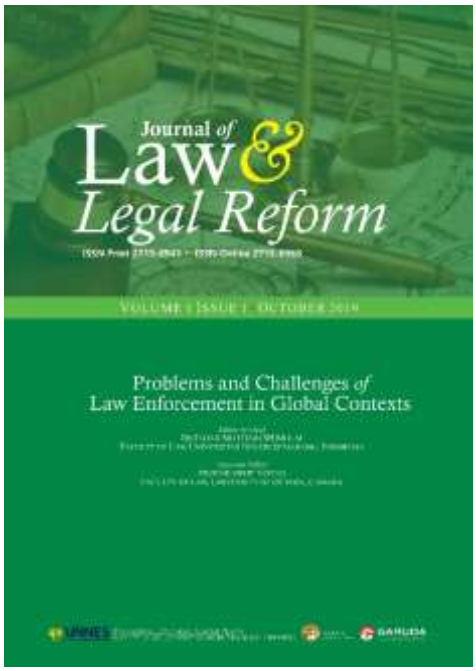
QUOTE

As computational technology and artificial intelligence matures, more people will be able to have better access to justice

Monica Bay, Fellow, Stanford Law School CodeX

from: https://www.relativity.com/blog/the-best-of-legaltech-2017-our-favorite-quotes-from-the-speakers/



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