



WORLD CLASS ISLAMIC UNIVERSITY
UNISSULA
SULTAN AGUNG ISLAMIC UNIVERSITY

SELECTED LEGAL ISSUES IN INDONESIA AND MALAYSIA



Imam As Syafei Building
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

UNISSULA PRESS

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Assoc. Prof. Dr. Mohammad Azam Hussain, B.Sh., M.Sh.
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ISBN : 978-623-7097-29-7

Publisher : UNISSULA PRESS

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FOREWORD

Bismillahirrohmanirrohim

Assalamu 'alaikum Wr. Wb.

Alhamdulillahirobila'lamin, praise be to Allah for all His mercy and blessings, so that this collaborative book can be realized. Prayers and greetings may always be upon to the Prophet Muhammad and his family, friends and followers until the end of time.

In the framework of developing a national legal system based on the Pancasila and the 1945 Constitution to answer the development of society both at national and global levels, a comparative study is needed, because according to Prof. Sudharto, comparative study can bring a "critical attitude" to the legal system itself and, according to Soerjono Soekanto, it is able to find out how to solve legal problems in a just and appropriate manner.

This book is a collaborative writing in the form of a Book Chapter with the title "Selected Legal Issues in Indonesia and Malaysia" which consists of 5 Chapters written by lecturers of the Faculty of Law, Sultan Agung Islamic University Semarang, Indonesia and 5 Chapters written by lecturers of the School of Law Universiti Utara Malaysia, Malaysia, as a form of cooperation between the two Universities in these two countries.

The presence of this editorial book is in addition to carrying out the tri dharma of Higher Education, especially in the field of education, it also aims to help lecturers and students learn various studies in the field of law between Indonesia and Malaysia both in the fields of Criminal, Civil and Administrative law and State Administration, Islamic law and other laws.

Based on the above matters, this legal study is expected to be able to help lecturers and students of the Faculty of Law as additional reference material regarding comparative studies between law in Indonesia and Malaysia in the context of conducting legal reform.

Wassalamu 'alaikum Wr. Wb.

Semarang, 5 November 2019
Dean, Faculty of Law
Sultan Agung Islamic University

Prof. Dr. H. Gunarto, SH, SE-Akt, MHum

FOREWORD

Legal essays expounding legal matters affecting Malaysia and Indonesia are gaining prominence in the light of continuous bilateral transactions between the two states. Multifarious challenges and problems facing contemporary societies demand attention by different stakeholders including the academics. Due to this need, both School of Law, Universiti Utara Malaysia, Malaysia and Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia combine their efforts to present contemporary legal issues in the legal landscape of both states in an important publication.

I commend both institutions for their collaborative effort and commitment to produce a joint publication of this nature and I wish them great success with this publication.

Malaysia, 5 November 2019
Dean, School of Law
Universiti Utara Malaysia
Sintok, Kedah, Malaysia

Assoc. Prof. Dr. Rohana Abdul Rahman

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THE DUTIES AND RESPONSIBILITIES OF SHARIAH COMMITTEE IN ENSURING SHARIAH COMPLIANCE OF ISLAMIC FINANCIAL BUSINESS IN MALAYSIA

Mohammad Azam Hussain

INTRODUCTION

Shariah supervision is a vital element for the Islamic financial institution to ensure that its operations and Islamic financial business activities always comply with Shariah principles. The Shariah Committee is the key person in conducting Shariah supervision and has a significant role in ensuring that the products and facilities offered by the Islamic financial institution comply with the Shariah principles. Shariah Committee can be referred as people entrusted with ensuring the compliance aspects of particular products and instruments used in the Islamic finance industry which broadly includes banking, capital market and takaful.¹

Shariah Committee also can be defined as an independent body of specialist jurists in *Fiqh al-Muamalat* (Islamic transaction/commercial law) entrusted with the duty of directing, reviewing, supervising and/or approving the activities of Islamic financial institution in order to ensure compliance with Shariah rules and principles.² In a nutshell, this committee is a group of persons appointed by the Islamic financial institution, who have qualification and expertise in the field of Shariah, particularly in *Fiqh Muamalat* (Islamic transaction/commercial law), and shall be independent in discharging its duties and responsibilities in ensuring adherence to the Shariah principles

¹ Moḥamad Akram Laldin, *The Role of Shariah Advisors in the Development of Islamic Securities*. In Mohamad Akram Laldin (editor), *Fundamentals and Practices in Islamic Finance*, International Shariah Research Academy for Islamic Finance (ISRA), Kuala Lumpur 2008, pp. 57.

² Rusni Hassan, Agus Triyanta and Adnan Yusoff, Shariah Compliance Process in Malaysian Islamic Banking, *Malayan Law Journal*, 5, 2011, pp. lxxxii.

by the Islamic financial institution and the *fatawa* (Islamic legal opinions) or resolutions made by them will bind the Islamic financial institution.

This chapter discusses on the duties and responsibilities of the Shariah Committee of Islamic financial institutions in Malaysia. The discussion begin with the theories of duties and responsibilities of the Shariah Committee from the perspective of scholars. Then the discussion focusses on the roles and responsibilities of two layers Shariah advisory framework implemented in Malaysia. Since the Shariah Committee in this country is governed by several legislations, the discussion also highlighted several issues arisen from those legislations pertaining to the Shariah Committee.

THE DUTIES AND RESPONSIBILITIES OF THE SHARIAH COMMITTEE

The duties and responsibilities of the Shariah Committee is the essence of their existence in the Islamic financial institution. In general, the Shariah Committee is entrusted with the duties and responsibilities to ensure that the Islamic financial institution complies with the Shariah principles in all areas of its operations and business activities. This includes financial facilities and services offered by the Islamic financial institution, the investments or projects in which the institution has interests and the institution is managed in line with Islamic principles.³ In addition they are entrusted with the duty of directing, reviewing and supervising the activities of the Islamic financial institution in order to ensure that the institution is in compliance with Islamic rules.⁴

According to Dawud, the duties of the Shariah Committee in the Islamic financial institution include: (a) To provide advice and guidance on Islamic matters; (b) To participate in the development of Islamic banking system; (c) To ensure that the products offered and the practices of the institutions comply with the Shariah principles and avoid the *haram* (illegal) activities; (d) To develop Islamic products and Islamic forms of contract or develop legitimate product as an alternative to the conventional products; (e) Become a reference body in deciding Islamic issues concerning the banking and

³ Sudin Haron and Bala Shanmugam, *Islamic Banking System-Concepts & Applications*, Pelanduk Publications (M) Sdn. Bhd., Subang Jaya, Selangor, Malaysia 2001, pp. 160; Sudin Haron, *Sistem Kewangan dan Perbankan Islam*, Kuala Lumpur Business School Sdn. Bhd.: Kuala Lumpur 2005, pp. 292; Ibrahim Warde, *Islamic Finance in the Global Economy*, Edinburgh University Press: Edinburgh 2000, pp. 226.

⁴ Engku Rabiah Adawiah Engku Ali and Odierno, Hassan Scott P. *Essential Guide to Takaful (Islamic Insurance)*. CERT Publications Sdn. Bhd: Kuala Lumpur, Malaysia 2008, pp. 114-115.

financial industry; (f) To supervise and control of industrial practices and make it compatible with global standards if possible; (g) Educating and training staffs of the bank; (h) Represent the financial institutions in meetings, conference or dialogues and exchange of the ideas and presentation on Islamic financial practices; and (i) Preparing the annual report on the conformity of banking activities with the Shariah to be presented in the General Meeting of the institution.⁵

Meanwhile, in the opinion of Moḥamad Akram Laldin, the role and duties of the Shariah Committee involve: (a) The development of products by using accepted Shariah principles which also fit the Shariah criteria developed by the highest authority of the state or international bodies. The Shariah Committee has to make sure that such standards are observed as much as possible. However the opinion of the Shariah Committee may differ from the opinion of those authorities due to some circumstances, local conditions and special needs; (b) Make sure that every decision made by the Shariah Committee is understood by the staff and is implemented. For this purpose, the Shariah Committee shall educate the staff and set up training workshops for them; (c) Examine and check the documentation related to the products and transactions, the formation of the contract and the Islamic principle referred. Ignorance in this regard may lead to a violation of Islamic principle and legal conflict. The Shariah Committee is required to have sufficient knowledge in the field of Shariah and legal aspect as well as the operational aspects of the products and processes; (d) Display thorough knowledge on the development of all products and ensure that such products are not a trick to gain illegal profit; (e) The knowledge and the ability to analyse the economic effects of the products to the nation. Hence, the consideration of the products is from the perspective of *Maqasid al-Shariah* (the objectives and purposes of Islamic law) and not only from the financial objectives; and (f) Strengthening the management of Islamic financial institutions with Islamic principles and ethics; protect the rights of consumers and ensure the responsibility of the financial institutions for its actions.⁶

Nizam Yaquby also list down five general roles of Shariah Committee as follows: (a) Cooperating with the founders of IFI at the initial stages to ensure

⁵ Moḥamad Akram Laldin, *Dawr al-Raqabah al-Syar'iyyah fi Dabt A'mal al-Masarif al-Islamiyyah: Ahammiyyatuha, Shuru'uha, wa Tariqatu 'Amaliha*. In Younes Soulhi and Ahmed Kameel Mydin Meera (editors). *IliBF Series in Islamic Banking and Finance: 2*, IIUM Institute of Islamic Banking and Finance: Kuala Lumpur, 2009, pp. 321-324.

⁶ Ibid, pp. 338-340.

that the articles of association are in accordance with Shariah; (b) Developing the contracts, products, forms, and all necessary related documents. All these must be reviewed by the Shariah Committee in order to ensure that all documents are in conformity with Shariah; (c) Auditing and supervising the actual application of the contracts and operations in order to confirm its conformity with the *fatawa* (Islamic legal opinions) issued; (d) Coordinating the development of new and innovative products; and (e) Educating the general public by acquainting them with the knowledge of Islamic financial laws via issuing *fatawa* (Islamic legal opinions) and resolutions.⁷

The Shariah Committee is also responsible for the operations of takaful companies for the purpose of ensuring that no company involves in its operations any element which is not approved by the Shariah principles.⁸ In this regard, Nizam Yaquby lists down the duties of Shariah Committee of takaful companies includes: (a) Ensuring that the company's articles of association and all documents and agreements are in accordance with Shariah; (b) Studying all insurance policies and re-insurance contracts to ensure that they are all in agreement with the provisions of Shariah; (c) Reviewing all investment vehicles, procedures and operations which must all be in accordance with the Shariah; (d) Conducting random inspections on all records and operations; (e) Responding to inquiries from the company or the public regarding takaful issues related to Islamic law; and (f) Submitting its annual report and certification of Shariah compliance in the General Assembly of the institution.⁹

In discussing the role of Shariah Committee, Hamzah °Abd Al-Karim Muhammad Hammad divides it into two main parts, scientific areas and operational areas. The roles of the scientific area include: (a) Rooting Islamic jurisprudence in the field of banking transactions, providing legal opinion in investment activities and the application of legal rules on investment banking activities and other banking activities; (b) Answering questions relating to banking activities that require rulings from Islamic perspective

⁷ Nizam Yaquby, *The Role of Sharia Supervisory Boards (SSB)*, as cited in Mohammad Azam Hussain, *A Study On The Legal Aspects Of The Shariah Advisory Boards In Malaysian Financial Institutions*, Unpublished PhD Thesis International Islamic University Malaysia, 2015, pp. 171.

⁸ Mohd Ma'sum Billah, *Principles and Practices of Takaful and Insurance Compared*, IIUM Press, Research Centre, International Islamic University Malaysia: Kuala Lumpur, Malaysia, 2001, pp. 356; Mohd Ma'sum Billah, *Applied Takaful and Modern Insurance-Law and Practice*, Sweet & Maxwell Asia: Petaling Jaya, Selangor, 2007, 3rd edn., pp. 286.

⁹ Nizam Yaquby, *op cit*, pp. 172.

raised by stakeholders or any other party on the Islamic financial activities conducted by the banking institution; (c) To provide awareness and education to employees in the Islamic banking sector in understanding the Islamic laws and Islamic banking transactions in particular; (e) Conducting courses, seminars and workshops in discussing matters related to the activities of Islamic banks especially involving issues which require Shariah rulings; and (f) Publishing the work relating to Shariah supervision such as books and bulletins in describing the *fatawa* (Islamic legal opinions) and ordinances related to banking operations. Meanwhile, the operational areas involving preventive control to be carried out before the implementation, treatment control to be carried out during the implementation and supplementary control to be carried out after the implementation.¹⁰

According to Accounting and Auditing Organisation for Islamic Financial Institutions, the roles of Shariah Committee are directing the related party on the intended product, reviewing the product and supervising the execution of the said product, in order to ensure that it complies with all the requirements of the Shariah.¹¹ Meanwhile according to Islamic Financial Service Board, the primary duties of the Shariah Committee are as follows:¹² (a) Advising the BoD on Shariah related matters; (b) Reviewing and endorsing Shariah related policies and guidelines; (c) Endorsing and validating relevant documentation for new products and services, including contract, agreements or other legal documentation used in the Islamic financial institution's business transactions; (d) Overseeing the computation and distribution of *zakat* (alms) and other fund to be channelled to charity; (e) Assisting and advising relevant parties that serve the Islamic financial institution, such as its legal counsel, auditor or other consultants, upon request; (f) Putting on record, written form, any opinion that it gives on Shariah related issues; and (g) Adopting any Shariah pronouncement/resolutions issued by the central Shariah Committee and addressing any arising issues to them.

Based on the above discussion on the roles and responsibilities of Shariah Committee, it reveals that the existence of the Shariah Committee in the Islamic financial institution is a necessity. The Shariah Committee is

¹⁰ Hamzah °Abd al-Karim Muhammad Hammad, *Al-Raqabah al-Shar°iyyah fi al-Masarif al-Islamiyyah*. °Amman, Dar al-Nafais: Al-Urdun, 2006, pp. 57-61.

¹¹ Mo°amad Akram Laldin, 2008, op. cit. pp. 57.

¹² Guiding Principles on Shariah Governance Systems for Institutions Offering Islamic Financial Services, Appendix 1: Key Terms of Reference for the Shariah Board.

responsible in ensuring that the operation and business activities carried out by the the Islamic financial institution complies with the Shariah principles.

SHARIAH ADVISORY FRAMEWORK FOR ISLAMIC FINANCIAL BUSINESS IN MALAYSIA

Malaysia practices two layers of the Shariah advisory framework consist of the Shariah Advisory Council (hereinafter referred to as “SAC”) of Central Bank of Malaysia at national level and the Shariah Committee of Islamic financial institution at institutional level. The establishment of these two layers reflects the Government’s efforts to strengthen the Shariah supervision in the implementation of Islamic financial business in Malaysia.

Historically, the SAC was established on 1st May 1997 pursuant to the requirement of Banking and Financial Institutions Act 1989 (Act 372) (hereinafter referred to as “BAFIA”).¹³ In the early days, the establishment of the SAC was based on three objectives. SAC is the sole authoritative body to ensure that the Islamic financial businesses offered by the Islamic financial institutions comply with the Shariah principles.

The SAC is responsible to give advice on matters relating to Islamic financial businesses that is supervised and regulated by Central Bank of Malaysia.¹⁴ Since the establishment of the SAC in 1997, the Council has been regulated by several statutes beginning with BAFIA, Central Bank of Malaysia Act 1958 (Revised 1994) (Act 519)¹⁵ and Central Bank of Malaysia Act 2009 (Act 701) (hereinafter referred to as “CBMA”).

The second layer is the Shariah Committee at institutions level. The establishment of the Shariah Committee is pursuant to the legal requirements since 1983 as enshrined in several statutes regulating Islamic financial business in Malaysia. This indicates that the existence of the Shariah Committee is an integral part of the Islamic financial institutions particularly in ensuring the Shariah compliance is constantly observed by the institution in its operation, affairs and business activities.

In Malaysia, the Shariah Committee is subject to the legal framework as set out by the laws governing Islamic financial business. The legal framework

¹³ Repealed by Financial Services Act 2013 (Act 758).

¹⁴ Rusni Hassan and Mohammad Azam Hussain, 2013, Scrutinizing the Malaysian Regulatory Framework on Shari’ah Advisors for Islamic Financial Institutions, *Journal of Islamic Finance*, 2(1), pp. 038-047, p. 41.

¹⁵ Repealed by CBMA.

of the Shariah Committee existed since 1983 with the enforcement of Islamic Banking Act 1983 (Act 276) (hereinafter referred to as “IBA”).¹⁶ Over 30 years, improvements have been made by the government to strengthen such legal framework via a series of legal amendments as well as the introduction of new legislations. Apart from that, the legal framework of the Shariah Committee is also pursuant to the guidelines issued by Central Bank of Malaysia to regulate the Islamic financial business in Malaysia.

Since 1983, the Shariah Committee of Islamic financial institutions is regulated by several statutes namely IBA, Takaful Act 1984 (Act 312) (hereinafter referred to “TA”), BAFIA, Development Financial Institutions Act 2002 (Act 618) (hereinafter referred to as “DFIA”) and Islamic Financial Services Act 2013 (Act 759) (hereinafter referred to as “IFSA”). Apart from the statutes, the Shariah Committee also regulated by several Guidelines issued by Central Bank of Malaysia such as Shariah Governance Framework for Islamic Financial Institutions (BNM/RH/GL 012-3) (hereinafter referred to as “SGF”), Guidelines on Takaful Operational Framework (BNM/RH/GL 004-22), Guidelines on the Governance of Shariah Committee for the Islamic Financial Institutions (BNM/RH/GL/012-1), Guiding Principles on Shariah Governance Systems for Institutions Offering Islamic Financial Services (IFSB – 10) and Fit and Proper Criteria (BNM/RH/GL 018-5).

THE DUTIES AND RESPONSIBILITIES OF THE SHARIAH ADVISORY COUNCIL OF CENTRAL BANK OF MALAYSIA

As the highest authority for the ascertainment of Islamic law for the purposes of Islamic financial business in this country,¹⁷ the SAC is mandated with several tasks by CBMA as follows:¹⁸

- (a) To ascertain the Islamic law on any financial matter and issue a ruling upon reference made to it;
- (b) To advise Central Bank of Malaysia on any Shariah issue relating to Islamic financial business, the activities or transactions of the bank;
- (c) To provide advice to any Islamic financial institution or any other person as may be provided under any written law; and
- (d) Such other functions as may be determined by Central Bank of Malaysia.

¹⁶ Repealed by IFSA.

¹⁷ CBMA, subsection 51(1).

¹⁸ Ibid, subsection 51(2).

To facilitate understanding of the above functions as specified by CBMA, the following discussion will be divided into specific sub topic as follows:

The Functions of the SAC to Ascertain the Islamic Law on any Financial Matter and Issue a Ruling upon Reference Made to It

CBMA grants the SAC the power to ascertain the Islamic law on any financial matter and to issue a ruling upon reference made before them.¹⁹ Rationally, by granting the SAC with this power, it will enable a product to be thoroughly screened by the SAC to spot if there is any Shariah issue in the Islamic financial matter. Secondly, it enables speedy ruling to be made on arising Shariah issues and thirdly, it will promote consistency of rulings on Shariah issues.²⁰

According to CBMA, the SAC is responsible to ascertain the Islamic law pertaining to Islamic financial business upon reference made by Central Bank of Malaysia. In this regard, the SAC shall ascertain the Islamic law relating to Islamic financial business under the supervision of Central Bank of Malaysia. The SAC has a function also to ascertain the Central Bank of Malaysia in carrying out its functions or conducting its business or affairs under CBMA or any other written law are in accordance with the Shariah.²¹ In relation to the Islamic financial institution, upon reference made by the Islamic financial institution for a ruling or to seek their advice on Islamic financial business, the SAC has a function to ascertain that the Islamic financial institution does not involve any element which is inconsistent with the Shariah in the operations of its business.²²

Apart from that, the SAC has a function to ascertain the question concerning Shariah matters upon reference made by the court or an arbitrator.²³ Finally the function to ascertain the Shariah matters upon reference made by the Government of Malaysia in order to ensure that the instruments issued under Government Funding Act 1983 (Act 275) (hereinafter referred to as “GFA”) are in accordance to Shariah principles.²⁴ Paragraph 52(1)(a) of

¹⁹ Ibid, paragraph 52(1)(a).

²⁰ Abdul Hamid Mohamad, 2012, Malaysia as an Islamic Finance Hub: Malaysian Law as the Law of Reference and Malaysian Courts as the Forum for Settlement of Disputes, Malayan Law Journal, 5, p. xcix.

²¹ CBMA, subsection 55(1).

²² CBMA, subsection 55(2); IFSA, subsection 29(1); DFIA, subsections 129(3) and (4).

²³ CBMA, subsection 56(1).

²⁴ GFA, section 2A.

CBMA also clarifies that the SAC has a function to issue a ruling on Shariah matters upon reference made to it. It must be note that, the ruling made by the SAC for the ascertainment of Islamic law is confined to Islamic financial business only.²⁵

The Advisory Function of the Shariah Advisory Council

Paragraph 52(1)(b) of CBMA clarifies the function of the SAC which is to advise Central Bank of Malaysia on any Shariah issue relating to Islamic financial business, the activities and transactions conducted by Central Bank of Malaysia. CBMA requires Central Bank of Malaysia to consult the SAC for the ascertainment of Islamic law on the above matters.²⁶ In addition, the approval of the SAC is important to ensure that Central Bank of Malaysia complies with the Shariah principles in dealing with Islamic financial business.²⁷

The SAC also plays significant role in providing advice to the Islamic financial institutions or any other persons as may be provided under any written law.²⁸ Regarding the Islamic financial institution, such institution may refer for a ruling or seek the advice of the SAC on the operations of its business in order to ascertain that it does not involve any element which is inconsistent with the Shariah.²⁹ Development Financial Institutions Act 2002 (Act 618) (hereinafter referred to as “DFIA”) also provides that the Development Financial Institutions participating in Islamic Banking Scheme may seek the advice of the SAC on Shariah matters.³⁰ Apart from that, the SAC also has a function to provide advice to any other persons as may be provided under any written law. For example, in providing the advice to the Government of Malaysia in issuing any instruments to ensure that such instruments are in accordance with the Shariah principles.³¹

In discussing the advisory role of the SAC, a question arises whether the SAC also serves as a supervisory role? According to Longman Dictionary of Contemporary English, the word ‘supervise’ means to be in charge of an

²⁵ CBMA, subsection 52(2).

²⁶ Ibid, subsection 55(1).

²⁷ Ibid, section 73.

²⁸ Ibid, paragraph 52(1)(c).

²⁹ Ibid, subsection 55(2).

³⁰ DFIA, subsection 129(4).

³¹ GFA, section 2A.

activity or persons, and make sure the things are done in the correct way. Meanwhile, ‘supervisor’ refers to someone who supervises a person or activity.³² In this context, the author is of the opinion that the role of the SAC is not merely advisory. It has also a supervisory role. This can be seen on the role of the SAC in approving the arrangements or any measures taken by Central Bank of Malaysia are in accordance with the Shariah principles in dealing with Islamic financial business.³³ Likewise the function of the SAC to approve the Shariah principles used by the Government in the instruments issued under GFA.³⁴ Apart from that, in the event of the appointment, reappointment, resignation and removal of the members of the Shariah Committee of Islamic financial institutions, these matters are subject to the approval of Central Bank of Malaysia and the SAC.³⁵

Though there is no clear provision for the supervisory role of the SAC, the author is of the opinion that this matter may be included under paragraph 52(1)(d) of CBMA which has a general provision to enable the SAC to perform any functions which are determined by Central Bank of Malaysia. Thus, it can be concluded that the SAC is not only responsible to provide advice on Shariah matters, but also serves a supervisory function.

THE DUTIES AND RESPONSIBILITIES OF SHARIAH COMMITTEE OF ISLAMIC FINANCIAL INSTITUTIONS

In the early stage of the implementation of Islamic banking and financial business in Malaysia, the statutes have provided the duties of the Shariah Committee in a general manner. The Shariah Committee is assigned with the duties and responsibilities to advise the Islamic banks and the takaful operators on the operations of its Islamic financial business in order to ensure that the operation of the institutions do not involve any element which is not approved by the religion of Islam.³⁶

Similar to the previous provision in the repealed Acts (IBA and TA), IFSA remains the general legislation on the duties of Shariah Committee to advise the Islamic financial institution in ensuring its business, affairs and

³² *Longman Dictionary of Contemporary English*, Fourth Edition 2003, Second Impression 2006, Harlow, Essex, England: Pearson Education Limited, p. 23.

³³ CBMA, subsection 73(1).

³⁴ GFA, section 2A.

³⁵ SGF, Part II, paragraph 3.8 and Appendix 2.

³⁶ IBA, paragraph 3(5)(b); TA, paragraph 8(5)(b).

activities comply with Shariah.³⁷ Pertaining to the duties of the Shariah Committee and its members, section 32 of IFSA stipulates that:

A Shariah committee and every member of the Shariah committee shall have such duties and functions set out in any standards as may be specified by the Bank under subparagraph 29(2)(a)(i).

IFSA also grants permission to Central Bank of Malaysia to specify standards relating to the duties and functions of the Shariah Committee.³⁸ Accordingly, the Shariah Committee and its members shall observe the duties and functions as set out by Central Bank of Malaysia.³⁹ Currently, Central Bank of Malaysia has specified standards on such duties and functions of the Shariah Committee in SGF. The duties and responsibilities of Shariah Committee as stipulated in Appendix 4: Duties, Responsibilities & Accountability of the Shariah Committee of the SGF are reproduced as follow:

1. Responsibility and accountability

The Shariah Committee is expected to understand that in the course of discharging the duties and responsibilities as a Shariah Committee member, they are responsible and accountable for all Shariah decisions, opinions and views provided by them.

2. Advise to the board and Islamic Financial Institution

The Shariah Committee is expected to advise the board and provide input to the Islamic financial institution on Shariah matters in order for the Islamic financial institution to comply with Shariah principles at all times.

3. Endorse Shariah policies and procedures

The Shariah Committee is expected to endorse Shariah policies and procedures prepared by the Islamic financial institution and to ensure that the contents do not contain any elements which are not in line with Shariah.

4. Endorse and validate relevant documentations

To ensure that the products of the Islamic financial institution comply with Shariah principles, the Shariah Committee must approve:

i) the terms and conditions contained in the forms, contracts,

³⁷ IFSA, subsection 30(1).

³⁸ Ibid, subparagraph 29(2)(a)(i).

³⁹ Ibid, subsection 29(5).

agreements or other legal documentations used in executing the transactions; and

ii) the product manual, marketing advertisements, sales illustrations and brochures used to describe the product.

5. Assess work carried out by Shariah review and Shariah audit

To assess the work carried out by Shariah review and Shariah audit in order to ensure compliance with Shariah matters which forms part of their duties in providing their assessment of Shariah compliance and assurance information in the annual report.

6. Assist related parties on Shariah matters

The related parties of the Islamic financial institution such as its legal counsel, auditor or consultant may seek advice on Shariah matters from the Shariah Committee and the Shariah Committee is expected to provide the necessary assistance to the requesting party.

7. Advise on matters to be referred to the SAC

The Shariah Committee may advise the Islamic financial institution to consult the SAC on Shariah matters that could not be resolved.

8. Provide written Shariah opinion

The Shariah Committee is required to provide written Shariah opinions in circumstances where the Islamic financial institution make reference to the SAC for further deliberation, or where the Islamic financial institution submits applications to the Bank for new product approval.

The first thing that is emphasized by the SGF is the explanation relating to the responsibility and accountability of the Shariah Committee in carrying out the tasks entrusted to them. As the Shariah Committee is the only qualified party to make a decision or provide views and opinions relating to Shariah matters in the Islamic financial institution appointing them, they should be responsible and accountable for all Shariah decisions, views and opinions provided by them. Furthermore, such Shariah decisions, views and opinions are binding on the operations of the Islamic financial institution.⁴⁰

This legal sanction is also to remind the Shariah Committee to constantly cautious and rigorous in making a decision or provide views and opinions relating to Shariah matters. This is significant to avoid any issues arising in the future, especially those that may prejudice the Shariah compliance of the Islamic financial institution.

⁴⁰ SGF, paragraph 2.7 of Part 2.

Advising the Board of Directors (hereinafter referred to as “BoD” and Islamic financial institution is a key role of the Shariah Committee. It is important for the Shariah Committee to advise the BoD parallel with the BoD’s responsibility in directing and overseeing the business and affairs of the Islamic financial institution.⁴¹ The BoD in discharging its functions shall have regard to any decision made by the Shariah Committee in respect of any Shariah issues relating the business, affairs or activities of the Islamic financial institution.⁴²

This is also parallel to the function of the BoD in the implementation of Shariah governance framework pursuant to the requirement of SGF. The BoD is ultimately accountable and responsible on the overall Shariah governance framework and Shariah compliance of the Islamic financial institution.⁴³ Furthermore SGF requires the BoD upon consultation with the Shariah Committee to approve all policies relating to Shariah matters.⁴⁴ While the function of the Shariah Committee to advise the Islamic financial institution is to ensure that the institution is at all times complying with Shariah as required by the law in carrying out its aims and operations, business, affairs and activities.⁴⁵

The third function is endorsing Shariah policies and procedures prepared by the Islamic financial institution. In this regard, the Shariah Committee has to ensure that the contents of such policies and procedures do not contain any element which is not in line with Shariah. The function number four (4) is pertaining to the duties of Shariah Committee to endorse and validate relevant documentations. In this regard, the Shariah Committee is required to approve the terms and conditions contained in the forms, contracts, agreements or other legal documentations used in executing the transactions. Other than that, they also must approve the product manual, marketing advertisement, sales illustration and brochures used to describe the product.⁴⁶

⁴¹ IFSA, subsection 65(1); GP1-i, paragraph 2.02 of Part 2.

⁴² IFSA, paragraph 65(2)(f).

⁴³ SGF, paragraph 2.1 of Part 2.

⁴⁴ *Ibid*, paragraph 2.2 of Part 2.

⁴⁵ IFSA, subsection 28(1).

⁴⁶ Guidelines on Introduction of New Products (BNM/RH GL 008-3), subparagraph 6.12(i) of Part B; Guidelines on Introduction of New Products for Insurance Companies and Takaful Operators (BNM/RH GL 010-14), subparagraph 6.12(i) of Part C; Guidelines on Property Development and Property Investment Activities by Islamic Banks (BNM/RH/GL 002-6), paragraph 6.9 of Part B.

SGF also requires that all new products shall be certified by the Shariah Committee and must be backed by the relevant *fiqh* (Islamic jurisprudence) literature, evidence and reasoning. The Shariah Committee is required to conduct a rigorous deliberation process as well as detailed scrutiny of the legal contracts and other documents relevant to the products or transactions.⁴⁷ During the product development process, Islamic financial institution is required to refer all Shariah issues related to its end-to-end product development design and process to the Shariah Committee. The requirement for an advice or decision must be made in a comprehensive manner for effective deliberations by Shariah Committee including explaining the process involved, documents used and other necessary information.⁴⁸ In addition, the identified officer shall consult the Shariah Committee in assessing whether the proposed change gives rise to any Shariah issues that are yet to be deliberated by SAC.⁴⁹ The involvement of the Shariah Committee during the product development process is vital to ensure that the Islamic financial products that will be offered by Islamic financial institution complies with Shariah. It is also to minimize the possibilities of the product being nullified on grounds of Shariah non-compliance.⁵⁰

The Shariah Committee also has a duty to assess the work carried out by Shariah review and Shariah audit. In this regard, the Shariah Committee has to assess the outcome of the review as well any non-Shariah compliances as highlighted by the Shariah review function.⁵¹ Similarly, the Shariah Committee has to assess the results of any assessment or findings from the Shariah audit function.⁵² This is parallel with the implementation of SGF in

⁴⁷ SGF, Appendix 7: Product Development Process, paragraph 5; Guidelines on Introduction of New Products (BNM/RH GL 008-3), subparagraph 4.1(vii)(a) of Part B; Guidelines on Introduction of New Products for Insurance Companies and Takaful Operators (BNM/RH GL 010-14), subparagraph 6.12(i) of Part C.

⁴⁸ SGF, Appendix 7: Product Development Process, paragraph 4.

⁴⁹ BNM/RH/GL 008-3, paragraph 3.6 of Part B.

⁵⁰ SGF, Appendix 7: Product Development Process, paragraph 1; Guidelines on Introduction of New Products (BNM/RH GL 008-3), subparagraph 6.12 of Part C.

⁵¹ *Ibid*, subparagraph 7.6(iii) of Part 2.

⁵² *Ibid*, subparagraph 7.13(v) of Part 2. Prior to SGF, the role of Shariah audit function is only handled by internal audit function in consultation with the Shariah Committee, to determine the scope of Shariah audit and are encouraged to produce internal Shariah compliant reports. Shariah Committee has the role is to express an opinion to the internal audit of Islamic banks in ensuring Shariah compliance in all aspects of the Islamic bank's products, operations and activities. See, Guidelines on Corporate Governance for Licensed Islamic (GP1-i) (BNM/RH/GL 002-1), paragraph 2.100.

the Islamic financial institution where Shariah Committee has to perform an oversight role on Shariah matters related to the Islamic financial institution's business operations and activities.⁵³

Another duty of the Shariah Committee is to assist related parties of Islamic financial institution such as its legal counsel, auditor or consultant on Shariah matters. Accordingly, the Shariah Committee should provide necessary assistance to the relevant parties of the Islamic financial institution on Shariah matters upon request by them. Finally, SGF stipulates that the function of the Shariah Committee is to provide written Shariah opinions. This should be observed by the Shariah Committee when the Islamic financial institution makes references to the SAC for further deliberation on Shariah issues. Similar when the Islamic financial institution submits applications to Central Bank of Malaysia for new product approval.

Based on the duties prescribed by the SGF, it can be concluded that the Shariah Committee has significant and comprehensive duties and responsibilities in ensuring that the operations and activities of the Islamic financial institution are in compliance with Shariah principles. The explanation to the accountability of the Shariah Committee in discharging their duties is very important to be understood by all members of the Shariah Committee.

CONCLUSION

The Shariah Committee has a significant role in ensuring that the products and facilities offered by the Islamic financial institution comply with the Shariah principles. In realizing this significant Shariah supervision for Islamic financial business, Malaysia practices two layers of Shariah supervisory framework namely, SAC of Central Bank of Malaysia at national level and Shariah Committee at institutional level. SAC of Central Bank of Malaysia is the highest authority in relation to Islamic financial business in Malaysia. Meanwhile Shariah Committee is the key person at institutional level in ensuring Shariah compliance. Both bodies are regulated by statutes and guidelines and have a significant duties and responsibilities as prescribed by the law in ensuring that the operations and activities of the Islamic financial institution are in compliance with Shariah principles.

⁵³ Ibid, paragraph 2.8 of Part 2.

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- Guidelines on Takaful Operational Framework (BNM/RH/GL 004-22)
- Guidelines on the Governance of Shariah Committee for the Islamic Financial Institutions (BNM/RH/GL/012-1).

Guiding Principles on Shariah Governance Systems for Institutions Offering Islamic Financial Services, Appendix 1: Key Terms of Reference for the Shariah Board.

Guiding Principles on Shariah Governance Systems for Institutions Offering Islamic Financial Services (IFSB – 10).

Shariah Governance Framework for Islamic Financial Institutions (BNM/RH/GL 012-3).

INVENTORY OF ISLAMIC LEGAL THEORIES AS AN EPISTEMOLOGY AND THEIR RELEVANCE ANSWERING THE DEVELOPMENT OF COMMUNITY LIVELIHOODS

Akhmad Khisni

INTRODUCTION

The one of the directions of the future national legal policies mandates that religious law (including Islamic law) is recognized and respected in managing national law (in Indonesia). It is expected to be comprehensive and integrated so that all laws and regulations do not conflict with religious morals.⁵⁴

Islamic law is part of the national legal system. In the national legal system in which there are sub-legal systems, among others, customary law, Western civil law and other sub-laws which constitute an interlocking unit called the national legal system. A national legal system is not called if there is no Islamic legal sub-system.

This life is never finished, always changing and what is eternal is the change itself, or in other terms, “*an-nushush mutanahiyah wal-waqa’iq gharu mutanahiyah*”⁵⁵ (Text/law has been completed enacted, as for events that have never been completed, always dynamic), then what can be questioned is whether something (the rule of law) that has already been enacted which is static can answer or resolve something that is dynamic.

Islamic legal theories are important as a foundation or principle as well as guides and guidelines in efforts to solve legal problems that do not yet

⁵⁴ A. Khisni. *Hukum Islam*, (Semarang: Unissula Press, Cet. 3, 2014), pp. 59.

⁵⁵ A. Khisni, *Perkembangan Pemikiran Hukum Islam (Ikhtiyar Pendidikan Doktor Membekali Calon Mujtahid Menggali Maqashish al-Syari’ah untuk Mewujudkan Hukum Islam yang Kontekstual)*, (Unissula Press, Cet. 2, 2015), pp. 1.

have laws. However, the implementation of the law or enforcement must be in accordance with existing legal ideas because what is faced is “case law”, the legal theory its presence is needed as a tool or method (epistemology) to help solve the legal problem.

In this section, it will be explained the inventory of any theories of Islamic law as an epistemology and its relevance to responding to the development of civil society in the field of civil law.

Islamic law as a source of positive law in national law reform must be able to be empirical and realistic in dealing with the ever-changing and dynamic human life. To deal with and answer the gap between Islamic law and the dynamics of Muslim life, Islamic legal theory will be able to help as a tool or methodology to solve it.

Laws that have been codified in the form of laws will always be out of date, because the values of consciousness continue to change, shifts in social awareness (social change) never stop. Legal norms originating from Islamic teachings and law are part of the national legal system. Here the importance of epistemology (way of thinking) is guided by the rules of Islamic law, so that Islamic law that is born into a contextual Islamic law in accordance with the development of time and place. Or with another issue the importance of using the rule of law is related to the number of legal issues that have not been regulated by written law (the law), it is necessary to develop the text of the law (*tahrij al-ahkam 'ala nashil qanun*) this is where the importance of using the rule of law as a principle and the guide.

There is a link between law and social change and the importance of legal norms in the effort to create or make legal decisions that have no law (*ijtihad*) due to social changes that occur. Never before had humans achieved such astonishing progress as it is today. What was imagined to be impossible in the past has now become a reality. Once you hold the phone, we can eat a set of dining table and its contents immediately.⁵⁶

An event happens at the end of the world in a tempo that almost simultaneously can be monitored at the other end of the world. The distance from the world to being an educator forces humans to not be able to isolate themselves from the cultural influences of other nations. Thus as the knife of analysis, “social change theory” is used.

⁵⁶ Ahmad Daroji., Hukum dan Perubahan Sosial (Suatu Pendekatan Historis), Kumpulan Makalah Seminar Islam dan Perubahan Sosial (Kajia Hukum Islam di Indonesia), date 16 – 18 October 1990, pp. 1.

Islamic legal theories are spread in various disciplines of science both in the science of *ushul fiqh*, *fiqhiyah* rules, and in the science of wisdom *at-tasyri'yyah* (Islamic legal philosophy) which is commonly used to answer legal problems with no law (legality). By using the theory (epistemology) above so that it is able to solve it.

Textual law both in the Qur'an, as-Sunnah, as well as from the opinions of scholars in fiqh books, all face changes in people's lives. This is not enough development (dynamics) of people's lives was answered textually (*shar'ah* approach), but it takes a way or method (*thariqah*) approach to solve the case of the incident. Besides that, it is necessary to improve the method or method by capturing the substance of the legal case or problem by reading the development of the times and circumstances. That understanding can be further increased to capture legal ideas made by official bodies namely the legislature and executive, as well as the legal idea of the product of revelation (God's law) what is God's legal idea, called the ma'rifatullah approach.

The rule of law is used as a lens to solve legal problems in the function of cases relating to the context (Case law). There are several variables that can affect a case occurrence so that the law is the function of the law if it is applied improperly. Different from the law in the function of the law which soars out of context, it is still purely unaffected by the incident variable, the spirit or the idea of the law is still sacred.

In carrying out the inventory, it is done by describing the rules of Islamic law that have been collected as a tool that can be used as an epistemology to solve or find the law in a case where there is no law.

In fact, the rules of Islamic law collected above are legal development tools that already have laws, but the existing law cannot answer cases or events that occur. The rules of law collected above are a lens to see the law of three things, namely: the law is good and is still relevant to the times, it needs to be maintained. Second, laws that are unable to respond to the times, need to be developed. Third, the law is not compatible with the times, then the law must be replaced (*al-muhafadhatu 'ala qadim al-shalih wal ahdu' ala jadid al-ishlah*).

Inventory Theory of Islamic Law as Epistemology Answering the Development of Life in the Field of Law.

There are 2 (two) fields of Islamic law, namely worship and *muamalah*. In the field of *muamalah* there are principles, namely:

1. *Ibahah* Rule (allowed). Everything (in the field of *mu'amalah*) is basically permissible as long as there are no restrictions. Islamic law in the field of *mu'amalah*, very little in detail is rated *qath'i*, whereas in general it is stated in the *Qur'an* that is global, in the form of global principles, in the form of basic principles, general rules, and is open to accept various interpretations.

Among the basic principles stated by the *Qur'an* such as upholding justice, the principle of deliberation, eliminating narrowness and rejecting *kemudharatan*, maintaining one's rights, fulfilling the mandate, returning complex problems to the expert.

The above rule shows a huge favor given by Allah to His servants, wherein with it feel more spacious to move to regulate themselves in the light of the *Qur'an*, because these provisions are drawn from the guidance of the *Qur'an*. In dealing with all-complex problems and new forms of *mu'amalah* that had no equivalent at the time of *Shari'a* were revealed, the general principles stated above will help a lot to solve them.

2. Rule of *Tahqiq al-Manath*. In the form of research on a problem that will be determined by law and know the similarity with the problem referred to by the *Qur'an* and the Hadith that have been explained by the law through these sources, or know the extent of its relationship with the principles and general rules described by revelation, as is known to conclude the intention of a verse or *Hadith* is a problem, while the application of that conclusion to a problem is another problem.

In linking a law to a problem requires an *ijtihad* called "*tahqiq al-mahath*". This method is needed in dealing with various social changes and so that in applying a verse to a new problem, the content of the verse needs to be understood carefully about the meaning or purpose why it was told or prohibited so that it approaches certainty, it is known what exactly is meant by a verse. So the scholars agree if the study of *mu'amalah* field in general is "*ma'qulatul ma'na*" (traceable to the meaning or *illat* of the law).

The meaning here is in the form of effective *illat*, which has an influence on the presence or absence of *illat*. 'Effective *Illat* is only found in the field of *mu'amalah*, not found in the field of worship *mahdhah* (pure worship). Back in the field of *mu'amalah* if the meaning or *illat* is known, then the *illat* is then used as a measure in assessing an issue. The law will always go along with the meaning ('*illat*) contained therein, not following its formal form.

It might be a problem when viewed formally is the same as that referred to in the source of revelation, but if seen the value or enthusiasm contained in it could be between the two can be different. Then *ijtihad tahqiq al-manath* is a study to which there are similarities or differences between the two problems when viewed in terms of 'illat or spirit.

Law in the field of society (*mu'amalah*) is more focused on the value and spirit of an order or prohibition, as long as the core problem can be traced and this is a measure. For this reason, the field of study of *tahqiq al-manath* is the core meaning of the problem. The law will always be associated with the core on which the law is based.

3. *Istihsan* Rules. Is a way to get out of a condition, where if general provisions or conclusions *qiyas* set, can shake the principles or rules of *shari'a* which is more important to be maintained. *Qiyas* and general legal norms can be applied, as long as they are able to achieve these objectives and do not clash with a more important interest to be maintained.

If it collides with an interest that must also be realized and maintained in *shari'ah*, then it is left behind, and for the way out the *istihsan* method is functioning. So the *istihsan* method functions as a way out of applying the general rules and the *qiyas* method. An example is the "contract greeting" which is a form of exemption from the provisions that generally apply, because of considerations. With *istihsan* here, even if it comes out of other general provisions, that is raising up hardness and realizing ease.

4. *Ta'wil* rules. The meaning of *ta'wil* is to turn the meaning of a *lafaz* or an editor from an intrinsic meaning or which can be captured by language understanding to *majazi* meaning. The *ta'wil* method is very functional in the formation and development of Islamic law.

This can be done, as long as there are indications that support to turn the meaning. This method is very effective, as long as it is understood that the legal verses in the *Qur'an*, very few definite *lafaz* or editions (*qath'i*) designate a meaning. *Lafaz-lafaz* or the uncertain editor (*dhanny*) is a field that is very possible to implement *ta'wil* as long as it is supported by indications.

Ta'wil if interpreted broadly, includes: first, turning the meaning of *lafaz* or editor from the essential meaning to the meaning of *majazi*, second, it contains the interpretation of *lafaz* or editorial which is open to accept various interpretations.

5. *Ta'wil al-ilmi* Rules (combining text-rational- and spirituality). In the realm of the science of *al-Qur'an* (*ulum al-Qur'an*) there are two ways to understand the *Qur'an*, namely interpretation and *ta'wil*. Interpretation is known as a way to understand language, context and moral messages contained in the texts or texts of the scriptures.

Here the text is made "subject". In this paper the paradigm is categorized as an interpretation containing infantile epistemology. While *ta'wil* is a way to understand the text by making the text and/more accurately called understanding, meaning and interpretation of the text as an "object" of the study.

The *ta'wil al-ilmi* approach as an alternative *ta'wil* to the text uses the hermeneutic circumference pathway which truly dialogues between the *infantile* (textual) epistemology paradigm, the *burhani* (rational) epistemology paradigm and the *irfani* epistemology paradigm in a mutually moving paradigm. Control, criticize, improve and perfect the inherent deficiencies in each stand-alone paradigm, separate from one another.

The message of humanity and justice inherent in the *Qur'an* which is often referred to as "*rahmatan li al-a'lamin*" (universal) can only be understood properly if interpreters of the scriptures understand that there are 3. (three) epistemological paradigms.⁵⁷

Philosophy developed in the Western world such as rationalism, empiricism and pragmatism is not suitable to be used as a theory and analysis of the ups and downs and development of Islamic Studies (including the study of Islamic law). The approach, struggle, and attention to the epistemology of science in the West lay more in the realm of natural science and not in the area of humanities and social science. For this reason, a specific epistemological analysis framework is needed for Islamic thought, namely the epistemology of *bayani*, *burhani* and *erfani*.⁵⁸

Epistemology must be appropriate and in accordance with the object being studied. The theoretical framework, method and epistemology used can be changed according to the object and condition of the study. The theoretical framework used by Fazlul Rahman considers that it is no longer sufficient to use *fiqh* or *ushul fiqh* which is usually very popular among *ushuliyyun* and *fukah*, namely "*qathiiyyat*" and "*dhanniyyat*" and "legal specific" in the *Qur'an*. Muhammad Arkoum questioned avoiding the dimension of "*tenshiyyat*" (historicity) of the science of *fiqh* and *kalam*. He questioned

⁵⁷ Ibid., pp.15.

⁵⁸ Ibid., pp.15.

the theories that were used and compiled a number of Ages ago to be taught continuously in the current era has been questioned and the challenges of the last time change no longer as before, which he argues.⁵⁹

The role of jurists (Islamic law) who are both at the same time theologians (*mutakallimun*) do not know that, they practice limited types of interpretations and make certain methods of *fiqh* and legislation. This changed the discourse of *al-Qur'an* which has a mythic majazi meaning, which is open to some meaning and understanding, into a standard and rigid discourse, which has neglected the historicity of religious ethical norms and *fiqh* laws. Jurisprudence be the norms and laws of Jurisprudence that are outside of social history, to be holy, not to be touched and discussed. Jurists have transformed temporal and contemporary socio-historical phenomena into a kind of ideal measure and sacred transcendental law, which cannot be changed and replaced.

6. *The Maqashid al-Shari'ah* (legal purpose) rule. In the study of Islamic legal philosophy cannot be separated from the axiological aspects. Every law established by *shari'a* (*Allah*) must have a purpose, which is generally Islamic law, i.e: "*jalbu al-mashalih wa al-dar'u al-mafasid*" (bring good and reject evil). The problem is how to understand and apply in answering legal problems in practice; this requires *ijtihad* in an effort to practice it in the life and implementation of law.

The meaning of *ijtihad* is the mobilization of sincerity with optimal efforts in exploring *syarra* laws'. According to *Al-Syatibi ijtihad* in terms of the work process can be divided into 2 (two) forms, namely, (1) *ijtihad istinbati*, namely efforts to examine the '*illat* contained in the text, and (2) *ijtihad tatbiqi*, namely efforts to examine a problem where the law will be identified and applied according to the ideas contained in the text⁶⁰.

In *istinbati ijtihad*, a *mujtahid* focuses his attention on the efforts to extract ideas contained by the abstract texts. On the other hand, in *ijtihad tatbiqi* a *mujtahid* tries to apply the abstraction ideas to concrete problems. So the object of *istinbati ijtihad* studies is texts, while the object of *ijtihad tatbiqi* studies are humans (as legal actors) with the dynamics of change and development they experience.

⁵⁹ Ibid., pp.5-6.

⁶⁰ Asfari Jaya Bakti, *Konsep Maqashid al-Syari'ah Menurut al-syatibi dan Relevansinya dengan Itjihad Hukum Dewasa ini*, Disertasi Program Pascasarjana IAIN Syarif Hidayatullah, Jakarta, 1994.pp.176-178.

Between *ijtihad istinbati* and *tatbiqi* have a mutual relationship. In implementing *ijtihad tatbiqi*, *ijtihad iistinbati* holds a very important role, because the knowledge of the essence and ideas for a text remains a benchmark in the application of law. Mistakes in the application of verse ideas will also create errors in evaluating new problems and applying the law.

Efforts to extract *sharia* law 'will be successful, if a *mujtahid* can understand *maqashid al-shari'ah*. For this reason, according to *al-Syatibi*, the degree of *ijtihad* can be achieved if a person has 2 (two) criteria, namely: (1) can understand *maqashid al-shari'ah* perfectly, if one can understand *maqashid al-shari'ah* with all problems and details, (2) The ability to dance the content of the law on the basis of the knowledge and understanding of *maqashid al-shari'ah* is in the help of *Arabic*, *al-Qur'an* and *as-Sunnah*.

Starting from the object of *ijtihad*, there are 2 (two) patterns of presentation that need to be stated in the application of *maqashid al-shari'ah*. In the two features there are methods of *ijtihad* that need to be developed. Both of them are, *Ta'lili* reasoning style and *istislahi* reasoning style.⁶¹

First, the style of *ta'lili* reasoning is an attempt to extract the law which is based on the discovery of the 'divine-law' contained in a text. On the basis of 'illah contained in a text, the legal problems that arise are attempted by the *mujtahid* through the reasoning of the *illat* in the text. The *ta'lili* reasoning style is in the form of *qiyas* and *istihsan* methods and the *istislahi* reasoning style is related to the *al-mashalil al-khamsah* and *al-zari'ah* methods.

In excavating the law with the *Ta'lili* reasoning method with the *qiyas* method, it cannot be released from the pillars of *qiyas*, namely: (1) original law, namely events that already have its legal law, (2) in the form of branch law, ie events that do not exist its text, (3) 'illah, that is, a trait that is present in the original event, and (4) this trait that originates in giving birth to a legal decision sought.

Thus, it can be said that *qiyas* as a form of *ta'lili* is an attempt at reason that has closeness to the text. *Qiyas* as *ta'lili* reasoning must always be sharpened by the consideration of *maqashid al-shari'ah* both related to social, economic, political and moral. The consideration of *maqashid al-shari'ah* makes the *qiyas* method more dynamic as a solution to solving legal problems.

In extracting the law through *ta'lili* reasoning with the *istihsan* method in connection with this, the meaning of *istihsan* is to think well of something. *Istihsan* is the transfer of thoughts of a *mujtahid* from the *qiyas jali* (clear

⁶¹ Ibid., pp. 194.

to the khafi *qiyas* (unclear) or from the kulli (general) to the provisions of *takhsis* (special) law on the basis of the proposition that allows the transfer.⁶²

In reality, generally accepted provisions are often difficult to apply fully. The clash between the application of general provisions and efforts to eliminate difficulties, requires that efforts to eliminate difficulties take precedence because they are *sharia* principles. *Istihsan* must always be oriented towards efforts to realize *maqashid al-shari'ah*, and to take into account the positive and negative impacts of applying the law, which is called "*al-nazar fi al-ma'alat*".

Second, *istislahi* reasoning style contains 2 (two) methods of *ijtihad* in an effort to reveal the intended *maqashid al-shari'ah*. *Maslahah* in the sense of the term is the benefit expressed by *Shari'a (Allah)* in establishing the law for His servants in the business of preserving religion, soul, reason, descent, and property (*al-masalih al-khamsah*).

Maslahat which has no special legality in texts is called *maslahat mursalah* or *masalih al-mursalah*. *Mursalah* means being separated from the specific texts. Related to *maqashid al-shari'ah* with the pattern of the presentation of *masalih al-mursalah*, that any benefit that is not specifically indicated by the texts, but that it is in accordance with the act of *sharia*, then such benefits can be the basis of law and as legal development in the field of *mu'amalah*.

The second method of the style of *istislahi* that needs to be developed is *al-zari'ah*, which means the path which conveys to something or the path which is to bring or bring to necessity or *halal*.

Al-zari'ah is a method of *ijtihad* that places emphasis on the impact of an action (*a-nazar fi al-ma'alat*). In relation to *al-nazar fi al-ma'alat*, there are two forms of the act of a *mukallaf* that has potential benefits, the act is recommended by *syara'*, secondly, the act of *mukallaf* which contains potential *mafsadat*, because there is a negative nature, then the act is prohibited by *syara'*.

The relevance of the importance of epistemology with the development of civil society in the field of civil law

Law deals with humans and their dynamics. Law (the field of *mu'amalah/civil*) is finished after the promulgation is normative, ideological, and deductive), but people's lives are never finished, dynamic, will continue to develop empirically-historically-and inductively). The law will always be out

⁶² Ibid., pp. 194.

of date normative, textual, but when faced with the development of society about a law where there is no rule of law, legal experts become confused. Here the relevance of the importance of a legal expert mastering methods (epistemology) to answer the development of the legal field in a dynamic society in their life.

Islamic law has a large enough role in life, a dynamic role not a static role. Islamic law can play a lot in accordance with the nature of dynamism, so that it does not lose its relevance to the development of life around it. How to make Islamic law (*fiqh*) today remains in the perspective of the social history of people's lives today.

The development of Islamic legal thought (*fiqh*) can be used as a dynamic social thought, called "contextual social Jurisprudence". The main concern is how *fiqh* still has a dynamic relationship with changing social conditions. In connection with this, it seeks to explore social *fiqh* from the real struggle between "religious truth" and "social reality" which is always lame. Jurisprudence always has a dynamic context and reality.⁶³ Thus, it inspired and encouraged changes in the orientation of the school of the school of *fi al-qaul* to the school of *fi-al-manhaj*.

CONCLUSION

Islamic law must be able to be empirical and realistic in dealing with ever-changing and dynamic human life. The law was enacted (*al-nushus mutanahiyah*), but life was never finished (*al-waqa'iq ghairu mutanahiyah*). To face and answer the gap between Islamic law and life, Islamic legal theory as an epistemology can help as a tool or method to solve it. As for the inventory of theories of Islamic law as an epistemology and its relevance for answering the development of public life in the field of civil law, among others, namely: (1) the rules of *ibahah* (allowed), (2) the rules of *tahqieq al-manath*, (3) *istihsan* rules, (4) *ta'wil* rules, (5) *ta'wil al-ilmi* rules, (6) *maqashid al-syari'ah* rules.

Legal experts must master the principles of law, legal principles, legal epistemology, when the law cannot answer the legal problems that occur. Epistemology of law is as a method or tool to help answer legal problems, or as a tool to create or develop existing laws.

⁶³ Huzaimah TY dan Hasanuddin, "Menjadikan Fikih sebagai Pemikiran Sosial yang Dinamis", dalam Asrori S. Karni dan Abdul Wasik, *Pandu Ulama Ayomi Umat, Kiprah Sosial 70 Tahun Kiai Sahal*, Cet. 1, (Majelis Ulama Indonesia, 2007), pp.79-80.

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TRANSFER OF INTELLECTUAL PROPERTY RIGHTS SMEs TRADEMARKS IN INDONESIA

Anis Mashdurohatun

INTRODUCTION

Trademarks (trademark) as one of the intellectual property rights, first known than other intellectual property rights, such as patents (patent) and copyright (copyright). Initially, the term brand in the English language is taken from the word brand (Old Norse language) that contains the meaning “to burn”, while in the old Scottish community, meaningful brand terms “keep your hands off”. It refers to the practice of identifying cattle in ancient times, which actually began in 2000 BC. This is also reflected in one of the brand definition contained in the Oxford Advanced Learner’s Dictionary of Current English “sign made with hot metal, particularly in farm animals to show who owns it.”⁶⁴

Commitment from Indonesia in brand protection is actually not a new problem, because In Intellectual Property Rights Indonesia recognize trademark rights at the first time when making Act of Industrial rights in Reglement Industrie Kolonien Stb 545 1912, which renewed by Act No. 21 of 1961 About brand then replaced also by Act No. 19 of 1992 on Marks and renewed by Act brands of 1997 on the Amendment Act No. 19 of 1992 on Marks.⁶⁵ Then after the reform era provisions on the brand renewed with Act 15 of 2001 on Marks which reformed by Act No. 20 of 2016 on Marks and Geographical Indications.

Brand is very important in the world of advertising and marketing because the public often associate an image, the quality or reputation of goods and services with a particular brand. A brand can be a wealth of commercially valuable. Brand of a company is often more valuable than the real assets of the company. Brand is also useful for consumers. They buy a particular

⁶⁴ Casavera, 8 Trademark Dispute Cases in Indonesia (2009) Graha Ilmu, Yogyakarta, pp. 2.

⁶⁵ Muhammad Djumhana. Intellectual Property Rights, History, Theory and Practice in Indonesia (1997) Bandung Citra Bakti Adytia, , pp. 150-151.

product (which is visible from the brand) because according to them, the brand of high quality or safe for consumption because of the reputation of the brand. If a company uses another company's brand, consumers may feel cheated for having to buy a product with a lower quality.⁶⁶

Brand as one form of intellectual work has an important role for smoothness and increased trade in goods or services in trade and investment activities. Brand (brand image it) can meet consumer needs for identification or distinguishing features are very important and is a guarantee of the quality of the product or service in an atmosphere of free competition. Therefore, the brand is an economic asset for the owner, whether an individual or company (legal entity) that can generate huge profits, of course, when utilized with due regard to aspects of business and good management processes. Thus the importance of this brand, the legal protection attached to it, namely as an object against him over the rights of individuals or legal entities.⁶⁷

The existence of legal protection for brand owners who legitimately intended to provide rights that are exclusive (special) for brand owners (exclusive right) so that the other party can not use a sign identical or similar to its good for the goods or services of the same or nearly the same. "Special rights tend to be monopolistic, meaning that only the brand owner can use it".⁶⁸ Rights holders can use its brand with a note without breaking the rules that exist in the use of the brand, while prohibiting others to use a trademark or consent.

Piracy and imitation brand slumped make the business world with unhealthy competition which resulted in the rise of bad faith behavior of businesses adventurers. Situations like this will be increasingly complicated for Indonesian business nature. On global spectacles, these conditions do not rule out the possibility of foreign investors doing late business. In turn, the competitiveness of Indonesian businesses at the global level will be weakened by the decline in the level of confidence to the brand and Indonesian products. We can imagine the damage to the image of Indonesia, if in this country spreads false brands or brands that piggyback well-known brands are already global or local.⁶⁹

⁶⁶ Tim Lindsey, *An Introduction to Intellectual Property Rights* (2006) Bandung: PT Alumni, pp. 131-132.

⁶⁷ Adrian Sutedi, *Intellectual Property Rights* (2009), Sinar Grafika, Jakarta, pp. 91-92.

⁶⁸ Supreme Sujatmiko, *Juridical Aspects of Brand Licensing and Competition Law* (2008), *Jurnal Pro Justitia*. Vol. 26 2.

⁶⁹ Faith Sjahputra, *Digging Justice Law: Legal and Political Analysis of Intellectual Property Rights* (2009), Alumni, Bandung, pp. 14-15.

THE POSITION OF INTELLECTUAL PROPERTY RIGHTS IN THE LAW OF GOODS/MATERIAL LAW

The type of objects, ie tangible objects (material) and intangible (immaterial) as defined in Article 503 BW. These intangible in Article 499 BW-called rights. Examples of rights is the right to collect, right to cultivate, security rights, IPR (intellectual property rights). Both items of tangible and intangible (right) can be the object of rights, when participating as utilized by other parties through licensing. Right to tangible objects called absolute rights over an object, in this case the Intellectual Property Rights (IPR). In order to obtain a more detailed understanding, the following is presented the scheme of things and rights.⁷⁰

In accordance with the essence of intellectual property rights which are classified as private property rights that are intangible. Intellectual Property Rights I is the moving objects intangible and movable, intellectual property rights may be transferred in whole or in part due to inheritance, grants, wills, be a property of the State, the agreement must be made by deed, provided that the agreement only on the authority named in the deed.

Intellectual Property Rights have properties can be divided (divisible) means it can be transferred in whole or in part to any other party. Transfer of all or part of it is shown by actions undertaken with regard to the use of the right. On copyright, the transfer entirely covers the right to announce, multiply, and gave permission to publish and / or reproduce the invention.

Intellectual Property Rights, or commonly abbreviated IPR is a right derived from the results of creative activity in a power of human thought. The existence of IPR arising as a form of appreciation for intellectual activity or human thought in creating an intellectual work.⁷¹ As for the form of the ability of intellectual work that is all the result of the power of human thought, among others in the fields of technology, science, art, literature, and so on.⁷² The distinctive character of IPRs are private rights attached to the individual producer of an intellectual work so that when others want to use or exploit such rights must obtain permission from the owner or right holder.⁷³ In other

⁷⁰ Anis Mashdurohaturun, Copyright of Books,Rajagrafindo, (2018),Jakarta,pp.35.

⁷¹ Ginting ER, Indonesia Copyright Law; Analysis Theory and Practice (2012), Bandung, Citra Aditya Bakti.

⁷² Saidin H.OK., Legal Aspects of Intellectual Property Rights (2015) Jakarta, RajaGrafindo Persada.

⁷³ Muhammad A. Study of Economic Law of Intellectual Property Rights (2007), Bandung, Citra Aditya Bakti,pp.70.

words, the owner or holder of the intellectual property rights has a monopoly, which is free to use and benefit, advantage or prohibit and restrict the utilization of the intellectual work by others in accordance with applicable regulations.⁷⁴ In other ways, it can be observed when viewing the rules regarding IPR. For example, in Article 1 (1) and (2) of Law No. 28 of 2014 (which is nothing but a part of the IPR) determined that “copyright is the exclusive right of the creator that arise automatically based on the principle of declarative after a work embodied in the form of real without prejudice to the restrictions in accordance with the provisions of the legislation “, then in the next paragraph stipulated that the reference to the creator is a person or persons who individually or jointly produce a creation that is unique and personal.

IPR as a material property rights in terms of the theory of property rights and the concept of the right material in the Indonesian legal system can be used as a justification for classifying IPR as part of joint property marriages. As in marriage law stipulated that ‘possessions’ acquired during the marriage become community property. In looking at the position of IPR as a joint property of marriage, of course, should not ignore the rules of existing IPRs. As one legal principle in the treatment of objects that will be different to other objects based on the settings of each of these material. Therefore, it needs to be observed a few things and limitations when viewed IPR as part of joint property marriages. The important thing that needs to be observed and identified in view of the limitations of IPRs in the joint property marital, the concept of ownership of IPRs, generally known as the moral rights and economic rights owned by a producer of intellectual work (Lindsey et al., 2011). Moral rights are rights inherent in private and lasting in producing intellectual works, moral rights can not be transferred, so that someone who is not producing intellectual works can not have moral rights. While the economic rights or the right to intellectual property rights holders to exercise the economic rights and receive benefits or economic value of the implementation of the economic rights. The economic rights are rights that can be switched or transferred.⁷⁵

In IPR rules, it is possible to obtain the economic rights apart from producing intellectual works itself that is the rights holder. Holders of rights in question are others who receive further rights from the producer of

⁷⁴ Roisah K, *The concept of Intellectual Property Law*, (2015), Malang, Equivalent Press.pp.67.

⁷⁵ Mohammad Djumhana & Djubaedillah, *History of Intellectual Property Rights Theory and Practice in Indonesia*, PT Citra Aditya Bakti, Bandung.,2014. pp.89.

intellectual work, under the terms of the transfer set out in the regulations of IPR. In general, under the provisions of existing IPRs, rights holders are not producing intellectual works can acquire the economic rights of the producer of intellectual work with two (2) ways, through transfer of rights or licensing. How prevalent and common in the transfer of IPR is through; inheritance, wills, grant, agreement, or other reasons that are justified by the legislation. While licensing is generally performed with the license agreement. When examined, the IPR regulations, stipulates that any assignment and licensing is done must be done clearly and in writing. Departing from the above, in the case of an intellectual work produced in marriage by either party of the husband or wife, married couples are not producing intellectual works (non-creator spouse), can not be categorized as rights holders, because of the non-creator of the spouse does not receive the right more than producing intellectual works under the provisions of the regulations in governing IPR basic rights for the emergence of a rights holder is not producing intellectual works.

Based on this, the logical consequence is, non-creator spouse does not have the moral right and also unable to carry out economic rights. Different thing indeed if the resulting intellectual work together so that the work can be categorized as a work together, so then the husband and wife have equal rights with respect moral rights and economic rights to his work. However, it should be observed, there are two (2) elements that can be identified in the economic rights of an intellectual work, namely, elements of the realization of economic and economic value that can arise from any form of implementation of the economic rights. As is the realization of economic, for example in the case of copyright, among others; translation rights, publicity rights, reproductive rights, adaptation rights, etc..

Each implementation of the economic rights that would be able to generate economic value. A person who is not a producer of intellectual work, or not as rights holder is not possible to have the moral rights and economic rights.

CLASSIFICATION OF INTELLECTUAL PROPERTY RIGHTS

The principle of legal protection of the registered mark shall be in accordance with the agreement that has been agreed in the GATT (General Agreement On Tariff and Trade) in round Uruguay for Indonesia with 116 other countries have ratified in Morocco on April 15, 1994, once approved

by the enactment of TRIP's (Trade Related Aspect Of Intellectual Property right), namely trade-related aspects relating to intellectual property rights. With the enactment of TRIP's is the consequence of the scope of intellectual property rights is becoming more widespread regulation among other things, copyright, trademarks, patents, industrial designs, geographical indications (geographical indication), lay out the desing and integrated circuit (desinge lay out of integrated circuit / totppgraphy right), trade secrets (indisclosed information or trade secret).⁷⁶

Broadly: the intellectual property is divided into two parts, namely:

1. Copyright is the exclusive right of the creator or the right to publish or reproduce his creations or give permission to do so without reducing restrictions under legislation is applicable.
2. Industrial Property Rights which include:
 1. Patent is an exclusive right granted by the state to an inventor over his invention results in the field of technology, which for a given period to own his invention to another party to carrying it out
 2. Industrial design is a creation of shape, configuration or composition of lines or colors, or a combination thereof in the form of three-dimensional or two-dimensional gives aesthetic impression and can be realized in a pattern of three-dimensional or two-dimensional and can be used to produce a product, goods, industrial commodity or handicraft.
 3. Brand is a mark in the form of pictures, names, words, letters, numbers, color composition or a combination of these elements, having distinguishing features and used in trading activities or services.

Geographical Indication is a sign which indicates the origin of goods, which is due to the geographical environment, including natural factors, human factors, or a combination of both factors, provide specific characteristics and quality of the goods produced.

4. Layout designs of integrated circuits is an exclusive right granted by the Republic of Indonesia to the designer or his creation, for a given period to own or to give permission to others to implement these rights.

⁷⁶ Mulyanto, The Other Side of the Applicability of Law No. 19 of 1992 on Trademarks, Varia Justice, No. 111. Year X, December, pp. 152.

5. trade secrets is information not known by the public in the field of technology and / or business, has economic value because it is useful in business activities, and kept secret by the owner of the trade secret.
6. Plant Variety Protection is the special protection granted by the state, which in this case is represented by the government and implemented by the Plant Variety Protection Office, on plant varieties produced by plant breeders through plant breeding activities.

TRANSFER OF INTELLECTUAL PROPERTY RIGHTS TRADEMARKS SMALL AND MEDIUM ENTERPRISES IN INDONESIA

Legislation on the brand starts from the Statute of Parma who had started functioning as a brand differentiator for products such as knives, swords, or goods from other copper products.⁷⁷ The brand's history can be traced even possibly centuries before Christ. Since ancient times, such as the Minoan period has been signaled for their belongings. In the same era, the Egyptians already wrote his name on to the bricks made on the king's orders.

Act of the oldest brands in Indonesia is Reglement Indutrielee Eigendom Kolonien (Regulation 1912 Colonial Industrial Property Rights) established by the colonial government (Dutch East Indies) by Gazette 1912-543 jo. 1913-213 Statute in force since March 1, 1913, these regulations are also enforced in Surename and Curacao are prepared and follow the Law Dutch brand by applying the principle of concordance.⁷⁸

Background to the Act brands, among others based on the emergence of globalization in all aspects of human life, especially in the fields of economy and trade. The rapid development in information technology and transportation to encourage the growth of market integration economy and global trade. Needs, capabilities and technological progress of a product today is the market for the productions of entrepreneurs and services of the trademark owner. All of them want their products gain access freely to the market, hence the development of trade and industry so rapidly require

⁷⁷ Rahmi Jened, *Intellectual Property Rights Exclusive Rights Abuse* (2007), Surabaya, Airlangga University Press, pp. 159.

⁷⁸ Adhiguna A. Herwinda, *Piracy (Hijacking) In Trademark Registration System In Indonesia*, thesis to earn a Master of Law in Legal Affairs At the University of Indonesia, Jakarta, 2006, pp. 38.

increased protection of the technologies used in the manufacturing process, when subsequently the product is on the market by using a specific brand, hence the need to protect the product which marketed from various unlawful acts in the end is the need to protect the brand. In this connection, the rights arising from intellectual property rights, particularly the rights to the brand of a product will become cross important that in terms of legal protection, and therefore to establish and develop the brand of the product or service is done with difficulty, given the need for too long and costly to promote the brand to be known and to get a place in the market. One way to strengthen a healthy trading system in developing the brand of a product or service, is to perform the legal protection of a trademark registration.

In Indonesia, the brand was first regulated in Law Number 21 Year 1961 About Trademarks and Brands Commerce.⁷⁹The main principles set out in this law are trademarks obtained through first using (first to use the system or stelsel declarative). First to use the system or stelsel declarative means the legal presumption arises that the first user is the person entitled to be proven otherwise.⁸⁰

Law No. 21 of 1961 on Marks, Trade and Commerce does not include the definition and meaning of brands in particular. This law simply states that the special rights over a trademark may be owned by a person (some people) when “has a different” and first put the brand in Indonesia. And special rights over the brand was only applicable to similar goods of up to three years after the last use of the brand. Law No. 21 of 1961 on Trademarks and Brands Commerce is still very imperfect because the legislation contained only 24 Article.

According to the Trademark Act of 1961 it held the distinction between what is called the “factory mark” or “the company’s brand” and “commercial brand”. The distinction of the two kinds of this brand Which refers to companies that use the mark concerned; plant or factory, on the one hand or a trading company that trades in items with mark concerned on the other. The company’s brand is used to distinguish the goods results from a factory (the company). Commerce brand is the brand to distinguish one’s goods trade, goods commerce. In other words, this commercial brand used by a large trading company handles inrichting, trade enterprise. Entitled to something brand is thus.⁸¹

⁷⁹ Rahmi Jened, *Trademark Law (Trademark Law) in the Era of Global Economic Integration*, Pranamedia Group, Jakarta, 2015, pp. 15.

⁸⁰ *Ibid*, pp. 15.

⁸¹ Sudargo Gautama, *Indonesia Trademark Law*, Citra Aditya Bakti, Bandung, 1993, pp. 65-66.

1. People who have these items, because he has a company that produces the goods.
2. A trading company, an enterprise, which trades goods with the brand in question.

Law No. 21 of 1961 which adopts declarative declarative system provides user rights to the brand in the first in Indonesia, although not registered. With been registered owner is regarded as the first user unless proven. If proven in fishing that the owner of the brand is not the first user then first assumption is invalid and the registration may be canceled pursuant to Article 10 of Law No. 21 of 1961.⁸²

Registration seen only provide a prejudice by law or legal allegation that the person who signed is the first of the wearer. So this registration only gives legal allegations, that people who register with the brand is considered by law as though it is recognized as the first user, and therefore as proprietor of the mark concerned.⁸³

System declarative is as described above, in practice less in establishing peace for the business world, because the registration of the brand can be canceled for reasons other party is the user first, whereas in practice proving the first usage is not less of a problem so that the system of declarative this perceived lack of creating legal certainty.⁸⁴

Furthermore, Act No. 21 of 1961 be replaced by Act No. 19 of 1992 on Marks⁸⁵ in effect since April 1, 1993.⁸⁶ Act No. 19 of 1992 on Marks scope rules made as broad as possible, with using title of the brand in the law brand in 1992 the scope of the brand covers both for trademarks and service marks, as well as aspects of a trade name which also are manifested as a brand and has cover in it.⁸⁷

⁸² Erma Wahyuni, et al, Trademark Law Policy and Management, Public Administration Reform Foundation of Indonesia, Yogyakarta, Without the Year, pp. 48.

⁸³ *Ibid.*, pp. 48.

⁸⁴ *Ibid.*, pp. 49.

⁸⁵ Trademark Act No. 19 of 1992 is based on the conception of the brand to grow in the period surrounding World War II as a result of development of the situation and needs as well as the more advanced norms and commercial arrangements, making conception on brands in the Act.

⁸⁶ Indonesia, on Trademark Law, Law No. 19 of 1992, LN No. 18 of 1992, Supplement No. 349 (hereinafter the Trademark Act of 1992).

⁸⁷ Further see Article 1 (1) of Law No. 19 of 1992 "Brand is a sign in the form of images, names, words, letters, numbers, color composition, or a combination of these elements owned by distinguishing and use the data the trading of goods or services.

Law No. 21 of 1961 on Marks Trade and Commerce Trademark amended by Act No. 19 of 1992 on Marks with some fundamental changes, namely:⁸⁸

1. The selected title is a Trademark Act that is simple but covers a broad setting. This order covers both trademarks and service marks, even can covers understanding the collective brand. In the future development, the use of brand terms can also accommodate another sense.
2. Changes in the system concerns the acquisition of rights of all Firs to use the system or stelsel declarative be siste first registration (first to file system or stelsel constitutive). The use of this system in order to ensure constitutive law.
3. In this law regulated the registration of the brand with the right priorities.⁸⁹
4. Act No. 19 of 1992 on Marks also regulates criminal sanctions, both for crime by qualifying crime or offense.⁹⁰

Furthermore, in order to adjust to the provisions of Trade Related Aspects of Intellectual Property Rights including Trade In Conterfeit Goods (TRIPS), improvements provisions of Law No. 19 of 1992 on Marks through Act No. 14 of 1997 on Marks, published in the State Gazette (LN) No. 31/1997 memory and additional explanations contained in the State Gazette (TLN) and declared effective on May 7, 1997, but the brand arrangements are not very practical.

Law No. 15 of 2001, promulgated on August 1, 2001 in line with the ratification of Convention on the Establishment of the World Trade Organization (WTO). This Act replaces the Act No. 19 of 1992 on Marks as amended by Act No. 14 of 1997 on the Amendment of Act No. 19 of 1992 on Marks. According to Article 1 of Law No. 15 In 2001 the brand is a sign in the form of images, names words, letters, numbers, color composition or a combination of these elements, having distinguishing features and used in the trading of goods or services. In the explanation of Article 5 letter of Law No. 15 of 2001 emphasized that the brand does not need distinguishing features. The point is a sign used as a trademark should not be too modest and should not be too complicated, so are not clear. A brand that looks simple and too complicated to be confusing the public whether the mark as a brand or not.

⁸⁸ Sudargo Gautama and Rizwato Winata., Op., Cit, pp.164.

⁸⁹ Ibid

⁹⁰ Ibid

Trademark Act of 2001 was successfully enacted by the government. The law contains a variety of things that most of it is set in the previous Act. Some important changes are listed in the Act No. 15 of 2001 on Marks is a provisional decision by the court, the ordinary into the offense changes to a complaint, the role of the commercial court in deciding the trademark dispute, the possibility of using alternative dispute resolution and aggravated criminal provisions.

According to Article 1 Paragraph 2 of Act No. 15 of 2001 describe the trademark is a brand used on goods which traded by a person or a few people to differentiate with other similar goods. Here the brand in its use attached to the manufactured goods are concerned, and characterize or mark to distinguish the goods of other production results.⁹¹

In Act No. 15 of 2001, the brand has been incorporated in the form of intellectual property protection rights that are closest to people's daily life, the brand is not only used as an identity of goods and services, but also play an important brand marketing products / services. After the Act applies, government immediately undertake corrective action in each case related to the brand. This is to provide services for entrepreneurs or traders to develop their business, they obtain the legal protection of energy, thoughts, time and costs that they sacrificed in order to build a reputation of the company in the form of the brand. Their arrangement on the brand is expected to prevent unfair competition. By brand,⁹²It is stated in the preamble of Act No. 15 of 2001 regarding Mark weighing point a part which reads:⁹³

“Whereas in the era of global trade, in line with international conventions which have been ratified by Indonesia, the role of brands is very important, especially in maintaining healthy competition;

Article 3 of Law No. 15 of 2001 on Marks says that right on the mark is an exclusive right granted by the State to brand owners registered in the public register of the brand for a certain period of time by using their own brand or give permission to others to use. In contrast to copyright, trademark should be registered in advance in the general list of brands.

Law No. 15 of 2001 on the brand requires registered Trademark. With its registered trademark as defined in Article 3 of the Act, then the holder

⁹¹ Further recov- Articles 1, 2 of Act No. 15 of 2001 on Marks.

⁹² H. OK. Saidin., Op., Cit, pp. 329.

⁹³ Republic of Indonesia, Law Intellectual Property Rights (2003), Jakarta, Sinar Grafika, pp. 134.

of the brand will be recognized over the ownership of the product brand merchandise. This is in accordance with the principles adopted by the Trademark Law of Indonesia, the first to file principle, not a first-come, first-out principle. Based on these principles, the person who wants to own the rights to the brand must perform the registration of the mark in question.⁹⁴

According to Article 3 has been able to see that the brand protection pursuant to Act No. 15 of 2001 was given to the brand which have been registered and for brands that are not registered then do not get protection by trademark law. Other legal protection is also provided in accordance with the provisions stipulated in Law No. 15 of 2001 on Marks, namely as enshrined in Article 76 paragraph (1) and (2) which states that the granting of the rights to the trademark holder whose rights are violated can do a lawsuit against the offender the right to brand either criminal or civil. The exclusive right to wear this brand serves as a monopoly, is only applicable to certain goods or services. Therefore a brand gives exclusive rights or absolute rights in question, then it can defend the rights of anyone. Mark rights granted to the owner of the brand with good intention, the wearer also includes goods and services.

On November 25, 2016 the fifth amendment of regulation brand in Indonesia renewed by Act No. 20 of 2016 on Marks and Geographical Indications replaces Law Number 15 of 2001 on Marks. Of course this is a political law established in order to enhance the regulations on brands and can provide protection against other forms of brand unprotected in the previous regulations (Act No. 15 of 2001 on Marks).

HMN Purwo Sutjipto gave formula that brand is a sign, with which a particular object personified, so as to differentiate with other similar objects.⁹⁵ Soekardono provide brand formulas are a sign, by which personified a particular item which should also private in origin of goods or guarantee in quality goods in comparison with similar goods made or sold by persons or entities other companies.⁹⁶ Adisumarno Harsono explains the brand is identification that distinguishes a person belonging to the property of others, such as the ownership of livestock by giving signs to put a stamp on the back

⁹⁴ Agus Budi Riswandi and M. Syamsudin, *Intellectual Property Rights and Legal Culture* (2004), Jakarta, Raja Grafindo Persada, pp. 85.

⁹⁵ HMN Purwo Sutjipto, *Understanding Principles of Commercial Law Indonesia* (1984), Djambatan, Bandung, pp. 82.

⁹⁶ R. Soekardono, *Indonesian Trade Law* (1983), Volume I Matter to 8, Jakarta, Dian Rakyat, pp. 149.

of a cow which is then released along with extensive grazing place. Cap as it is a badge to indicate that the animals in question are owned by a particular person. Usually for distinguishing marks or brands used the initials of the owner's own name as a distinctive sign.⁹⁷ Sudarto Gautama, The brand must be a sign. This mark can put in the relevant goods or packages of goods it. If goods produced a company does not have the power and hence or other characteristics of goods orit by cover. A distinctive shape or color, the color of a piece of soap or a doss, tube and bottle. All of this does not quite have the power distinction to be regarded as a brand, but in practice we see that the partial color used with a particular combination is considered as a brand.⁹⁸

Esel R. Dillavou "No complete defenition can be givenfor a trade mark Generally it is anysing, symbol marks, work of words in the from of a label Adopted and used by a manufacturer of distributor to desingnate bus partuculer goods, and the which no other person has the legal right to use it. Originally, the sigh or trade mark, indicated resources to the origin, but to day it is used more as an advertinsing mechasim.⁹⁹(There is no definition of a complete will be given for a trademark, in general is a symbol, a symbol, a sign, the words or wording in the form of a label that is quoted and used by a person's employer or disributor to signify goods as special and no one else has the legitimate right to wear the design or trade mark indicates the authenticity but now it is used as an advertising mechanism).

Based on the opinion of experts as well as from the legislation brand itself generally can be concluded that it is meant by the word "brand" is a sign to distinguish the goods or services of the kind produced or sells by person or group of persons or legal entities with goods or services of the kind produced by others, having distinguishing features as well as a guarantee on their quality and used in the market of goods or services.¹⁰⁰

Based on some of the scholars definition, means that the brand is a sign or a tool that in itself there is power distinction with other similar goods to indicate the origin of goods, quality assurance and distinguish goods and services produced by a company, so that it can be compared with similar goods

⁹⁷ Adisumarto Harsono, *Industrial Property Rights*, Academic Pressindo, Jakarta, 1990, pp. 44.

⁹⁸ Sudargo Gautama, *Indonesia Trademark Law*, Citra Aditya Bakti, Bandung, pp. 34.

⁹⁹ Paratasius Daritan, *Trademark Law and Trademark Dispute in Indonesia*, Thesis, unpublished, pp. 7.

¹⁰⁰ OK. Saidin, *Legal Aspects of Intellectual Property Rights*, Jakarta, Raja Grafindo Perasada, pp. 345.

which made and traded by a person or another company. While in Australia and Britain broad definition of the brand has grown to include forms and aspects of the appearance of the product inside. In the UK the company has registered the Coca-Cola bottle shape the brand as a brand. This development further identify trouble distinguishing mark protection with the protection of product design. Besides difficulties also arise because as long as there are differences between brands with items that plastered the brand. According to the reference for this, which is represented by the product description of shapes, sizes and colors cannot be categorized as a brand. For example, “little blue house” (small blue house) can not be registered as a trademark for a portrait of the shape of the house. Possibility to register the brand by considering the shape of goods has become food for thought in the example above. Display products may not be registered as a trademark but it can be consideration if there are other products that may have a similar appearance. In some countries, sound, smell, and color can be registered as a trademark.¹⁰¹

Brand has been used since hundreds of years ago to give an indication of the products which produced with the intent to show the origin of goods (indication of origin) brand and the like were developed by the merchants before their industrialize. Similar shape brand began we know it began to form start official mark (hellmark) the Englishman for goldsmith, silversmith and cutting tools. Official signs such systems continue to be used because they can distinguish from which the producer of the like goods originate.

Protection of the brand in the UK in its early development is against impersonation. The first cases of the brand completed the English Courts is the case of Lord Hardwicle LC In Blanchard opponent Hil in 1972. While the legislation is the first brand created Marcks Merchandise Act in 1862. Previous English in 1857 has adopted trademark registration system of the French law.¹⁰²

Act known as Marchandise Marks In basing how they are protected in the form of criminal law. The Act is equipped with refurbished in 1887. Furthermore, continuously updated and continue to be valid until he made a new law known as the Trade Description Act 1968. England besides having Marchandise Marks Act legislation also has other brands namely Registratation Trade Marks Act 1975 which was renewed in 1876 and 1877

¹⁰¹ Ibid., pp. 347.

¹⁰² M. Yahya Harahap, Brand Overview General and Law in Indonesia based on Law No. 19 of 1992, pp.43.

were combined into Patents and Trade Marks in 1883. Additionally in 1938 issued Trade Marks Act, which in 1984 on the recommendation of the Mathys Departmental Committee and legislation was updated and inserted trademark registration system.¹⁰³

The transfer of license rights to the brand has clearly set out in Article 41 through Article 45 provisions of Law No. 20 of 2016 on Marks and Geographical Indications CHAPTER V RIGHTS AND LICENSE, Part One, Assignment.

article 41

- (1) The rights listed brands may be transferred because: a. inheritance; b. will; c. endowments; d. grant; e. agreement; or f. Another reason is justified by the legislation.
- (2) Transfer of Rights on a registered Trademark by the Trademark Owner having more than one registered brand that has a substantially or wholly identical equation for goods and services similar or can only be done if the registered Trademark all transferred to those equal.
- (3) The transfer of the registered Trademark Rights as meant in paragraph (1) and (2) applied for the recording to the Minister.
- (4) Application for transfer of Rights to Marks referred in paragraph (3) shall be accompanied by supporting documents.
- (5) The transfer of the registered Trademark Rights ruling by a note referred to paragraph (3) published in the Official Gazette of Marks.
- (6) The transfer of the registered Trademark Rights that is not recorded has no legal consequences on third parties.
- (7) Registration of the transfer of the right to Marks referred to in paragraph (1) is free of charge.
- (8) Transfer of Rights to Marks referred to in paragraph (1) may be performed at the Trademark registration application.
- (9) Further provisions on the requirements and procedures of application for registration of transfer of Rights to Marks referred to in paragraph (1) through (8) is regulated by the Minister.

The second part

License Article 42

- (1) The owner of a registered Trademark could grant a license to others to use the trademark in part or all types of goods and / or services.

¹⁰³ M. Djumhanan, .Op, Cit, pp. 150.

- (2) A licensing agreement valid throughout the territory of the Republic of Indonesia, unless agreed otherwise.
- (3) The licensing agreement shall be applied for the recording to the Minister to be charged.
- (4) License Agreement referred to in paragraph (3) shall be recorded by the Minister and published in the Official Gazette of Marks.
- (5) License Agreement that is not recorded no legal consequences on third parties.
- (6) License Agreement contains provisions prohibited both direct and indirect impacts on the cost the Indonesian economy or loading restrictions that impede the ability of the Indonesian nation in mastering and developing technology.

Article 43

Owner o registered brand that has given license to another party as referred to in Article 42 paragraph (1) may still use their own or to grant a license to a third party to use the trademark, unless agreed otherwise.

Article 44

Use of the brand is registered in the territory of the Republic of Indonesia by the licensee are considered equal with the use of the trademark in the territory of the Republic of Indonesia by the brand owner.

Pasal 45

Further provisions on the requirements and procedures of registration of license as referred to in Article 42 paragraph (3) is regulated by the Minister.

Understanding brand based on Article 1 paragraph 1 of Law No. 20 of 2016 on Marks and Geographical Indications as follows:

The brand is a sign that can be displayed graphically in the form of images, logos, names, words, letters, numbers, color composition, in the form of two (2) dimensional and / or 3 (three) dimensions, sound, hologram, or a combination of the two (2) or more of these elements to distinguish the goods and / or services produced by the person or legal entity in the trading of goods and / or services.

Definition of mark rights under Article 1 paragraph 5 of Act No. 20 of 2016 on Marks and Geographical Indications following:

Brand is the right to the exclusive rights granted by the state to the owners of registered brands for a specified period by using their own brand or give permission to others to use it.

Mark rights acquired after the trademark is registered. In order for a registered trademark, required an application, in this case the mark registration request submitted to the Minister of Justice and Human Rights. Transfer of Rights to Trademark and Licensing

Article 41 paragraph 1 of Law No. 20 of 2016 on Marks and Geographical Indications, Explained that the right to a registered mark may be transferred because:

- a. inheritance;
- b. will;
- c. endowments;
- d. grant;
- e. agreement; or
- f. Another reason which is justified by the legislation.

This does not contradict the legislation, such as changes in brand ownership due to ense are:

1. A transfer of rights to the brand of the owner of the registered mark to the other party resulting in the transfer of all rights to the brand to other parties so that the owner of the brand loses rights to the brand.
2. A license from the owner of a registered trademark to another party lead the permissibility of using all or partial rights to the brand to the other party, but the owner can still use their own brand or to license a third party to use the trademark. That is the mark rights are not transferred to another party.

Other differences are:

1. The transfer of a registered mark rights can occur through several legal events, such as inheritance, grant, agreement, or other reasons allowed by applicable law, whereas licenses can only be done through agreement.
2. In the transfer of rights to registered brands, assignee can use all the rights attached to the right to the trademark. Whereas in the license, the recipient can only use the licensed rights to him, may be some of the rights or the entire rights.
3. Transfer of rights to registered brands by brand owners who have more than one registered mark which has a substantially or wholly

equation for goods and / or services of that kind can only be done if all the registered mark was transferred to the same side. While in the license, the owner of a registered trademark may give licenses to other parties either in part or all types of goods and / or services, are not regulated to the same need.

4. The transfer of rights to the brand can be done during the process of application for trademark registration. Meanwhile, for a license without such a regulation.
5. The transfer of license rights to the brand and the fact shall be recorded to the Minister of Justice and Human Rights and is free of charge. Based on figures Annex V of the type and Tariff on Non Tax Revenue derived from Intellectual Property Services Government Regulation No. 45 Year 2016 regarding the Second Amendment to Government Regulation No. 45 Year 2014 regarding Type and Tariff on Non-Tax State Revenues Applicable in the Ministry of Law and Human Rights (“Regulation 45/2016”) arranged for transfer of rights registration fee is Rp 650,000 per number register, while the registration of license agreements amounting to Rp 500,000 per number list.

Thus the transfer of trademark rights between SMEs in Indonesia with a trademark license SMEs are very different in accordance with the provisions of Law No. 20 of 2016 and regulations governing each individually. In the transfer of rights to the brand provided for in Article 41 paragraph (1) of Law No. 20 of 2016, which is in this case a registered mark rights may be transferred as grants testament in this case after the transfer of rights to the brand occur, should be followed with the submission. The transfer of rights to the brand with an authentic deed made by public officials or Notary have legal certainty in accordance with the deed anatomy as stipulated in article 38 of Law No. 2 of 2014 on about Notary. As far as the contents of the transfer agreement will grant can not be denied by the parties, the certificate proving the perfect strength to be used as evidence in court. Transfer of Rights on brands to others has the consequence that the recipient of trademark rights required to administer and finance the recording of the transfer of rights to the brand officially to the Trademark Directorate, Directorate General of Intellectual Property Rights, with the transition through inheritance; wills; endowments; grant; the agreement; or any other cause that is justified by the legislation, then the original owner of the brand provide branded original certificate and a letter of authorization weeks to organize the petition of rights

over the brand. Recording the transfer of rights to the brand in the public register of the brand officially in the rector brand aims to guarantee legal certainty for stakeholders and provide legal protection for both parties, the public as well as government's consumer brands.

CONCLUSION

Based with the essence of intellectual property rights are classified as private property rights that are intangible. Intellectual Property Rights is a moving object intangible, a movable, intellectual property rights may be transferred in whole or in part due to inheritance, grants, wills, be a property of the State, the agreement must be made by deed, provided that the agreement it was just about the authority referred to in the deed. Trademarks of SMEs in Indonesia can be diverted or right to switch brands because ,inheritance; wills; endowments; grant; the agreement; or any other cause that is justified by the legislation by basing the provision of Article 41 Paragraph 1 of the Law No.20.th 2016 on Marks and Geographical Indications. Its implementation is regulated through government regulation and the government has established IPINDO (Intellectual Property Indonesia) online system.

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- Rahmi Jened, *Intellectual Property Rights Exclusive Rights Abuse*, Airlangga University Press, 2007.
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- Trademark Act No. 19 of 1992 is based on the conception of the brand to grow in the period surrounding World War II as a result of development of the situation and needs as well as the more advanced norms and commercial arrangements, making conception *teruang* brands in the Act.
- Act No. 20 of 2016 on Marks and Geographical Indications;
- Government Regulation No. 45 Year 2014 regarding Type and Tariff on Non-Tax State Revenues Applicable in the Ministry of Law and Human Rights as last amended by Government Regulation No. 45 Year 2016 regarding the Second Amendment to Government Regulation No. 45 Year 2014 regarding Type and Tariff on Non-Tax Revenue Applicable to the Ministry of Justice and Human Rights.
- Regulation of the Minister of Justice and Human Rights of the Republic of Indonesia Number 8 Year 2016 About Terms and Procedure of Registration Application Intellectual Property License Agreement

COPYRIGHT LEGAL ISSUES IN MALAYSIAN ESPORT INDUSTRY

Nor Azlina Mohd Noor & Ahmad Shamsul Abd Aziz

INTRODUCTION

Sports has always been an important aspect of Malaysian culture that embedded in every Malaysian's soul.¹⁰⁴ In maintaining the order and integrity of sport, every sport has their own crucial rules and regulations. The legal rules here principally denote the basic framework of how the sport operates, what can and cannot be done within the sport.¹⁰⁵ Based on this premise the development of sports law in Malaysia is skyrocketing with the introduction of specific legislation referred to as the Sports Development Act 1997. Nevertheless, at the moment, the awareness of sports law in Malaysia is fairly low. Many people may not realise that sports law has its own jurisprudence, rules and regulations and its own conventions.¹⁰⁶

The love and affection of Malaysian does not only apply to the traditional sports such badminton, football or hockey anymore. In recent times, eSport has emerged as a new player in unorthodox sport industry.¹⁰⁷ eSport is known as a collective noun for video or computer games played competitively between individuals or teams of players. eSport shares many of the characteristics of traditional sport. The key stakeholders in the eSport industry are the games publishers and the tournament promoters¹⁰⁸. Just like

¹⁰⁴ Richard Wee, Lesley Lim & Kevin Seow (2018). Emerging sports and Sports Law. Retrieved from <https://mahwengkwai.com/emerging-sports-and-sports-law/> on 15 August 2019.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Richard Wee, Lesley Lim & Kevin Seow (2018). Emerging sports and Sports Law. Retrieved from <https://mahwengkwai.com/emerging-sports-and-sports-law/> on 15 August 2019.

¹⁰⁸ Ian Smith. (2016). The continued rise of eSport – Efforts to combat match fixing and improve integrity. Retrieved from <https://www.lawinsport.com/content/features/item/the-continued-rise-of-esport-efforts-to-combat-match-fixing-and-improve-integrity> on 15 August 2019.

traditional sports and notwithstanding the novelty of eSport in Malaysia, the requirements and needs for rules and regulations remains necessary.¹⁰⁹

Even though some writer opined that eSport is still in its infancy,¹¹⁰ the evolution of eSports from its initiation to a world-wide phenomenon is truly mesmerizing. This is so as, it begins with a family or friendly match on the computer or gaming console but end as a multi-million dollar tournaments such as The International 2017, a Dota 2 tournament, boasting a total prize pool of \$24,687,919.00, with the winner team taking home a massive \$10,862,683.¹¹¹ In other hand, the industry players begin to understand their rights and how they can enforce them.

To cope with the massive development of the eSport industry, there are several legal issues that the industry players need to grapple with. From hacking and e-doping to advertising and merchandise, there will definitely be intriguing developments and exciting times ahead. While eSport is still in its infancy globally, eSport law has definitely started to pick up especially to the protection and infringement of right under copyright law.¹¹² Based on that premise, this chapter will focus on the copyright issues and broadcasting rights in Malaysian eSport industry.

THE DEVELOPMENT OF ESPORT INDUSTRY

Sport industry is one of the industries that have an implied effect of the Industrial Revolution 4.0 with the recognition made to the eSport by the International Olympic Committees (IOC). The momentous facts of eSport started in 2017 where the International Olympic Committees during a summit in Lausanne on October 28, 2017 declared that eSport, or competitive video gaming, could be considered a sporting activity.¹¹³ This recognition has leveraged the video gaming activity as family leisure activity to an international

¹⁰⁹ Richard Wee, Lesley Lim & Kevin Seow (2018). Emerging ports and Sports Law. Retrieved from <https://mahwengkwai.com/emerging-sports-and-sports-law/> on 15 August 2019.

¹¹⁰ Salcedo, M.(2016). The eSport Scene is Still in its Infancy. Retrieved from <http://topshelfgaming.net/esports-scene-still-infancy/> on 19 August 2019.

¹¹¹ Richard Wee, Lesley Lim & Kevin Seow. (2017) . Three Grappling Legal Issues in Esports. Retrieved from <https://themalaysianlawyer.com/2017/11/10/three-legal-issues-esports/> on 15 August 2019.

¹¹² Richard Wee, Lesley Lim & Kevin Seow. (2017). Three Grappling Legal Issues in Esports. Retrieved from <https://themalaysianlawyer.com/2017/11/10/three-legal-issues-esports/> on 15 August 2019.

¹¹³ Townley, S. & Townley, A. (2018). eSport: Everything to play for. Retrieved from https://www.wipo.int/wipo_magazine/en/2018/01/article_0004.html on 20 April 2019.

event worth millions dollar of income. eSport is a countermovement of human intelligence between different people through high-tech software and hardware equipment as exerciser.¹¹⁴ The announcement triggers an immediate need for extensive discussion and research relating to the development of sports in Malaysia.¹¹⁵

eSport, or ‘electronic sports,’ is the term used to refer to professional gaming. Electronic sports, cybersports, gaming, competitive computer gaming, and virtual sports are all synonyms for the term eSports. English academic observations on eSport started to appear in the 2000s.¹¹⁶ Lee & Lee refer eSport as alternative sport realities, that is, to electronically extended athletes in digitally represented sporting worlds¹¹⁷. eSport also can be defined as electronically extended human actions in computer mediated or generated sporting worlds where Hilvoorde¹¹⁸ and Hilvoore & Pot¹¹⁹ tying electronically extended to the traditional sporting ideal. Wagner¹²⁰ on the other hand defines eSport as an area of sport activities in which people develop and train mental or physical abilities in the use of information and communication technologies.

Regardless of the term used, eSport is now becoming more accepted as a sport and gamers are being identified as athletes within society today.¹²¹ The commercial value and impact of the global sports industry, especially in terms

¹¹⁴ Bo, L. U., Fa, H. Q., & Yi, Y. A. N. G. (2010). Beijing E-Sports Industry Development Based on SWOT Analysis. Scientific Research, Proceedings of International Innovation Design and Management Forum.

¹¹⁵ Hassim. J.Z. (2018) Sports Law in Malaysia Governance and Legal Issue. Subang Jaya: Sweet & Maxwell Asia.

¹¹⁶ Kushner, D. (2004). Masters of Doom: How Two Guys Created an Empire and Transformed Pop Culture. New York, NY: Random House. See also Lee, A. (2005). E-Sports as a Growing Industry. Research Report. Seoul: Samsung Economic Research Institute.

¹¹⁷ Lee, S., An, J., & Lee, J. (2014). The Relationship between E-Sports Viewing Motives and Satisfaction: The Case of League of Legends. In J. Strouhal (Ed.), Proceedings of International Conference on Business, Management & Corporate Social Responsibility (pp. 33–36), 14–15 February. Batam, Indonesia: ICEHM.

¹¹⁸ Hilvoorde, V.I. (2016). Sport and Play in a Digital World. *Sport, Ethics and Philosophy*, 10(1), 1–4.

¹¹⁹ Hilvoorde, V.I., & Pot, N. (2016). Embodiment and Fundamental Motor Skills in eSports. *Sport, Ethics and Philosophy*, 10(1), 14–27.

¹²⁰ Wagner, M. (2007). Competing in MetagameGamespace: eSport as the First Professionalized Computer Metagames. In F. von Borries, S.P. Walz, M. Bèotger, D. Davidson, H.Kelley & J. Kücklich (Eds.), *Space Time Play* (pp. 182–185). New York, NY: Springer

¹²¹ Jenny, S. E., Manning, R. D., Keiper, M. C., & Olrich, T. W. (2017). Virtual (ly) athletes: where eSports fit within the definition of “Sport”. *Quest*, 69(1), 1-18.

of image rights, broadcastings, intellectual properties and copyrights have significantly contributed to the rise of sports professionalism in Malaysia¹²².

Moreover, eSport have turned traditional video gaming into a spectator sport, elevating those who are exceptional at their game of choice into athletes who perform both online and in stadiums for rapt audiences. The history of eSports can be traced back as far as to November 1972¹²³ when Atari published its extremely simplistic tennis simulator Pong which enabled two players to compete against one another.¹²⁴ Since then, electronic games have become extraordinarily more complex and refined, albeit their focus lay primarily on single player gaming. A decisive step towards eSports as a mass phenomenon could be observed with the publication of Blizzard Entertainment's game StarCraft which first became a huge success as an eSport game in South Korea and then in the rest of the world. Since then, the eSport scene has significantly grown throughout the globe¹²⁵.

INTELLECTUAL PROPERTY LAW AND ESPORT INDUSTRY

Intellectual property law creates security for the commercial and economic value of sports. One of the branches of intellectual property is copyright law. Other branches of intellectual property laws include trademark, patent, geographical indication, layout design of integrated circuit and industrial design. Intellectual property rights are designed to promote the development and publication of creativity, technology and innovation.

Intellectual property and its function in relation to sport are to grant a limited monopoly to the originator of information and the rationale for this protection is to encourage creativity and fairness to the consuming public to

¹²² Hassim, Jady Zaidi, and Anowar Zahid. "The employment rights and legal protection for professional footballers in Malaysian labour market." *International Journal of Business and Society* 18, no. 2 (2017).

¹²³ Harttung, J. (2015). *The Issue Of "Deep Control" In Professional E-Sports – A Critical Analysis Of Intellectual Property Structures In Electronic Gaming*, Faculty of Law University of Toronto

¹²⁴ Ford, W.K. (2012). "Copy Game for High Score: The First Video Game Lawsuit," *Journal of Intellectual Property Law*, Vol. 20, 1.

¹²⁵ Comerford, S. (2012). "International Intellectual Property Rights and the Future of Global "E-Sports," *Brooklyn Journal of International Law* Vol. 37:2, 623. See also Rogers, J. (2012) "Crafting an Industry: An Analysis of Korean Starcraft and Intellectual Properties Law," *Harvard Journal of Law and Technology*. Retrieved from <http://jolt.law.harvard.edu/digest/copyright/crafting-an-industry-an-analysis-of-korean-starcraft-and-intellectual-properties-law> on 13 August 2019.

ensure commercial morality.¹²⁶ These functions and rationales are intertwined with the objective of Malaysian National Sport Policy 2009 in developing sports as an industry in its own right and regulating any impact on its economic growth.

There is a significant difference between the legal protection available to the traditional sport and eSport. The challenges in traditional sport have entered into a new dimension with the emergence of eSport. The law may recognize intellectual property law such as copyright in a virtual eSport game but not in the real traditional sporting events. For instance, a sport performance does not amount to a copyright work in the same way as a musical or dramatic performance through a picture or media coverage whereas, the recognized creative work in developing and publishing eSport will qualify for such protection.¹²⁷

The console manufacturers, game developers, publishers and players are seemed looking to placed themselves as part of the family of sport while controlling access to their own communities. Sport inventors, creators and sports persons endeavour to create new opportunities for their performance as professionals and enjoyment as amateurs.¹²⁸ As a pie of revenue from sport has expanded, the tensions of eSport over intellectual property rights have also increased. The industry players such as athletes, teams, officials, event promoters and governing bodies all fight to secure what they see as their fair return for their efforts, skills and invention¹²⁹.

The commercialisation of the different games, the operation and governance of esports tournaments and the rapidly changing industry trigger a range of commercial, policy and legal issues including broadcast rights and intellectual property. This is so as eSports is a big web of licensed rights where each different game could be thought of as a different code of eSport.¹³⁰

¹²⁶ Abd. Aziz, A.S., Mohd Noor, N.A., & Mohamed, K. (2018). Undang-Undang Harta Intelek Dalam Pembangunan Teknologi Dan Revolusi Industri 4.0. *International Journal of Law, Government and Communication*. 3(13), 195 - 204. See also Gupta, B (1995). Names and Logos: Protection under Intellectual Property Law and Consequences, *Sports Law Journal* 245.

¹²⁷ Townley, S. & Townley, A. (2018). eSport: Everything to play for. Retrieved from https://www.wipo.int/wipo_magazine/en/2018/01/article_0004.html on 20 April 2019.

¹²⁸ Hassim. J.Z. (2018). Sports Law in Malaysia Governance and Legal Issue. Subang Jaya: Sweet & Maxwell Asia.

¹²⁹ Townley, S. & Townley, A. (2018). eSport: Everything to play for. Retrieved from https://www.wipo.int/wipo_magazine/en/2018/01/article_0004.html on 20 April 2019.

¹³⁰ Emma Johnsen and Nathan Mattock, (2018). Australia: Esports – is it a sport, a business or both? We look at the legal issues circling this new, weird millennial thing called esports. Retrieved from <http://www.mondaq.com/australia/x/736716/Gaming/Esports+is+it+a+sport+a+business+or+both+We+look+at+the+legal+issues+circling+this+new+weird-millennial+thing+called+esports> on 15 August 2019.

COPYRIGHT AND BROADCASTING ISSUES IN ESPORT INDUSTRY

Copyright law in Malaysia is governed by Copyright Act 1987.¹³¹ There are several copyright issues as regard to the eSport that need to be taken into consideration by the industry players. Firstly, the issue of copyright ownership. A computer game's underlying code is a set of statements or instructions to be used in a computer in order to bring about the game. The game is also protectable as a cinematograph film under Malaysia law, computer programs are protected by copyright. Computer program can be defined as; an expression, in any language, code or notation, of a set of instructions (whether with or without related information) intended to cause a device having an information processing capability to perform a particular function either directly or after either or both of the following:

- (a) conversion to another language, code or notation;
- (b) reproduction in a different material form;¹³²

As such, the underlying code, both in the form of source and as object code, is protected as a literal work under Section 3 of Copyright Act 1987. In the case of *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1249 (3d Circuit 1983), it was held that the basic principle that a computer program is a literary work. In *Creative Purpose Sdn. Bhd v. Integrated Trans Corp Sdn. Bhd* [1997] 2 MLJ 429, computer program is eligible for copyright if sufficient effort has been expended on it to render the work original and the work is reduced to material form.

One of the first major decisions regarding copyright of games, however, came in 1988 with *Atari Games Corp. v. Oman* 979 F.2d 242, 245 (1992) where the court of appeal rejected the decision of US Register of Copyright's decision in denying protection for the game *Breakout*, claiming that it lacked minimal artistic expression necessary to render copyrightable the design and configuration. It was held that the focus should be on the flow of the game as a whole, rather than the individual screens and the copyright was finally granted to Atari. The hallmark of a video game is the expression found in the entire effect of the game as it appears and sounds, its sequence of images.

A significant issue with video game copyright ownership is one of avatar ownership. In a video game, the avatar is the in-game representation of the

¹³¹ Khaw Lake Tee & Tay Pek San. (2017). *Khaw on Copyright Law in Malaysia*. 4th ed. Petaling Jaya: LexisNexis.

¹³² Section 3, Malaysian Copyright Act 1987.

player.¹³³ According to Ochoa,¹³⁴ statutorily, the creator of an avatar would be able to enforce copyright protection using the rule of joint authorship. Burk¹³⁵ believes that game publishers are likely granting implied permission for players to create a derivative work. A shared conceptual frame for labelling eSport through two criteria: technological specificity (computers, cyberspace, electronics) and advanced competition (athleticism, professionalism, sport). These criteria are directly connected to the videogame culture so that eSport is recognized as an extension of gaming.¹³⁶

Furthermore, the major intellectual property rights in copyright issue arisen from judicial practices is whether the game players, while live broadcasting process of their playing of the game, should get a license from the copyright owner of the game? The pertinent issue in this case is who is actually the legal owner of eSport entertainment property? Licence here means a lawfully granted licence in writing, permitting the doing of an act controlled by copyright.¹³⁷

This matter can lead to licensing issues in broadcasting rights when the professional leagues and tournament organizers use the game at a public event. Broadcast under section 3 of Copyright Act 1987 means;

a transmission, by wire or wireless means, of visual images, sounds or other information which— (a) is capable of being lawfully received by members of the public; or

(b) is transmitted for presentation to members of the public, and includes the transmission of encrypted signals where the means for decrypting are provided to the public by the broadcasting service or with its consent;

and includes the transmission of encrypted signals where the means for decrypting are provided to the public by the broadcasting service or with its consent;

¹³³ McTee, M. (2014). E-sports: More than just a fad. *Oklahoma Journal of Law and Technology*, 10(1), 3.

¹³⁴ Ochoa,T.T (2012). Who Owns an Avatar? Copyright, Creativity, and Virtual Worlds, 14 *VAND. J. ENT. & TECH. L.* 959, 961-62 (2011-2012).

¹³⁵ Burk ,D.L. (2013). Owner E-Sports: Proprietary Rights in Professional Computer Gaming, 161 *U. PA. L.REV.* 1535, 1547)

¹³⁶ Karhulahti, V. M. (2017). Reconsidering eSport: Economics and executive ownership. *Physical Culture and Sport. Studies and Research*, 74(1), 43-53.

¹³⁷ Section 3, Malaysian Copyright Act 1987.

Game play and game content is, legally, the intellectual property of the developer. Hence as a general rule, the copyright of a game is owned by the game developers. Therefore, those who wish to use a game must seek a license from the developer. Furthermore, the images of online games are works of fine arts or works created by virtue of an analogous method of film production (audio visual works). Therefore, the copyright thereof belongs to the online game creator.¹³⁸ Without the authorization by the online game copyright owner, live broadcasting the images of online games on the internet constitutes the act of broadcasting to the public, and is covered by any other rights a copyright owner is entitled to enjoy, whereby not included in the scope of limitations of the copyright law.¹³⁹

In Malaysia, the broadcasting rights has been discussed under section 15(1) Copyright Act 1987. The section provides as follows;

Copyright in a broadcast shall be the exclusive right to control in Malaysia the recording, the reproduction, and the rebroadcasting, of the whole or a substantial part of the broadcast, and the performance, showing or playing to the public in a place where an admission fee is charged of the whole or a substantial part of a television broadcast either in its original form or in any way recognizably derived from the original.

In this case, the game developer who own the copyright to the game may not have any problem with broadcasting rights. However, the broadcasting rights model in eSport is still somewhat chaotic. Game publishers own the copyright to the game, but often don't have a direct relationship with a tournament looking to broadcast its competition.¹⁴⁰ Unfortunately, some tournament organisers, while not having the intellectual property to the game, have gotten streamers on online platforms banned from these platforms for broadcasting the tournament, even if it was broadcasted through the free viewing within the game client. It must be noted that

¹³⁸ Qilin, L. (2017). The Copyright Puzzle of the Live Transmission of Computer Games: Infringement or Fair Use. *Journal of the Postgraduate of Zhongnan University of Economics and Law*, (4), 17.

¹³⁹ Yang, L. (2017). Copyright Issues in the Live Broadcast of Online Games. *Intellectual Property*, (1), 3.

¹⁴⁰ Richard Wee. (2018). Three key legal issues currently facing the Esports industry: A perspective from Asia. Retrieved from <https://www.lawinsport.com/content/articles/item/three-key-legal-issues-currently-facing-the-esports-industry-a-perspective-from-asia> on 15 August 2019.

for many of these streamers, their income is from viewers subscribing to their channel or from donations in support of their stream. A ban from streaming will significantly affect their livelihood.¹⁴¹ The main threat facing broadcasters is illegal or unauthorised streaming of these events. With rudimentary information technology (IT) skills and devices, one could easily circumvent restrictions or geographical controls to stream and watch live sporting events¹⁴². When a material is distributed without a license to use it is akin to piracy.¹⁴³

Apart from the licensing broadcasting issue in copyright, *Wales Cricket Board Ltd & Anor v Tixdaq Ltd & Anor* [2016] EWHC 575 (Ch) held that the sharing of clips to sporting event between users can be consider as commercial exploitation. If the case were to be applied in the Malaysian context using local law, a fair dealing defence is mirrored in Section 13 of the Copyrights Act 1987. Section 263 of the Communications and Multimedia Act 1988 could also potentially be used to address “citizen journalism”. Under this Communications and Multimedia Act 1988, licensees are bound by law to ensure that their network and service are not involved in the commission of any offence, including those which are governed under the Copyright Act 1987¹⁴⁴.

Currently, there are two countries which have established a good framework for intellectual property rights protection while facing the growth of illegal streaming of sports broadcasts. United Kingdom is leading the way with flexible yet compelling laws such as the Copyright, Designs and Patents Act 1988 to protect intellectual property rights protection. In 2011, the United States Senate introduced a Bill (Bill S. 978) to amend the federal criminal code to provide imprisonment of up to 5 years, a fine, or both for criminal infringement. Richard et al opined that Malaysia has the potential to become

¹⁴¹ Richard Wee, Lesley Lim, Bryan Boo and Vincent Lim. (2017) . Three Grappling Legal Issues in Esports. Retrieved from <https://themalaysianlawyer.com/2017/11/10/three-legal-issues-esports/> on 15 August 2019.

¹⁴² Richard Wee. (2018). Three key legal issues currently facing the Esports industry: A perspective from Asia. Retrieved from <https://www.lawinsport.com/content/articles/item/three-key-legal-issues-currently-facing-the-esports-industry-a-perspective-from-asia> on 15 August 2019.

¹⁴³ Richard Wee, Lesley Lim, Saphna Ravichandran and Bryan Boo (2018). Digital Streaming: Snuffing The Life Out Of Live Sports On TV. Retrieved from <https://www.awanireview.com/articles/2018/12/03/news/digital-streaming-snuffing-the-life-out-of-live-sports-on-tv-531/> on 15 August 2019.

¹⁴⁴ Richard Wee, Lesley Lim, Saphna Ravichandran and Bryan Boo (2018). Digital Streaming: Snuffing The Life Out Of Live Sports On TV. Retrieved from <https://www.awanireview.com/articles/2018/12/03/news/digital-streaming-snuffing-the-life-out-of-live-sports-on-tv-531/> on 15 August 2019.

one of the forerunners of establishing a good framework for intellectual property rights protection. This is on the reason that Malaysian has several acts such as the Copyrights Act 1987 accompanied by the Communications and Multimedia Act 1988. However at this point, there is a lack of case law precedent in Malaysia to further pursue and discuss the issue in depth.¹⁴⁵

CONCLUSION

There is still a lot of unexplored areas of eSports law that the industry will definitely have to tackle with. The extent of copyright law protection in the eSport context still until today remains unclear as there have not been any reported cases surrounding this issue in Malaysia. Nevertheless, Malaysian court may exercise their flexibility when balancing the broadcaster's lawful rights, live streamers' limited rights, as well as the public's right to information and entertainment.

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¹⁴⁵ Ibid.

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LACUNA IN MALAYSIAN AND INDONESIAN LEGISLATIVE RESPONSES TO RESTORATIVE JUSTICE APPROACH

Yusramizza Md Isa & Asmar Abdul Rahim

INTRODUCTION

The inefficacy of the criminal justice system in addressing criminal behaviour and its detrimental effects are increasingly highlighted by numerous international and national seminal works and research.¹⁴⁶ This is mainly for the soaring rates of crimes and recidivism and the overcrowding, counterproductive and brutalising nature of imprisonment. The critiques to conventional criminal justice processes have spurred the emergence of different forms of thinking, including the development of restorative justice approach. Many across the globe have seen promise in the restorative justice approach as a possible response of addressing over-incarceration, youth offending and recidivism.

The restorative justice generally refers to, as has been endorsed by the United Nations Working Party on restorative justice of the Alliance of NGOs on Crime Prevention and Criminal Justice¹⁴⁷, “a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future”.¹⁴⁸ According to Daly and Immarigeon, the restorative justice is “emphasises the repair of harms and of ruptured social bonds resulting

¹⁴⁶ MacDonald, Morag. *Overcrowding and Its Impact on Prison Conditions and Health*, International Journal of Prisoner Health No. 2 Vol. 14. 2018. pp. 65-68; Adam, Mohamed. *Betrayal. A Prison Under Siege*, Transition No. 126. 2018. pp. 19-24; Lessing, Benjamin. *Counterproductive Punishment: How Prison Gangs Undermine State Authority*, Rationality and Society No. 3 Vol. 29. 2017. pp. 257-265.

¹⁴⁷ McCold, Paul. *Restorative Justice Handbook*. Corrections Compendium No. 12 Vol. 23. 1998. pp. 20.

¹⁴⁸ Marshall, Tony. *The Evolution of Restorative Justice in Britain*, European Journal of Criminal Policy and Research No. 4 Vol. 4. 1996. pp. 37.

from crime; ... focusing on the relationships between crime victims, offenders and society".¹⁴⁹ The restorative justice hence typifies an alternative method to the traditional response to criminal behaviours rooting on the retribution and deterrence by, at its heart, focusing on repairing the harm done by offences as well as emphasising the accountability and responsibility of offenders for their actions to preserve the justice.

This chapter of book is devoted to discuss about the adoption of restorative justice approach to criminals in Malaysia and Indonesia, against the backdrop of endorsement upon such approach at the international level. Further, it seeks to highlight the extent and loopholes of both settings' legislative responses to restorative justice approach.

INTERNATIONAL RECOGNITION OF RESTORATIVE JUSTICE

Embedded in the belief that crimes affect not only the individuals but also the communities, restorative justice primarily seeks to address the needs and harms experienced by the victims and their communities and to assist with the rehabilitation of offenders through reconciliation with the victims and the communities. It encourages the active participation of all stakeholders through communication and consensual decision-making about the harm of offence, the offenders' responsibility and solutions acceptable to them. This mirrors the approach's emphasis on the significance of both the processes and outcomes. It has the potential to meet the interest and needs of victims, to mitigate the recidivism rates among offenders, to improve public confidence in criminal justice system¹⁵⁰ and to address over-incarceration¹⁵¹. Restorative justice strategies, such as victim-offender mediation, referral order (order of community works) and compensation have been employed as a legitimate approach for dealing with crimes and their underlying causes and impacts since the past three decades. They are practised considerably by countries in the West, particularly Canada, New Zealand and the United Kingdom.

The restorative justice approach is progressively admitted internationally, with the United Nations Economic and Social Council meeting in 2002 passing

¹⁴⁹ Daly, Kathleen, Immarigeon, Russ. *The Past, Present, And Future of Restorative Justice: Some Critical Reflections*, Contemporary Justice Review No. 1 Vol. 1. 1998. pp. 22.

¹⁵⁰ Brooks, Thom. *Criminal Justice at a Crossroads: Why Victims Should Have a Say*, Political Insight No. 2 Vol. 5. 2014. pp. 34-37.

¹⁵¹ Chua, Sarah Xin Yi and Foley, Toney. *Implementing Restorative Justice to Address Indigenous Youth Recidivism and Over-Incarceration in the ACT: An Exercise in Navigating Law Reform Dynamics*. Australian Indigenous Law Review No. 1 Vol. 18. 2014. pp. 138.

a resolution which puts restorative justice officially on the international map and urging states to formulate standards and guidelines for restorative justice practices in penal matters (ECOSOC Resolution 2002/12). Additionally, the Declaration of the Eleventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders¹⁵² called the member states to recognise the significance of undertaking restorative justice policies, procedures and programmes including alternatives to prosecution.

LEGAL COVERAGE OF RESTORATIVE JUSTICE IN MALAYSIA

The Malaysian government has also begun to emulate the international initiatives of recognising the restorative justice approach in spite of the country's historical concentration on punitive measures. The move covers the initiation of community service order in 2007 after the passing of the Criminal Procedure Code (Amendment) Act 2006. It has been designated for criminals between ages 18 and 21, representing a restorative justice-based diversion in the post-trial phase. As it has been deemed successful, the agenda of community service has been broadened to child offenders since 2016 through the amendment to Child Act 2001. The community service programme has been maintained primarily under the auspices of the Social Welfare Department Malaysia, a division of the Ministry of Women and Family Development of Malaysia, with progressive governing structures and mechanisms.

Against the backdrop of crime prevalence in Malaysia, the government and others further explicitly underscored the restorative justice approach's status as one of pivotal strategies for controlling youth crimes. This is somehow depicted by series of the policy makers' and legal practitioners' endorsement and calls for support of the restorative justice approach. For example, in 2011, the Minister of Women and Family Development, Tan Sri Shahrizat Jalil advocated for the study into the restorative justice mechanism for juvenile offenders¹⁵³ whereas in the early 2019, the Chief Justice, Tan

¹⁵² The "Bangkok Declaration-Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice", 11th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Bangkok, 18-25 April 2005, pp. 6. available at https://www.unodc.org/documents/congress/Documentation/11Congress/ACONF203_18_e_V0584409.pdf [accessed 11 September 2018].

¹⁵³ The Star. (2011, October 22). *Shahrizat Jalil: Taskforce to Look into Restorative Justice System*, available at: http://thestar.com.my/news/story.asp?file=/2011/10/_22/nation/20111022134537&sec=nation [accessed 27 February 2019].

Sri Richard Malanjun called for the augmentation of non-custodial sentences such as community service in suitable criminal cases instead of prison sentences¹⁵⁴. These have furnished a base for the movements and efforts towards intensifying the restorative justice interventions in Malaysia.

Despite the official acknowledgment of restorative justice approach in Malaysia, considerable controversy among public and some stakeholders has still persisted over whether the government should broadly implement its measures. The restorative justice approach is subject to ideological questions relating to its apparent deviance from mainstream political and legal lens. Additionally, the efficient implementation of restorative justice approach is partially thwarted by the disinclination of the enforcement agents. Malaysian police, for instance, barely practise mediation for minor crimes and disputes. The domestic opposition to the restorative justice approach triggered by cultural prejudices, misconception and bureaucratic reluctance, as Mohammad and others argue¹⁵⁵, need to be rectified.

In addition, the available legislation in Malaysia provides only a limited permissive process for the progression of the restorative justice approach. There are several statutes, including the Child Act 2001, Domestic Violence Act 1994 and Criminal Procedure Code which tailor access to protection of victims. The protection is congruent to the restorative justice concept of the victim restitution. It, however, is frequently in the physical forms such as shelter rather than financial and psychological aids. The only psychological service which is offered is counselling and the only financial support that is catered (by the provision of section 426(1A) of Criminal Procedure Code) is monetary compensation. But, these are conditioned on the exercise of discretion by enforcement officials including welfare officers and the public prosecutor. Moreover, the statutory victim support deals particularly with specific target population; victims of child abuse and of domestic violence.

¹⁵⁴ Tee, Kenneth. (2019, January 11). *What's Better Than Jail for Misdemeanors? Community Service, Says CJ*, available at: <https://www.malaymail.com/news/malaysia/2019/01/11/whats-better-than-jail-for-misdemeanors-community-service-says-cj/1711491> [accessed 27 February 2019].

¹⁵⁵ Mohammad, Taufik; Azman, Azlinda and Anderstone, Ben. *The Global Three: A Malaysian Lens on The Challenges and Opportunities Facing Restorative Justice Planning and Implementation*. Evaluation and Program Planning Vol. 72. 2019. pp. 5-6.

The existing laws entail less tangible redress for the victims of other crimes, such as rape, causing hurt, robbery and theft. It is relevantly that the punitive justice which is massively applied in Malaysia devotes more attention to the punishment which is to be imposed upon the culprit.

Furthermore, the present situation recognises the loopholes in the laws, given that there are less provisions which acknowledge the diversionary strategies within the criminal justice context envisaged by the restorative justice principle to reintegrate the criminals into their community. Undeniably, the amendment of section 293(1)(e) of the Criminal Procedure Code in 2006 has directed the court to consider the community service sentencing. The community service not exceeding 240 hours, however, is only applicable for young offenders between the ages of 18 and 21. To add, section 91 of the Child Act 2001 authorises the court to discharge the child upon executing a bond to be of good behaviour. Both community service and good behaviour bond are hence apparently restricted to certain groups of people, excluding those who are above 21 years old. These are also seemingly to be imposed limitedly where other sentences will be inappropriate, having considered the gravity or circumstances of the crime.

Despite few rooms available for the restorative justice measures, the Malaysian courts, in practice, have massively relied on punitive sentencing options such as imprisonment and fines. The official data demonstrates high numbers of imprisonment and fines imposed upon youth offenders whose age are above 21, such as in 2016 whereby the imprisonment, fine and combination of both were 195, 352 and 138 cases respectively. These cases represent 685 of overall 1526 cases (nearly 50 per cent).¹⁵⁶ The probability of scepticism to diversionary sentencing is further suggested by the finding that judges have been less likely to grant community service order and bond of good behaviour. By illustration, the community service order was granted in only 441 of 1446 relevant cases in the year of 2015 while only 223 of 4569 child convicts obtained good behaviour bond in the same year.¹⁵⁷ These prove that the Malaysian judiciary has been keeping its commitment weighted on the side of conventional ways of sentencing.

¹⁵⁶ Jabatan Kebajikan Masyarakat. *Buku Tahunan Perangkaan Jabatan Kebajikan 2016*, Jabatan Kebajikan Masyarakat, Kuala Lumpur 2017, pp. 124.

¹⁵⁷ Jabatan Kebajikan Masyarakat. *Buku Tahunan Perangkaan Jabatan Kebajikan 2015*, Jabatan Kebajikan Masyarakat, Kuala Lumpur 2016, pp. 140.

The scenario reaffirms the scant statutory scope of practice for non-punitive interventions in conformity to restorative justice principle in Malaysia. Similarly, it raises the question of compatibility between the punitive and restorative justice approaches and its impacts upon the restorative justice strategies. The question of practicability of the restorative justice approach is sparked by international literature¹⁵⁸ demonstrating that the credential and delivery of restorative justice approach to curb youth crimes and recidivism can be crippled by the waxing of support for the restorative justice reforms among stakeholders and lack of concrete *legislation* guiding access to the *approach*.

LEGAL COVERAGE OF RESTORATIVE JUSTICE IN INDONESIA

Indonesia consists of hundreds of distinct native ethnic and linguistic groups where Javanese is the largest and politically dominant ethnic group in Indonesia. Generally Indonesian law is a mixed between civil law system, intermixed with customary law and the Roman Dutch law. These laws were adopted and maintained by the Indonesian government after its independence¹⁵⁹. The original source of Indonesian Penal Code was adopted from Dutch Law known as *Wetboek van Strafrecht voor Netherlands Indische/WvSNI* (Criminal Code for Netherlands Indie).¹⁶⁰ The Indonesian government has adopted the *WvSNI* as the Criminal Code of Indonesia (Act No. 1/1946) or known as *Kitab Undang Undang Hukum Pidana/KUHP* (Criminal Code) after the independence in year 1945.¹⁶¹

The root of restorative justice in Indonesia has been practiced within their customary judicial institution. Zulfa stated that the characteristics of customary law in every region or provinces in Indonesia are generally very supportive in implementing a restorative justice.¹⁶² Thus, in Indonesia the

¹⁵⁸ For example, Dandurand, Yvon. and Griffiths, Curt.T. *Handbook on Restorative Justice Programmes*, United Nations Office on Drugs and Crime, Vienna 2006, pp. 51.

¹⁵⁹ Fathurokhman, Ferry. 2013. "The Necessity of Restorative Justice on Juvenile Delinquency in Indonesia, Lessons Learned from the Raju and AAL Cases." *Procedia Environmental Sciences* 17: 967–75. <https://doi.org/10.1016/j.proenv.2013.02.115>.

¹⁶⁰ Darmika, Ika. 2018. "Diversion and Restorative Justice in the Criminal Justice System of Children in Indonesia." *Ijtima'iyya: Journal of Muslim Society Research* 3 (2): 179–96. <https://doi.org/10.24090/ijtimaiyya.v3i2.1921>.

¹⁶¹ Fathurokhman, Ferry. 2013. "The Necessity of Restorative Justice on Juvenile Delinquency in Indonesia, Lessons Learned from the Raju and AAL Cases." *Procedia Environmental Sciences* 17: 967–75. <https://doi.org/10.1016/j.proenv.2013.02.115>.

¹⁶² Zulfa, Eva Achjani. 2011. "Restorative Justice in Indonesia: Traditional Value." *Indonesia Law Review* 1 (2): 33. <https://doi.org/10.15742/ilrev.v1n2.81>.

customary sanctions is an effort to restore the disturbed balance which could not be separated from religious activities, cultural and governmental activities, as well as the economy and other life in criminal justice system.¹⁶³ The role of customary law in Indonesia has its solving mechanisms with regard to the violation or offense of indigenous customs which includes actions that disturb the peace of life or violation of propriety in the society.¹⁶⁴

In Indonesia, restorative justice refers as to the settlement of a criminal case involving perpetrator, victims, a family of perpetrator or victim, and other parties concerned to jointly seek a fair settlement by emphasizing restoration to the original condition, rather than retaliation¹⁶⁵ It is carried out by the diversion technique which involved the roles of investigator, or the prosecutor, or the judge. The enforcement of restorative justice works as (a) the settlement of criminal case involving doer, victim, family of doer or victim, and other related parties; (b) the settlement of a fair criminal case by emphasizing on: (i) the restoration of the original situation, and (ii) the settlement is not retaliation to the offender.¹⁶⁶

The development and implementation of restorative justice in Indonesia is derived from the wisdom of five principles of Pancasila.¹⁶⁷ Pancasila is 'The Five Principles' have since become the blueprint of the Indonesian nation formulated in 1945 by the Indonesian nationalist leader Sukarno. According to Rocheati, the principles are used to be as a measure and basic values of development and legal reform in Indonesia.¹⁶⁸ The first principle of Pancasila is trust in God Almighty; the second is a just and civilized humanity; the third is the unity of Indonesia; the fourth is the one who is directed by wisdom in the consideration of representation; and the fifth is social justice for all Indonesians.¹⁶⁹

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Widodo, W. 2018. "The Diversion Based Philosophy of Restorative Justice Indonesia Version The Diversion Based on Philosophy of Restorative Justice Indonesia Version : Between Ideality and Reality in Settlement of Child's Cases by An Investigator," no. January: 0–12.

¹⁶⁶ Widodo, W. Ibid.; Rochaeti, Nur. 2017. "Legal Culture of Restorative Justice in Juvenile Criminal Justice System in Indonesia" 84 (Iconeg 2016): 111–12. <https://doi.org/10.2991/iconeg-16.2017>.

¹⁶⁷ Rochaeti, Nur. 2007. "Prospek Peradilan Restoratif Berdasarkan Pancasila Sebagai Sarana Non Penal Dalam Penanggulangan Delinkuensi Anak Dimasa Datang." *Masalah-Masalah Hukum* 42 (4): 492–502. <https://doi.org/10.14710/mmh.42.4.2013.492-502>.

¹⁶⁸ Ibid.

¹⁶⁹ Mashdurohatun, Anis, 2017, "Restorative Justice Penal System Based from Value of Justice : A Study in Kotawaringin City of Indonesia" 3 (4): 14–17.

In upholding the justice, Indonesian faced the challenge to optimize the implementation of restorative justice particularly in the juvenile criminal justice system. This is due to the pluralistic society in a variety of ethnic, namely Batak, India, China, and Java in Indonesia.¹⁷⁰ For example in Medan, the procedure to handling all problems in community is done by ‘*awig-awig*’ and ‘*pakraman*’. The legal mechanism settlement is done through ‘*Paruman*’ by practicing the principle of consultation and consensus (*paras paros gilik seguluk*) which implementing and balance by taken into consideration the principles of harmony, decency and harmony, the interests of the perpetrator, the victim, and society.¹⁷¹

Fathurokhman also argued that adopted from the Dutch laws, do not fit with Indonesian values and create the problem practice of law enforcement in Indonesia.¹⁷² It is also claimed that restorative justice in Indonesia is not governed in criminal law policy, especially when it is related to reported crimes.¹⁷³ The long standing and current application of criminal court proceedings in Indonesia proved that the system is no longer adequate in order to provide protection of human rights nor is it transparent to the public.¹⁷⁴ The weakness in the criminal justice system due to failures in law enforcement and legal empowerment, the completeness of existing laws such as procedures, doctrines and legal principles will affect the efficiency of the judiciary system.¹⁷⁵ As a result it will triggers dissatisfaction and disappointment among the Indonesian.

The implementation of restorative justice through police actions in Indonesia is claimed not been done well due to several obstacles. According Susilowati, the positivistic behaviour or culture practices; existence of paramilitary cultural practices and the practice of corruption, collusion and nepotism are overshadowed by the police. While criminal law cases and criminal procedural law, it has been claimed that the restorative justice can

¹⁷⁰ Rochaeti, Nur. 2017. Op. Cit.

¹⁷¹ Ibid.

¹⁷² Fathurokhman, Ferry. 2013. “The Necessity of Restorative Justice on Juvenile Delinquency in Indonesia, Lessons Learned from the Raju and AAL Cases.” *Procedia Environmental Sciences* 17: 967–75. <https://doi.org/10.1016/j.proenv.2013.02.115>.

¹⁷³ Susilowati, Christina Maya. 2019. “Estbalishing Humanistic Tendencies through Restorative Justice in the Law Enforcement Context.” *Journal of Legal, Ethical and Regulatory Issues* 22 (2): 1–6.

¹⁷⁴ Zulfa, Eva Achjani. Op. Cit.

¹⁷⁵ Mashdurohatun, Anis, 2017, Op. Cit.

be carried out only for minor crimes only.¹⁷⁶ Further Susilowati also claimed that unfair bargaining power in the process of restoring justice between the perpetrator or victim and the police will influence law enforcement and decision makers. The decision making will influence between the poor and rich. For example if the perpetrator is from a poor class in the community, the police tend to take a repressive approach but if the offender comes from a high class society, restorative justice will be an option.¹⁷⁷

With regard to crime committed by a child, Law Number 11 of 2012 on Child Criminal Justice System and its implementation rules provided and regulated the policy on the concept of diversion and restorative justice in Indonesia. This law is to aim protection for children who commit crimes are no longer faced in the judicial process but through alternative settlement, that is by completion which is restorative justice.¹⁷⁸ For example, in the Raju's case¹⁷⁹ where the question of criminal age liability to Article 1 Act No. 3/1997 has been discussed when a person who has reached the age of eight, but is not yet 18. The case is about a bully case in the school involving minors and there was no detention house for children in North Sumatera. Thus the minor would have to share a room with an adult detainee. Similarly in the AAL's¹⁸⁰ which involved minor who is committed crimes. These two cases are the examples where the restorative justice have been implemented in the Indonesian as mechanism to settle the problems. Unlike the formal criminal justice proceedings, in the case of Raju's and ALL's, they are give the victims of crime and affected members of the community an opportunity to play a central role in both the process and the outcome.¹⁸¹

¹⁷⁶ Susilowati, Christina Maya. 2019. "Estbalishing Humanistic Tendencies through Restorative Justice in the Law Enforcement Context." *Journal of Legal, Ethical and Regulatory Issues* 22 (2): 1–6.

¹⁷⁷ Ibid.

¹⁷⁸ Sinatrio, Wikan, 2019, "The Implementation of Diversion and Restorative Justice in the Juvenile Criminal Justice System in Indonesia." *Journal of Indonesian Legal Studies* 4 (1): 73–88.

¹⁷⁹ Fathurokhman, Ferry, Op. Cit.

¹⁸⁰ The case is about stealing the sandals, the majority felt that criminal court was not the best solution for this case since the crime was not serious and AAL was only a teenager. See in Fathurokhman, Ferry. 2013. "The Necessity of Restorative Justice on Juvenile Delinquency in Indonesia, Lessons Learned from the Raju and AAL Cases." *Procedia Environmental Sciences* 17: 967–75. <https://doi.org/10.1016/j.proenv.2013.02.115>.

¹⁸¹ Commission on Crime Prevention and Criminal Justice, 2017. "Use and Application of United Nations Standards and Norms in Crime Prevention and Criminal Justice." 2015 03590 (May): 89–91. <https://doi.org/10.18356/08489a8e-en>.

The involvement of the community can be seen in the case of ALL's, when the non-governmental organizations, the National Commission for Child Protection (a government agency concerned with children's issues) and society together supported the case during the trial beside become a symbol of protest of injustice in criminal justice system in Indonesia.¹⁸²

There are several plans or programmes have been carried out in upholding the justice in Indonesia as follows:

(a) Institution of Meeting Council

Institution of Meeting Council is refer to the public consultation and regarded as part of the mechanism to solve a criminal case. The Consultations are held by the perpetrators and the victims themselves or with the involvement of police or prosecutorial institution, or the traditional institutions in order to influence the public mind set to better detect an emerging problem.¹⁸³ The objective of the institutional mechanism is for consultative resolution by working in the committee. Thru the dialogue process it also inspired the actors to correct themselves, realize mistakes and accept responsibility and the consequences of the criminal acts committed. A part from that, the public can also participate in shaping the agreement and monitor its implementation.¹⁸⁴ According to Ferry, this approach is the best settlement for juveniles in conflict with the law in order to create a safeguard beside to protect the children's future.¹⁸⁵

(b) Diversion

Diversion can be carried out by the community in a way to reconcile both parties i.e. victim and perpetrator in Indonesia as provided by Law Number 11 of 2012 on SPPA (which entered into force in July 2014). Diversion provision is provided under Article 6 to Article 15 Law Number 11 of 2012 on SPPA with regard to the child criminal justice system¹⁸⁶
Diversion aims to divert young offenders from formal judicial proceedings

¹⁸² Fathurokhman, Ferry, Op. Cit.

¹⁸³ Zulfa, Eva Achjani, Op .Cit.

¹⁸⁴ Ibid.

¹⁸⁵ Fathurokhman, Ferry, Op. Cit

¹⁸⁶ Sinatrio, Wikan, 2019, "The Implementation of Diversion and Restorative Justice in the Juvenile Criminal Justice System in Indonesia." *Journal of Indonesian Legal Studies* 4 (1): 73–88; Rochaeti, Nur, and Pujiyono Pujiyono. 2018. "Implementation Study of Restorative Justice for Juvenile Criminal Justice System by Customary Court in Mainland Sulawesi." *IOP Conference Series: Earth and Environmental Science* 156 (1). <https://doi.org/10.1088/1755-1315/156/1/012044>

and provide alternative programs tailored to children's needs. The concept is initially derived from Article 11 of the Beijing Rules.¹⁸⁷ Diversion is known as an alternative to formal trial and not necessarily an alternative to imprisonment and a form of deprivation of liberty. Diversion can be a part of retroactive justice when it involved the crime with victims. In this process the child offenders from the trial seeks other settlement and both parties agreed to enter diversion. Then formal proceeding is no longer needed.¹⁸⁸ But according to Pratiwi, not all diversion programs involve restorative justices. In some situations, the diversion can apply without victim's involvement.¹⁸⁹

According to Sinatrio, not all child matters in conflict with the law must be resolved through the formal justice system. Thus diversion is an alternative to provide the solutions by using restorative justice approaches for the best interests of the child and justice for the victims and the community.¹⁹⁰ As compare to Institution of Meeting Council diversion is subject to the permission of the victims and the families of the victim, as well as the willingness of the offender and his family.¹⁹¹ If the parties choose and agree to use diversion then the judges and litigants must gave full cooperation since the process of diversion is permissible to resolve the matter outside of court even though the case is on the mediation process or the proceeding in court.¹⁹²

(c) Mediation Process by Police

Mediation process by police is another example where restorative justice takes place in criminal system in Indonesia. The Role of Investigators in the Restorative Justice System of Police Crimes in law enforcement is an agency that deals directly with the violators of the law. This is provided in Article 13 of Law Number 2 Year 2002 on the Law of the Republic of Indonesia when

¹⁸⁷ Pratiwi, DN, 2018, "Balancing The Interests of Child Offenders and Child Victims through Diversion in Child-on-Child Crime: Evaluation through The International Children's Rights." *UniversiteitLeiden.NL*. <https://www.universiteitLeiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-privaatrecht/jeugdrecht/jr-thesis-pratiwi-july-2018.pdf>.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid; Rochaeti, Nur, and Pujiyono Pujiyono, Op.Cit.

¹⁹⁰ Sinatrio, Wikan, Op. Cit.

¹⁹¹ Hardjaloka, Loura. 2015. "Criminal Justice System of Children: An Overview Restorative Justice Concept in Indonesia and Other Countries." *Journal of Dinamika Hukum* 15 (1): 73–81.

¹⁹² Ibid.

“The duty and authority of the police is to maintain the security and order of the people, to uphold the law, and to provide protection, wisdom and service to the community”.¹⁹³ The police become mediators as well as investigator to find a meeting point between the conflicting parties.

According to Susilowati, the police in Indonesia are open to conducting restorative justice in dealing with non-legal complaint cases. The form of restorative justice started during the level of police investigation by way of mediation process. If the parties agreed and achieved the consensus on certain agreement then case is dismissed.¹⁹⁴ Thus as the investigators, the police must be responsible for their behaviour in order to ensure that the restorative justice is available in justice system and law enforcement.

CONCLUSION

Crime in restorative justice is not seen as a violation of the state’s interest but is considered infringement of a person by another person when the reconciliation and restoration is the goal. The recover losses and this relationship will be achieved by cooperative processes that include all stakeholders. Through restorative justice in the future will lead to completion flexibly without having to stick to law and law enforcement when the victims and offender of criminal acts are recognized. The rights and needs of victims are recognized while criminal offenders are to take responsibility.

The approach of restorative justice system In Malaysia and Indonesia are considered as it offers a more comprehensive and effective solution in the society. As it aims to empower victims, perpetrators, families and communities to improve the actions or effects of unlawful acts, use awareness for the improving of living society, the restorative justice able to improve the availability of fair and equitable justice together with universal protection of human rights.

¹⁹³ Mashdurohatun, Anis, 2017, “Restorative Justice Penal System Based from Value of Justice : A Study in Kotawaringin City of Indonesia” 3 (4): 14–17.

¹⁹⁴ Susilowati, Christina Maya. 2019. “Estbalishing Humanistic Tendencies through Restorative Justice in the Law Enforcement Context.” *Journal of Legal, Ethical and Regulatory Issues* 22 (2): 1–6.

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IMPROVING THE QUALITY OF PUBLIC SERVICES IN FULFILLING CONSTITUTIONAL RIGHTS OF CITIZENS IN THE INDUSTRY REVOLUTION 4.0 ERA

Widayati

INTRODUCTION

The State of Indonesia is a state of law as stated in Article 1 Paragraph (3) of the 1945 Constitution of the Republic of Indonesia. As a state of law, the state guarantees orderliness for the state's people. The state forms legal rules that must be obeyed by every citizen. The rule of law established is intended to protect the rights of citizens from the arbitrary actions of the authorities, and to prevent absolute power for the recognition and protection of human rights.

The conception of the state law that was first developed in Europe is the night watch state law (*nachtwachterstaats*), where the state is functioned to maintain order and peace, while the economic affairs and welfare of the people are considered to be their personal affairs. The state needs to maintain order and security so that each individual can carry out activities safely to meet his needs.¹⁹⁵

The state law that is developing now is no longer a night watch state law, but a welfare state. The principle of legality that is originally interpreted as a government based on constitution (*wetmatigheid van het bestuur*) changed to a government based on law (*rechtmatigheid van het bestuur*). In this concept, the people consider the government as partner to achieve its goals, namely prosperity.¹⁹⁶ In welfare state, it has more flexible nature, because it is not

¹⁹⁵ Hotma P. Sibuea, *Asas Negara Hukum, Peraturan Kebijakan, dan Asas-Asas Umum Pemerintahan yang Baik*, Penerbit Erlangga, Jakarta, 2010, p. 26

¹⁹⁶ Ni'matul Huda, *Negara Hukum, Demokrasi dan Judicial Review*, UII Press, Yogyakarta, 2005, p. 8

rigidly bound to laws based on the principle of legality. However, this does not mean that the state can violate or ignore the law without any justification or basis.¹⁹⁷

In a welfare state, the state participates or intervenes in every aspect of community life so that its people can live prosperously. The state is responsible for the welfare of society by regulating economic, social, cultural, political, and so on. Efforts are made to guarantee the protection of human rights and to improve the welfare of society, by providing good public services to each of its citizens. In Indonesia, guaranteeing human rights, increasing the welfare of the community, and providing good public services are mandated by the 1945 Constitution of the Republic of Indonesia.

Although public service is mandated by the 1945 Constitution of the Republic of Indonesia and to implement the provisions of the 1945 Constitution of the Republic of Indonesia, the Republic of Indonesia has set up Law No. 25 year 2009 on Public Services. But in practice, public services provided by the government until now are still getting many complaints from the community, for services of education, health, transportation, and others. Public complaints include those related to the poor quality of public service products, lack of quality public service delivery, high-cost public services, long and overlapping bureaucracy, unclear complaints mechanisms and dispute resolution related to public services.

Therefore, it is necessary to find a solution to overcome public complaints related to all aspects related to public services, so that people's lives will become more prosperous as mandated by the 1945 Constitution of the Republic of Indonesia. Moreover, in the industrial revolution 4.0 era, the government is demanded to further improve the quality of public services is adjusted to the rapid development of technology.

DEFINITION OF PUBLIC SERVICES

Every country in the world, without distinguishing the form of the state, the form of government, the system of government, and other constitutional systems, always requires public services because providing public services is a necessity for a country for each of its citizens. Public services are indeed not easy to do, especially in countries with large areas, large and heterogeneous populations, so that it is possible for countries to fail in providing good public services, even though there are also many successful countries.

¹⁹⁷ Hotma P. Sibuea, *Asas Negara Hukum*.....Op.Cit. p. 39

The fourth paragraph of the Preamble to the 1945 Constitution of the State of the Republic of Indonesia mandates that the purpose of the State of Indonesia, among others are to advance public welfare and improve the life of the nation. The mandate for the Preamble of the 1945 Constitution of the Republic of Indonesia means that the state has an obligation to meet the needs of every citizen through a government system that supports the creation of good public services. This is in order to fulfill the basic needs and civil rights of every citizen of public goods, public services, and administrative services.

Current public service delivery practices are still confronted with conditions that are not yet in accordance with the needs and changes in various fields of community, nation, and state life. Many things can be the cause, for example, unpreparedness to face changes in values, rapid technological developments, increasing community needs, and so on. Meanwhile, the new order of Indonesian society is faced with global expectations and challenges triggered by advances in science, information technology, communication, transportation, investment, and others.

The various things that occur must be addressed properly and wisely, by carrying out activities that are continuous in various aspects of life in order to foster public trust in realizing national development goals. For this reason, a good concept of a public service system that contains values, perceptions, and behavioral references is needed that is able to realize human rights as mandated by the 1945 Constitution of the Republic of Indonesia. The concept of a good public service system must be implemented, so that people can obtain public service in accordance with the hopes and ideals of national goals.

To meet the needs of citizens as mandated by the Preamble to the 1945 Constitution of the Republic of Indonesia, it constitutes Law Number 25 of 2009 concerning Public Services. The background to the formation of Law Number 25 of 2009 are: a) the state is obliged to serve every citizen and population to fulfill their basic rights and needs within the framework of public services which are mandated by the 1945 Constitution of the Republic of Indonesia, b) building public trust for public services carried out by public service providers is an activity that must be carried out in line with the expectations and demands of all citizens and residents about improving public services, c) as an effort to reinforce the rights and obligations of each citizen and population and the realization of state and corporate responsibilities in implementation of public services, legal norms by making clear regulation,

and d) as an effort to improve the quality and guarantee the provision of public services in accordance with the general principles of good governance and corporation and to provide protection for every citizen and populations from abuse of authority in the administration of public services, by providing legal arrangements.

The purposes of the establishment of the Law on Public Services are:¹⁹⁸

1. the establishment of clear boundaries and relationships about the rights, responsibilities, obligations and authority of all parties related to the public services delivery,
2. the realization of proper public service delivery system in accordance with the general principles of good governance and corporation,
3. fulfillment of public service delivery in accordance with law and regulations,
4. realization of protection and legal certainty for the public in the administration of public services.

In addition to Law Number 5 of 2009, Law Number 30 of 2014 concerning Government Administration has also been formed. One of the aims of establishing Law Number 30 Year 2014 is to provide the best possible service to citizens.

Based on the purpose of the establishment of the Law on Public Services and the Law on Government Administration that the implementation of adequate public services must be in accordance with the general principles of good governance for the creation of good governance. There are four main elements in good governance, namely accountability, the rule of law, transparency and openness. Government organizations are responsible for achieving national goals, including the realization of people's welfare.¹⁹⁹ In *Fikih Siyash* (state administration according to Islam), the principles of good governance include the principle of trust, the principle of responsibility (*al-mas-uliyah*), the principle of benefit (*al-mashlahah*), and the principle of supervision (*al-muhasabah*).²⁰⁰ The good governance according to UNDP (United Nations Development Programs) includes participation, rule of law, transparency, responsiveness, consensus orientation, equity, effectiveness and

¹⁹⁸ Article 3 of Law Number 25 of 2009 concerning Public Service

¹⁹⁹ Ahmad Sukardja, *Hukum Tata Negara & Hukum Administrasi Negara dalam Perspektif Fikih Siyash*, Sinar Grafika, Jakarta, Cetakan kedua, Pebruari 2014, p. 241

²⁰⁰ *Ibid.*, p. 242

efficiency, accountability, and strategic vision.²⁰¹ While the general principles of good governance according to Law Number 30 of 2014 are legal certainty, expediency, impartiality, accuracy, not abuse of authority, openness, public interest, and good service.²⁰²

Article 1 number 1 of Law Number 25 Year 2009 states that public services are activities or series of activities in the framework of fulfilling service needs in accordance with law regulations for every citizen and population of goods, services, and / or administrative services that are provided by public service providers.

Basically, public services involve very broad aspects of life. In state life, the government has the function of providing a variety of public services needed by the community, ranging from services in the form of regulation, or other services in order to meet the needs of the community in the fields of education, health, utilities, etc.²⁰³

Based on the objectives of the Indonesian state as stipulated in the fourth paragraph of the Preamble of the 1945 Constitution of the Republic of Indonesia and the definition or definition of public services as stated in Law Number 25 of 2009, public services are all activities in the framework of meeting basic needs in accordance with basic rights of every citizen and population of goods, services and / or administrative services.²⁰⁴ As a public service provider is every state organizing institution (state institutions and / or government agencies), corporations (State-Owned Enterprises and / or Regionally-Owned Enterprises), independent institutions formed under the law for public service activities, and other legal entities are formed solely for public service activities. Other legal entities include legal entities that conduct public services based on subsidies and / or similar assistance, or legal entities that conduct public services based on norms, standards, procedures and criteria, or based on licenses according to the relevant service sector. Whereas public service providers are work units of public service providers that are located in state institutions, corporations, independent institutions established under the law for public service activities, and other legal entities

²⁰¹ Abdul Mahsyar, *Masalah Pelayanan Publik di Indonesia dalam Perspektif Administrasi Publik*, Jurnal Ilmu Pemerintahan “Otoritas”, Volume 1, Nomor 2, Oktober 2011, pp. 86-87

²⁰² Article 10 paragraph (1) of Law Number 30 of 2014 concerning Government Administration

²⁰³ *Ibid.*, p. 83

²⁰⁴ Saiful Arif, *Paradigma Pelayanan Publik*, in *Buku Reformasi Pelayanan Publik*, Program Sekolah Demokrasi PLaCIDS in collaboration with Averroes Press, Malang, 2008, p. 3

formed solely for public service activities. To carry out public services, there are public service implementers, namely officials, employees, officers, and everyone who works in an organizing organization tasked with carrying out an action or series of public service actions.

In the Indonesian constitutional system, as an effort to maintain and improve the quality of public services the Ombudsman of the Republic of Indonesia has been formed which is given the authority to oversee the implementation of public services.²⁰⁵ One of the tasks of the Ombudsman is to receive reports on alleged maladministration in the administration of public services. Maladministration is a behavior or act that is against the law, exceeds authority, uses authority for other purposes than those intended, including negligence or neglect of legal obligations in the administration of public services carried out by state and government administrators that cause material and / or immaterial losses to the community and individuals.²⁰⁶

PUBLIC SERVICE STANDARDS

To provide good public services, each public service provider must have service standards, and those service standards are published with the aim of providing certainty for recipients of public services. This service standard is a benchmark used as a guideline for service delivery and a reference for evaluating service quality as an obligation and promise of public service providers to the public in the context of good quality, fast, easy, affordable and measurable services. Public service standards not only cover service product standards, but also operating standards that enable every public service officer to be able to carry out their duties according to clear and standardized instructions.²⁰⁷

²⁰⁵ Law Number 37 of 2008 concerning the Ombudsman of the Republic of Indonesia, in Article 1 number 1 states that the Ombudsman of the Republic of Indonesia, hereinafter referred to as the Ombudsman, is a state institution that has the authority to oversee the implementation of public services both organized by state and government administrators including those organized by Business Entities State-Owned Enterprises, Regional-Owned Enterprises, and State-Owned Legal Entities as well as private or individual entities that are given the task of carrying out certain public services which partly or wholly funds come from the state revenue and expenditure budget and / or regional revenue and expenditure budget.

²⁰⁶ Article 10 number 3 of Law Number 37 of 2008 concerning the Ombudsman of the Republic of Indonesia

²⁰⁷ Sistem Administrasi Negara Kesatuan Republik Indonesia, Buku I Prinsip-Prinsip Penyelenggaraan Negara, Lembaga Administrasi Negara, Jakarta, Cetakan Pertama, Pebruari 2003, p. 188

The background of the need for public service standards is: a) demands of the aspirations of the community towards the implementation of quality public services, b) providing the same understanding and perception for the organizers, the public, and related parties in the preparation of service standards, c) the existence of service standards in each unit service as a guarantee and certainty of the implementation of services. While the aim of Service Standards is to provide certainty, improve the quality and performance of services in accordance with the needs of the community and in harmony with the ability of the organizers so as to gain public trust. Whereas the service standard goal is for each service provider to be able to compile, establish and implement Public Service Standards properly and consistently.²⁰⁸

Law Number 25 of 2009 concerning Public Services requires every public service provider, whether to provide services to the public directly or indirectly to develop, establish and apply Service Standards for each type of service as a benchmark in the delivery of services in their respective environments. In order to implement these provisions, Ministry of Administrative Reform and Bureaucratic Reform Regulation Number 15 of 2014 concerning Guidelines for Service Standards has been formed.

Preparation and determination of public service standards by taking into account the ability of organizers, community needs, and environmental conditions, must include the community and related parties. The community here includes all parties, both citizen and population, as individuals, groups, and legal entities that are domiciled as beneficiaries of public services, both directly and indirectly. While related parties are parties that are considered competent in providing input to the preparation of public service standards. Community participation and related parties are carried out with the principle of non-discrimination, directly related to the type of service, have competence and prioritize deliberation, and pay attention to diversity. The diversity in question is in the form of community participation representing various elements and professions, including community leaders, academics, the business world, and non-governmental organizations. Community participation in the process of formulating and setting public service standards can be done using the Focused Group Discussion (FGD) method to conduct a deeper discussion of the Service Standards Design material, if deemed necessary by inviting expert speakers related to the type of service being

²⁰⁸ Socialization of Minister of Administrative Reform Regulation and Bureaucratic Reform in the Field of Public Services.

discussed, and / or public hearing to search facts that can reveal the interests of the real public. This method is done by inviting practitioners who are seen to represent the public for their opinions to be heard.²⁰⁹

The purpose of community participation in a joint discussion forum is to align the ability of service providers with the needs / interests of the community and environmental conditions, in order to make effective the delivery of quality services. Discussion on Service Standards Design is intended to build an agreement, a compromise between the expectations of the community and the ability of service providers, especially concerning the capabilities possessed, including:

1. funding support allocated for service delivery
2. the executor in charge of providing services in terms of quality and quantity
3. facilities, infrastructure, and / or facilities used to provide services.

In the process of discussion with the community, service provider organizations may also consider other components, such as: facilities and infrastructure, implementing competencies, internal monitoring mechanisms, number of implementers, service guarantees, service security and safety guarantees.

In the preparation, stipulation and application of Service Standards carried out with due regard to principles:²¹⁰

1. Simple. Service Standards that are easy to understand, easy to follow, easy to implement, easy to measure, with clear procedures and affordable costs for the community and organizers.
2. Consistency. In the preparation and application of service standards must pay attention to the timeliness, procedures, requirements, and determination of affordable service costs.
3. Participatory. Preparation of Service Standards by involving the community and related parties to discuss together and obtain harmony on the basis of commitment or agreement results.
4. Accountable. Matters regulated in Service Standards must be able to be carried out and accountable to interested parties.

²⁰⁹ Attachment of Ministry of Administrative Reform and Bureaucratic Reform Regulation Number 15 of 2014 about Standard Service Guidance, Chapter III letter B

²¹⁰ Attachment of Ministry of Administrative Reform and Bureaucratic Reform Regulation Number 15 of 2014 about Standard Service Guidance, Chapter II letter B

5. Sustainability. Service Standards must be continually improved in an effort to improve service quality and innovation.
6. Transparency. Service Standards must be easily accessible to the community.
7. Justice. Service Standards must ensure that the services provided can reach all people with different economic status, geographical location, and different physical and mental capabilities.

Before the public service standards that have been compiled are applied, the public organizers are required to prepare and determine a Service Notice. Service Notification is a statement of ability and obligation of the organizer to carry out services in accordance with Service Standards.

The things that need to be included in the Service Notice are:²¹¹

1. Statement of promise and ability to carry out services in accordance with Service Standards.
2. Statement of providing services in accordance with the obligations and will make improvements continuously.
3. Statement of willingness to accept sanctions, and / or provide compensation if the services provided are not in accordance with standards.

Information on services that have been prepared must be widely publicized, clear and open to the public, through various media that are easily accessed by the public.

Public Service Standards that have been prepared and established must be implemented or applied. The process of implementing this Service Standard is carried out with internalization and socialization to related parties. In order to implement these Service Standards, it must be integrated into the planning of programs, activities and budgets of the relevant service units. Integration of Service Standards in the management of service delivery is carried out by doing planning, budgeting, implementation, monitoring, and evaluation stages of the results of service delivery. This integration aims to ensure that the needs for the implementation of Service Standards are accommodated through programs and budgets, be a reference for the quality of service delivery, a reference for monitoring and evaluating the results of service delivery, and be feedback in the next program and budget planning stage.

²¹¹ Attachment of Ministry of Administrative Reform and Bureaucratic Reform Regulation Number 15 of 2014 about Standar Service Guidance, Chapter III letter E

The next stage in the process of applying Service Standards is internalization and socialization. Internalization is needed to provide understanding to all levels of service provider organizations. Meanwhile, socialization needs to be done to build understanding and common perception in the service unit / work unit environment. This internalization and socialization process must be documented by the organizer.

In order to assess the success of implementing service standards, it is necessary to monitor and evaluate. In principle, the process of monitoring and evaluation is to evaluate the performance of services as a basis for continuous improvement. In the monitoring process an assessment is made whether the Service Standards that have been prepared can be implemented properly, what are the key success factors and what are the inhibiting factors.

Methods that can be used include: document analysis, surveys, interviews, and observations. The survey can be carried out using the Community Satisfaction Survey (*Survei Kepuasan Masyarakat/SKM*) method as applicable regulations. Service Standards Evaluation is a series of activities comparing the results or achievements of an application of a predetermined Service Standard, and what factors influence the success and / or failure in the framework of implementing Service Standards. The evaluation process also considers complaints of public services obtained, as well as the results of the Community Satisfaction Survey. Based on the results of monitoring and evaluation conducted, service providers can make improvements to improve the quality of public services / innovation on an ongoing basis (continuous improvement).

Assessment of the success of the delivery of public services can be measured from the index of community satisfaction that receives public services. The measure of success of public services is reflected in the index of satisfaction of the public recipients of public services based on their actual expectations and needs. If public services meet or even exceed the expectations and needs of the community, then the service referred to can be said to be excellent. This is as happened in the United States, in the framework of good public service, the people of the United States of America are the strongest controllers of the process of public service.²¹²

²¹² Ahmad Ainur Rohman, *Perbandingan Perspektif Akuntabilitas Pelayanan Publik*, in *Buku Reformasi Pelayanan Publik*, Program Sekolah Demokrasi PLACIDS in collaboration with Averoes Press, Malang, 2008, p. 46

TYPES OF PUBLIC

Types of public services include goods, services and administrative services.²¹³ Public services must meet the scale of activities based on a certain size of the amount of costs used and the network owned in public service activities to be categorized as a public service provider. Goods services are services that produce various forms / types of goods used by the public. Public goods services include:

1. Procurement and distribution of public goods carried out by government agencies that part or all of the funds come from the state budget and / or regional budget. Public goods provided by government agencies using the state revenue and expenditure budget and / or regional revenue and expenditure budget are intended to support the agency's programs and tasks, for example:
 - a. the supply of medicines for avian influenza whose procurement uses the state budget in the Ministry of Health;
 - b. passenger ships managed by PELNI (*Pelayaran Nasional Indonesia*) to facilitate inter-island transportation services, the procurement of which uses state revenue and expenditure budgets at the Ministry of Transportation; and
 - c. the provision of urban transportation infrastructure, the procurement of which uses regional revenue and expenditure budgets.
2. Procurement and distribution of public goods carried out by a business entity whose capital is partly or wholly sourced from state assets and / or separated regional assets. Public goods whose availability is the result of the activities of state-owned enterprises and / or regionally-owned business entities that have delegated tasks to carry out public service obligations, for example:
 - a. electricity managed by PLN (*Perusahaan Listrik Negara*),
 - b. clean water as a result of the management of regional water supply companies.
3. Procurement and distribution of public goods which financing is not sourced from the state revenue or expenditure budget or regional revenue and expenditure budget or business entity whose capital is partly or wholly sourced from state assets and / or separated regional assets, but availability becomes the country's

²¹³ Article 5 Law Number 25 of 2009 concerning Public Service.

mission stipulated in the legislation. State mission is a policy to overcome certain problems, certain activities, or achieve certain goals relating to the interests and benefits of many people, for example:

- a. the policy that assigns Pertamina to distribute premium fuel oil at the same price for retail throughout Indonesia;
- b. the policy of providing subsidies so that fertilizer prices are sold cheaper to encourage farmers to produce;
- c. the policy of eradicating or reducing mumps through iodine administration (excluding industrial salt);
- d. the policy of guaranteeing the selling price of unhulled rice at the farm level through the determination of the purchase price of unhulled rice purchased by the Public Logistics Agency;
- e. the policy of securing food reserves through securing the price of staple food, managing reserves and distributing food to certain groups of people; and
- f. the policy of procuring three kilo gram-gas cylinders of LPG for certain community groups in the context of the conversion of kerosene to gas.

Services are services that produce various forms of services needed by the public. Services for services include:

1. The provision of public services by government agencies that part or all of the funds come from the state budget and / or regional budget. Public services in this provision include health services (hospitals and health centers), educational services (primary schools, junior high schools, senior high schools, and tertiary institutions), marine navigation services (lighthouses and beacon lights), judicial services, services traffic (traffic lights), security services (police services), and market services.
2. The provision of public services by a business entity whose capital is partly or wholly sourced from state assets and / or separated regional assets. Public services in this provision are services produced by state-owned / regionally-owned business entities that have delegated tasks to carry out public service obligations, including air / sea / land transportation services performed by Garuda Indonesia, Merpati Airlines, PT PELNI (*Pelayaran Nasional Indonesia*), PT KAI (Kereta Api Indonesia), and DAMRI (*Djawatan Angketan*

Motor Repoeblik Indonesia), as well as clean water supply services performed by regional water companies.

3. The provision of public services whose financing does not originate from the state revenue or expenditure budget or regional revenue and expenditure budget or business entity whose capital is partly or wholly sourced from state assets and / or separated regional assets, but availability becomes the state mission stipulated in legislation. State mission is a policy to overcome certain problems, certain activities, or achieve certain goals relating to the interests and benefits of many people, for example:
 - a. health services for the poor by private hospitals;
 - b. services for providing education by the private sector must comply with national education provision;
 - c. inter-city or inner-city bus transportation services, the route and the tariff are determined by the government;
 - d. economy class air transportation services, the upper limit tariff is determined by the government;
 - e. social institution establishment services;
 - f. security services.

Administrative services are services that produce various forms of official documents needed by the community. Administrative services include:

1. Government administrative actions required by the state and regulated in statutory regulations in order to realize the personal, family, honor, dignity, and property of citizens. Government administrative action is the service of providing documents by the government, including starting from someone born to obtain a birth certificate to death and obtaining a death certificate, including all matters needed by the population in living their lives, such as obtaining building permits, business licenses, certificates land, and marriage certificate.
2. Administrative actions by non-governmental institutions required by the state and regulated in statutory regulations and applied based on agreements with service recipients. Non-government administrative actions are services providing documents by agencies outside the government, including banking, insurance, health, security, management of industrial zones, and management of social activities.

The three types of public services must be fulfilled by the government in good and quality in accordance with established service standards for the welfare of its citizens.

Enhancing the Quality of Public Services in Fulfilling Citizens' Constitutional Rights in the Era of the Industry Revolution 4.0

The development of technology today is so rapid and even unstoppable. The development of increasingly sophisticated technology, is the sign of the world entering the industrial revolution 4.0 era. The term industrial revolution 4.0 itself emerged, beginning with the existence of the German Federal Government's mega projects relating to computer technology that is so sophisticated that was used in every factory in Germany in 2012 and is growing today. Industrial Revolution 4.0 is the fourth phase of the history of the industrial revolution which began in the 18th century, and is now at its peak with the birth of massive digital technology.²¹⁴

In the industrial revolution 4.0 era, digitalization has begun to enter every gap of people's lives. The industrial revolution 4.0 era emphasizes the patterns of digital economy, artificial intelligence, big data, robotic, etc., otherwise known as the phenomenon of disruptive innovation.

Many services in the private sector are then utilizing the rapid advances in increasingly sophisticated technology in the provision of services to maintain the trust of customers, so that the business they run will be more productive. Many large companies and even small creative industries use digital technology in developing their businesses. For example, Gojek and Grab are companies engaged in the provision of transportation services through the online system. Both companies are progressing very rapidly. While on the other hand, transportation service providers that are still conventional in nature and have not used digital technology have become scrambling and even almost out of business. This shows how disruptive the industrial revolution 4.0 era is.

Technological advances should not only be used by those engaged in the private sector, but also be used by the Government as public service provider. Moreover, the number of customers accessing services in the public sector is greater than those who access in the private sector. So, if the Government wants to gain the trust of customers, in this case the people receiving public

²¹⁴ Muhammad Burhan, *Proyeksi Pelayanan Publik Era 4.0*, ombudsman.go.id, downloaded on August 8 2019.

services, it should be in the delivery of public services, the government is getting serious about utilizing digital technology in the Industrial Revolution 4.0 era. Therefore, it is not only the private sector that can utilize and take advantage of current technological advances, but also the public sector.

This should be a concern of the government to be able to adjust the implementation of public services to the citizens in facing the industrial revolution 4.0 at this time, namely by implementing technology-based public services (digital). Because by using technology, transparency, speed, and convenience, the key to a service will be realized.

The challenges faced by the government in providing public services by utilizing extraordinary technological advances today are certainly very complex. The rapid increase in population, both naturally occurring and occurring due to migration, triggers the emergence of various problems involving the political, economic, social, cultural, security, and so on. On the one hand, the community demands increasingly maximum public services from government administrators, especially in big cities, while on the other hand the resources owned by the government often do not support or even not provide maximum quality of public services.

Entering the Industrial Revolution 4.0 Era demands progress on all systems, including those relating to public services. In facing the era of digitalization and the Industrial Revolution 4.0, in fact countries in the world have begun to apply digitalization in managing their governments. The aim is to increase productivity and efficiency, and create accountability for the performance of each institution. Efforts are being made to build e-government systems in all institutions, both state and government institutions. In addition to building e-government, building service-frame based on information and communication technology that are integrated from the center to the regions will eventually reach the end, namely the delivery of public services. Because the implementation of e-government will be able to lead to the development of the quality of public services and also electronic based government towards the satisfaction of the community as recipients of public services.

In Indonesia, the link between public services and the Industrial Revolution 4.0 era has actually been implied and stated in Law Number 25 of 2009 concerning Public Services. The law requires every public service provider to have a system that can provide convenience to the public. Article 23 paragraph (1) of Law Number 25 Year 2009 states that: In the context of providing information support to the implementation of public services,

national information system needs to be established. This national information system contains information on all services needed to formulate national policies on public services. To be able to implement a national information system, information technology plays a major role in the fulfillment of the system on a national scale. Furthermore, in Article 23 paragraph (4) of Law Number 25 Year 2009 states that: The Administrator is obliged to manage an information system consisting of electronic or non-electronic information systems which at least covers the administrator's profile, executor's profile, service standards, service notice, complaints organizer, and performance appraisal. Electronic information system is the application of information technology based on telecommunications networks and electronic media, which functions to design, process, analyze, display and / or disseminate electronic information.

In order to implement provisions in the Law on Public Services, currently the Ministry of Administrative Reform and Bureaucracy Reform as a Ministry that assists the President in organizing government has function of formulating and determining policies related to public services, and has begun to utilize information technology in providing information nationally by forming the Minister of Administrative Reform and Bureaucratic Reform of the Republic of Indonesia Number 13 of 2017 concerning Guidelines for the Implementation of the National Public Service Information System.

Article 3 of Ministerial Regulation states that Ministers, Institutional Leaders, Governors, Regents, Mayors, Managing Directors of State-Owned Enterprises, Managing Directors of Regionally-Owned Enterprises, must ensure the provision of information on public services in the National Public Service Information System (*Sistem Informasi Pelayanan Publik Nasional/ SIPPN*) after the enactment of the Minister of Administrative Reform and Bureaucratic Reform in accordance with statutory provisions.

Within one year after the regulation was enacted, the Minister of Administrative Reform and Bureaucratic Reform launched the National Public Service Information System application as a public service information container for all public service providers nationally starting from the regional government, ministries / institutions, and State Owned Enterprises /Regional owned enterprises. With the National Public Service Information System, public services in Indonesia will be integrated with each other. Then all information related to public services can be accessed through the National Public Service Information System application. In addition, the National

Public Service Information System is an effective form of supervision and public participation so as to prevent abuse of authority in the administration of public services.

The industrial revolution 4.0 in Indonesia begins with the launching of “Making Indonesia 4.0” by the President at the Indonesia Industrial Summit in 2018. The program is part of a national industrial strategy in the Industrial Revolution 4.0 covering various fields, one of which is governance. For this purpose, the President has issued Presidential Regulation No. 95 of 2018 concerning Electronic-Based Government Systems. In the development of the Industrial Revolution 4.0, the application of information technology (e-government) is a must for state administrators (government). With the issuance of Presidential Regulation Number 95 of 2018, it proves that the Indonesian government is currently serious in realizing effective and efficient governance by utilizing information technology (e-government) as a whole and interconnected in a government administration system and in the delivery of public services in a government agency.

Although regulations have been established relating to the use of technology in providing public services, however, the e-government system which is the government’s attempt to implement the use of computers, computer networks and information technology to run the government, especially public services, is still very minimal. This is indicated by the fact that there are still very few Ministries / Institutions and regional governments that utilize technology in the process of public service. However, if e-government itself was implemented in every government, this would be in line with the Industrial Revolution 4.0. Whereas e-government has many benefits in the democratic system that we are currently implementing, includes increasing the speed of communication between government, society, the private sector, as well as coordination between internet-based agencies. In addition, realizing transparent services, increasing accountability of the governance process, saving government budgets, and facilitating information flows that can be openly accessed are the benefits that can be obtained in order to realize the ideals of good governance and open government in governance in Indonesia.

CONCLUSIONS

In order to improve the quality of public services in fulfilling the constitutional rights of the citizens in the industrial revolution 4.0 era, it is time for the government to seriously pay attention to its obligations in promoting

good governance of organizing public services based on information technology. The change of services from conventional to digital has become a necessity. The use of information technology in governance management (e-government) is also one way to realize bureaucratic reform in improving the quality of public services to be more transparent, effective, efficient and responsive (more quickly responded). For this reason, every public service provider needs to immediately integrate information technology to public services (information technology based public services). An innovation to support and implement information technology in governance (e-government) is needed to make public services be easy, effective and efficient as part of the Industrial Revolution Era 4.0. It is also necessary to create an agile and accountable public service organization. In addition to these two things, no less important is the improvement in the quality and competence of human resources who provide public services. Qualified and competent human resources must also be distributed evenly throughout the country so that quality public services can be felt by the entire citizens.

In addition to the statements above, to improve the quality and innovation of public services, it is also necessary to make continuous improvements to the standards of public services that have been prepared to adjust to the development of information technology. Improvements in public service standards are based on the results of monitoring and evaluation, and pay attention to public complaints and the possibility of replication of public service innovations.

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A PLANNING LAW PERSPECTIVE ON ABANDONED HOUSING PROJECTS IN MALAYSIA

**Nuarrual Hilal Md. Dahlan, Seeni Mohamed Mohamed Nafees &
Muhamad Hassan Ahmad**

INTRODUCTION

Housing is a burgeoning industry in Malaysia. Initially, housing accommodation was provided by the Malaysian Federal Government in the early days of its independence. Later, the private sector was invited by the government to participate in providing housing accommodation to meet the public upsurges in demand for housing.²¹⁵ To govern the housing industry spearheaded by the private sector, the Malaysian Government introduced laws. One of the laws is the Town and Country Planning Act 1976 (Act 172) ('TPCA'). Despite there are many housing policies and legal means to ensure housing success, there are still issues plaguing housing industry in Malaysia. For instance, one of the significant problems is the issue of abandoned housing projects. This issue has been existed since the 1970s. Nonetheless, hitherto this issue has not been adequately addressed and resolved. Many purchasers have become victims in abandoned housing projects, suffered irreparable damage, and excessive losses.²¹⁶

The objective of this chapter is to discuss the issues arising from the planning law that govern housing development projects in Malaysia. The purpose of the planning law is to ensure the housing development projects are successful and sustainable for human lives and harmonious

²¹⁵ The Staronline, *Private sector has role to play in affordable housing*, 2 April 2019. <https://www.thestar.com.my/business/business-news/2019/04/02/private-sector-has-role-to-play-in-affordable-housing/> (accessed July 2, 2019).

²¹⁶ Nuarrual Hilal Md Dahlan, "Abandoned Housing Projects in Peninsular Malaysia: Legal Regulatory Framework" (PhD Diss., International Islamic University Malaysia, 2009), pp. 60-118.

with the environment. This writing is pertinent, particularly in the event of abandonment of housing development projects, which hitherto have not been fully resolved in Malaysia. By identifying the issues, the authors will suggest some proposal to overcome the problems and provide better protection to house purchasers and other stakeholders.

This chapter analyses planning legal issues about two (2) abandoned housing projects in Malaysia. The investigation is done by applying qualitative case study and legal research methodologies over these two abandoned housing projects. These two housing projects are:

- 1) Taman Harmoni, Lot 82, Mukim of Cheras, District of Hulu Langat, at the State of Selangor, Malaysia ('Taman Harmoni'); and,
- 2) Taman Lingkar Nur, KM 21, Jalan Cheras-Kajang, Selangor at P.T. 6443, H.S(D) 16848, Mukim of Cheras, District of Hulu Langat, also at the State of Selangor, Malaysia ('Taman Lingkar Nur').

RESULTS AND DISCUSSION

Case Study 1 - Taman Harmoni

Pursuant to a resolution passed in the Selangor State Executive Council (EXCO) dated 2 October 1991 on the application of the State Secretary of Selangor Incorporated (SUK (Incorporated)) to alienate a piece of land formerly known as Lot 82, Mukim of Cheras, District of Hulu Langat, Selangor ('the said land') and based on the layout plan as approved by the Selangor State Department of Town and Country Planning, the Council had agreed on the proposal of alienating the said land to SUK (Incorporated). Prior to the application for such alienation, the EXCO had once approved an application for the said land to be developed into a Low-Cost-Housing-Special-Programme on 21 September 1988. This housing project was named 'Taman Harmoni'²¹⁷.

The project—Taman Harmoni was divided into two (2) phases—Phase I consists of single-story-medium-cost-terraced houses, while Phase II involved the development and erection of the low-cost flats. The development for Phase I was fully completed, albeit delayed, by the defaulting developer (K&T Development Sdn. Bhd. ('K&T')), whilst Phase II had not been commenced

²¹⁷ Hulu Langat Land and District office file number: P.T.D. U.L 1/2/520-91; Majlis Perbandaran Kajang file number: MPKj PB/KM 2/41-99, MPKj 6/P/14/93/PT 1; Permodalan Negeri Selangor Berhad file number: PNSB 2/72; Ministry of Urban Well-being, Housing and Local Government file number: KPKT/BL/19/6037-1; KPKT/08/824/6037-1.

at all, except for the preliminary, piling, and levelling works done by the defaulting developer. Thus Phase II was considered an abandoned housing project. This project was a joint venture between K&T, Perbadanan Setiausaha Kerajaan Negeri Selangor (State Secretary of Selangor Incorporated ('SUK (Incorporated)'), being the land proprietor and Permodalan Negeri Selangor Berhad ('PNSB'). The primary reason leading to the abandonment of the project was the financial difficulties faced by K&T. These difficulties arose due to the lack of skills, experience, and expertise of the defaulting housing developer company (K&T), and the inappropriate selling prices for the units compared to the costs of construction and unforeseen expenses (earthworks and piling works) faced by K&T.²¹⁸

Fortunately, the project had been revived by the land proprietor—SUK (Incorporated) through their project manager, PNSB—until full completion and Certificates of Fitness for Occupation ('CF') were obtained on 1 July 2005. However, the rehabilitation was a loss-making venture for PNSB and SUK(Incorporated).²¹⁹

Analysis and Findings

The facts show that there was no mention in the planning permission and the comments made by the related technical agencies about the future problem of slime soils beneath the land of the purported project. Neither was there any requirement for the applicant developer to carry out soil investigations for the area in the project. Further, as there was yet any gazetted local plan and structure plan for the District of Hulu Langat, at the commencement of the project (Taman Harmoni), which might have envisaged any soil problem and the suitability of the location for housing development. The planning authority being the Department of Town and Country Planning ('JPBD'), Ulu Langat Municipal District Council ('MDUL') and Kajang Municipal Council ('MPKj') only had conducted an *ad hoc* investigation about the suitability of the purported project and the land, including by consulting several technical agencies.

The Cheras Local Plan (the local plan where the project under study is located) emphasises the suitability of the specific areas or zones where housing development projects should be carried out, within its jurisdiction. Further, pursuant to the Selangor Structure Plan, the categorizations of the

²¹⁸ Ibid.

²¹⁹ Id.

land use in Selangor for specific developments, including land areas and zones, purportedly suitable for housing development projects, were made after the affected lands had been subjected to certain suitability analyses and after considering issues and factors such as the saturated areas, committed developments and the need to preserve environmental sensitive areas such as water catchment areas, wildlife forest reserves, low-lying watery grounds, high-lands exceeding 100 meter from the sea level and water areas. These measures and analyses were undertaken in order to optimise the land use according to their suitability and to be consistent with the sustainable development objectives and rules.²²⁰

Despite the above measures and analyses conducted over the land use, the suitability and the categorizations of the land use, it is opined, the Cheras Local Plan and the Selangor Structure Plan still lack a requirement which imposes on the applicant developers to carry out necessary and thorough soil investigations against the affected land and its soils. This soil investigation is to ensure that the land area and its grounds are practically suitable for carrying out housing development projects. This is because, even though the local plan and structure plan have been prepared after certain studies, analyses and field works made based on primary and secondary data over the suitability of the lands for certain uses, certain specific soil investigations, it is opined, are still required to ensure that the purported location and its soils are suitable for housing development projects. This suggestion is raised, in view of the fact that the said analyses, studies and field works might have been outdated or might not have been exhaustively made and thus they are incapable of identifying specific soil problems such as slime soils beneath certain areas within the jurisdiction of the local plan for certain necessary actions.

Apart from the proposal to fit the above suggestion into the local plan and the structure plan, the above suggestion, regarding the necessity to undertake certain soil investigations, can also be applied, it is opined, when the local planning authority deals with applications for planning permission, provided the above suggestion has been duly given appropriate and sufficient

²²⁰ Majlis Perbandaran Kajang, Jabatan Perancangan Bandar dan Desa Semenanjung Malaysia & Jabatan Perancangan Bandar dan Desa Negeri Selangor, *Rancangan Tempatan Cheras 1997-2010, Peta Cadangan dan Pernyataan Bertulis*, 1.0-3, 1.0-4, 1.0-10, 1.0-12, 2.02-2, 2.0-8 and 2.0-16; Jabatan Perancangan Bandar dan Desa Negeri Selangor, *Rancangan Struktur Negeri Selangor 2020, Perancangan Mampan Selangor Sejahtera*, 2-5, 4-119. See also section 12(8) of the TCPA requiring that, the draft local plan must conform to the structure plan, whether or not the structure plan has come into effect or otherwise.

consideration by the draft development plans or the gazetted development plans or the State Planning Committee so directs or that the development proposal report made so proposes (section 21A of the TCPA), or there is an objection by the neighbouring land owner to the project site, respectively pursuant to section 22(2)(a)(the provisions of the development plan, if any), or (b)(the provisions that the local planning authority thinks are likely to be made in any development plan under preparation or to be prepared, or the proposals relating to those provisions), or (aa)(the direction given by the State Planning Committee, if any) or (bb)(the development proposal report) or (c) (objection by the neighbouring land owner against the purported application for planning permission under section 21(6) of the TCPA) of the TCPA.

The planning permission, too, did not emphasise the capability of the applicant developer to implement the purported housing project. For example, there was no reference made to MHLG for views regarding the ability of the applicant developer. Similarly, no references were made to Department of Environment ('JAS') and the Department of Minerals and Geoscience, regarding the suitability of the location and the soil structure or the provision of certain countermeasures that the applicant developer had to comply with before planning permission could be granted.

The above problems may also be due to the absence of a specific provision in the TCPA, particularly section 22(2) of the TCPA which does not require the local planning authority to consider the views from the relevant technical agencies in dealing with an application for planning permission. Due to the absence of such a specific provision, even though in practice there are planning rules (the repealed Planning Control (General) (Selangor) Rules 1996 and the current Planning Control (General) (Selangor) Rules 2001(Sel. P.U.9)) and guidelines to refer to the technical agencies for views, the local planning authority may conduct *ad hoc* investigations and may not seek any view from the technical agencies or if there is any, only a limited and insufficient number of technical agencies are consulted. This is because, the duty to refer to these agencies or parties is not mandatory but is a mere directory, i.e. it is subject to the discretion of the planning authority, either to refer or not to refer to them, pursuant to rule 8 of the repealed Planning Control (General) (Selangor) Rules 1996 and rule 8 of the current Planning Control (General) (Selangor) Rules 2001(Sel. P.U.9) and the guidelines.

Even though the developer had submitted the Development Proposal Report to MPKj, according to section 21A of the TCPA, there was no mention

about the problem of slime soils at the location of the project. It should be noted that pursuant to section 21A(1)(d)(i) of the TCPA, the applicant developer shall have to describe, *inter alia*, the physical environment, topography, landscape, geology and the natural features of the said land. In other words, the report submitted to MPKj, was incomplete, as the applicant developer did not carry out any soil investigation on the area to ascertain the ‘geology’ of the purported project land.²²¹

Despite section 22(2)(a) of the TCPA which requires the local planning authority to comply with the development plans (local and structure plans) if any, in considering applications for planning permission, the development plans need not be followed blindly. This was the result of the judicial findings in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor* [1999] 3 MLJ 1 (Federal Court) and in *Chong Co Sdn. Bhd v Majlis Perbandaran Pulau Pinang* [2000] 5 MLJ 130 (Appeal Board (Penang)). The decisions of these cases have marginalised the importance of development plans. Thus, even if there may be certain provisions in the development plans which the applicant developer shall have to comply with, for example, provisions for avoiding future abandonment or requirements of certain counter-measures and solutions for facing the abandonment, these provisions are not mandatory, following the decision of the above case-law.

In *Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor*, Edgar Joseph FCJ at p. 51 said as follows:

“Before us, it was argued by Counsel for the Society that the Structure Plan, the Malaysia Plan, and Cabinet Policy all have political objectives and these do not constitute legal requirements and are therefore not enforceable.

²²¹ Aznor Abdul Karim, Interview by author, Gombak, Selangor, 8 November, 2006. Based on certain finding, local planning authorities have been slow to take up this provision (section 21A(1)(d) of the TCPA) in their enforcement of development control nor have they used it as a basis of argument in the courts of law. See Mr. Murgan, *Pelaksanaan Penguatkuasaan Akta Perancangan Bandar dan Desa 1976—Prosedur dan Aspek Perundangan*, paper presented at Kursus Teknikal Untuk Pegawai-Pegawai Yang Terlibat Dalam Kelulusan Pembangunan, organized by the Ministry of Housing and Local Government at IKRAM, 2005, quoted from Kamalruddin Shamsudin, *Sustainable Land Use Development In the Klang Valley: An Elusive Dream*, in *Land Use Planning and Environmental Sustainability in Malaysia: Policies and Trends*, 301. See also *Manual Laporan Cadangan Pemajuan, Disediakan di Bawah Peruntukan Seksyen 21A Akta Perancangan Bandar dan Desa 1976*, (Kuala Lumpur: Jabatan Perancangan Bandar dan Desa dan Pertubuhan Perancang Malaysia, April 2001), 18, 19, 33 & 63.

By way of illustration, it was said that planning requirements would relate to density, type of building, landscaping, aesthetic matters, and other matters such as green belt and environmental impact.

The question for decision regarding this part of the case, therefore, is: in considering an application for planning permission for development, what is the status and relevance of the Development Plan? It is not difficult to cite an anthology of authorities on this question. Our choice is as follows.

By s 22(2) of the Act, it is provided that in dealing with an application for planning permission, the local planning authority 'shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular, *inter alia*, the provisions of the Development Plan'. These statutory provisions are equivalent to s 70(2) of the UK Town and Country Planning Act. In this context, the cases of *Kissell v Secretary of State for the Environment* (1993) TLR, 22 July at p 32, *Etherridge v Secretary of State for the Environment* (1991) EGCS 28 *Good v Epping Forest DC* [1994] 2 All ER 156 and *R v Westminster City Council, ex p Monahan* [1989] 3 WLR 408 (the *Royal Opera House Covent Garden* case) are relevant and show that the Structure Plan has legal status and cannot be disregarded, as Counsel for the Society implied by his submission. **It is also obvious that the statutory requirement in s 22(2) of the Act, 'to take into consideration' to the provisions of the Development Plan does not mean that the local planning authority must slavishly comply with it. It will suffice if it considers the Development Plan without incurring the obligation to follow it.** (See, Lord Guest in *Simpson v Edinburgh Corp* [1960] SC 313 *Enfield London Borough Council v Secretary of State for the Environment* (1974) 233 EG 53). But, note the two situations -- not material to the present case -- where the planning authority would be debarred from granting planning permission (s 22 (4) of the Act)..” (Emphasis added).

In Chong Co Sdn. Bhd, the appellant (Chong Co Sdn. Bhd), in July 1996, applied for planning permission to erect a 12-storey building. The appellant fulfilled all the conditions and requirements imposed by the respondent. In January 1997, the appellant was informed to consider the reduction of the height of the proposed building to five-storey. The appellant informed the

respondent (Majlis Perbandaran Pulau Pinang) of their intention to proceed with the erection of the proposed 12-storey. The respondent did not give any reply as to the status of the appellant's application. The appellant appealed under section 23 TCPA against the decision of the respondent, contending that the conduct of the respondent in refusing to make a decision and reply to the appellant tantamount to rejecting the appellant's application for planning permission. The respondent raised a preliminary objection that there was no decision on the application for planning permission, and there was, therefore, no appealable matter within the meaning of s 23(1) TCPA. On the appeal proper which was received in the circumstances as an appeal against the refusal of planning permission, the appellant contended that the application must be granted since they had complied with all guidelines prevailing at the time of submission of the application. The respondent submitted that a proposed development that met with the development plans will not necessarily be approved. The local planning authority must take current conditions and policies into account. Because of the height of the building, the respondent recommended no approval for the plan submitted.

The court, *inter alia*, decided that TCPA does not say that planning permission will be granted if the development in respect of which permission is applied for would not contravene any provision of the development plan. Planning permission could be refused even if the development in respect of which permission is applied for would not contravene any provision of the development plan. And in the instant case, even if the development in respect of which permission was applied would not contravene any provision of the 1987 structure plan, planning permission could be validly refused on account of the provisions that the respondent thinks are likely to be made in any development under preparation or to be prepared, or the proposals relating to those proposals. The development plan was not the only matter to be taken into consideration.

Concerning the decision of the court, Jeffrey Tan J said as follows (at pp. 141—142):

“An application for planning permission is made to the local planning authority -- s 21(1). Where the development involves the erection of a building, the local planning authority may give written directions to the applicant on any of the following matters, that is to say:

- a) the level of the building;
- b) the line of frontage with neighbouring buildings;
- ...
- g) any other matter that the local planning authority considers necessary for the purpose of planning.

The local planning authority, in dealing with an application, shall take into consideration such matters as are in its opinion expedient or necessary for planning and in particular:

- a) the provisions of the development plan, if any;
- b) the provisions that it thinks are likely to be made in any development plan under preparation or to be prepared, or the proposals relating to those proposals;
- c)

And after taking into consideration the aforesaid matters, the local planning authority may grant planning permission either absolutely or subject to such conditions as it thinks fit to impose, or refuse to grant such planning permission -- s 22(3). However, the local planning authority cannot grant planning permission if the development in respect of which permission is applied for would contravene any provision of the development plan --s 22(4).

It is observed that the Act does not say that planning permission will be granted if the development in respect of which permission is applied for would not contravene any provision of the development plan. What the Act does say, however, is that the local planning authority, in dealing with an application, shall take into consideration such matters as are in its opinion expedient or necessary for planning, and in particular the provisions of the development plan, if any, and the provisions that it thinks are likely to be made in any development plan under preparation or to be prepared, or the proposals relating to those proposals. It translates, that the local planning authority, in dealing with an application, must consider not just the development plan, if any, but also provisions that it thinks are likely to be made in any development plan under preparation or to be prepared, or the proposals relating to those proposals. It is also observed that the Act defines a development plan as 'the local plan', or, if there is no local plan, 'the structure plan'. There is no local plan in the present case, and the 1987 structure plan, in the event, is the development plan.

It was submitted, that the appellant having complied with all guidelines prevailing at the time of submission of the application must be granted planning permission, that the respondent must continue to use the interim zoning plans enacted under the Town Board Enactment, and, that Zone six which came about after the submission of the application has not been approved by the state planning committee nor adopted by the respondent. With respect, that is just another way of saying that the respondent, in dealing with the appellant's application, shall take into consideration only the provisions of the development plan, if any, and not the provisions that it thinks are likely to be made in any development plan under preparation or to be prepared, or the proposals relating to those proposals, and that the respondent must grant planning permission if the development in respect of which permission is applied would not contravene any provision of the development plan. That, as observed, is not true. **Planning permission could be refused, even if the development in respect of which development is applied for would not contravene any provision of the development plan. And in the instant case, even if the development in respect of which permission is applied would not contravene any provision of the 1987 structure plan, planning permission could be validly refused on account of the provisions that the respondent thinks are likely to be made in any development plan under preparation or to be prepared, or the proposals relating to those proposals. The development plan is definitely not the only matter to be taken into consideration.**"(emphasis added).

The above case study - Taman Harmoni shows that in approving the application for planning permission, the local planning authority (the State Director of Selangor JPBD, MDUL, and MPKj) did not know about the problem of slime soils. Thus, the only ways for the local planning authority to find out about the conditions of the land and its suitability was by making a direct site visit and by way of a reference to certain technical agencies for example the Department of Irrigation and Drainage ('JPS'), Tenaga Nasional Berhad – electrical authority ('TNB') and the Land/District Office and if possible through the information provided in the Development Proposal Report prepared by the applicant developer. However, these parties had not identified the problem of slime soils either.

Even of late, too, planning factors involving and affecting housing development and its sustainability have not been given satisfactory consideration in the development plans.²²² This is due to the lack of mandatory, multi-criteria evaluation and multi-criteria decision making (MCDM) in the planning process which emphasise factors affecting housing development, the absence of comprehensive study/assessment/evaluation over factors influencing housing developments including the soil conditions and structures and other matters relevant in housing development, the prices for the houses and the development costs, the absence of a coherent policy and the unreasonable political interferences over the planning permission process for housing development (*ad hoc* planning).²²³

The above non-compliance, in the case study, was partly because the State of Selangor had yet, as at the date of the applications for planning permissions by the applicant developer, adopted the TCPA in *toto* and that the Planning Control (General) (Selangor) Rules 1996 only came into existence in 1996. The State of Selangor through the State Planning Committee Meeting had only on 13 May 1996 approved the application of parts IV to IX of the TCPA and TCPA (amendment) 1995, enforced from 1 May 1996. On the same date also, the State Planning Committee approved the application of Planning Control (General) (Selangor) Rules 1996.

Alternatively, during the approval of the planning permission for the project, there were no emphases, guidelines, nor considerations on factors leading to the abandonment of housing projects. Likewise, there were no counter-measures provided to face the problem. Thus, before the enforcement of TCPA and its Rules, the planning practices were made on *ad-hoc* bases, including by referring to certain technical agencies.

It is opined that the local planning authority could be liable for negligence in their failure to exercise due care in granting planning permission and failure to use proper and sufficient planning control, which partly had caused the abandonment. This is because there is no provision in the TCPA that confers on the local planning authority immunity against any breach of duty

²²² Foziah bt. Johar, Environmental Sustainability in Selected Local Plans in Malaysia, 266 & 269.

²²³ These are also the dilemmas for commercial development projects. See in Sharifah Zubaidah Syed Abdul Kader, "Legal Control of Commercial Land Development in Kuala Lumpur and Petaling Jaya," (SJD Thesis, Bond University, 2001), 42, 206-215, 218 & 219. See also Hunud Abia Kadouf & Sharifah Zubaidah Aljunid, Perspectives, Policy Issues in Land Use and Environmental Sustainability: The Malaysian Scenario, in *Land Use Planning and Environmental Sustainability in Malaysia: Policies and Trends*, 15.

and negligence, as compared to and provided for the State Authority and the local authority, pursuant to section 95(2) of the Street, Drainage and Building Act 1974 (Act 133) ('SDBA'). However, any action against the local planning authority shall be subject to the provisions in the Public Authorities Protection Act 1948 (Act 198) (revised 1978), for example, pursuant to section 2(a) of this act, the legal action must be commenced within three years from the default of that authority.

As compliance with the development plan is not mandatory, following the case-law—*Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* and *Chong Co Sdn. Bhd.*, the local planning authority may tend to carry out *ad hoc* planning control based on expediency and necessity, especially in areas not identified or covered by any existing development plan. Further, this gives the local planning authority flexibility in exercising planning control. By this reason too, it is opined that, following the above case-law and the subservient authority of the planning authority to the State Authority, these may undermine initiative and need to adopt and apply the gazetted comprehensive development plans. This would also give the local planning authority more flexibility, based on expediency and necessity, even where a gazetted development plan exists for the area, allowing the exercise of *ad-hoc* planning control over the housing developments to take place. However, it is opined, this situation may lead to certain unwarranted results. Thus, if this was the case, then the judicial policy and the policy of the local planning authority are in conflict with section 22(4)(a) of the TCPA *viz*, 'the local planning authority shall not grant planning permission if the development in respect of which the permission is applied for would contravene any provision of the development plan'.

Case Study 2 – Taman Lingkaran Nur

Taman Lingkaran Nur, Kajang, Selangor above was a result of a privatization project between Saktimuna Sdn. Bhd. (the defaulting developer) ('Saktimuna') and the Selangor State Government. The latter was the proprietor of the project land, who later alienated the land to Saktimuna for it to develop into a housing project subject to certain terms and conditions. However, in the course of the development of the project, the project failed and was abandoned as Saktimuna faced serious financial problems due to insufficient sales and revenues generated through sales, and their inability to

meet the development and construction costs, which persisted from 1992 to early 2000.²²⁴

Later the project was taken over by one Syarikat Lingkaran Nur Sdn. Bhd. ('SLN')—the first rehabilitating party with the consent of the Selangor State Government and the defaulting developer. Unfortunately, SLN also suffered the same fate, i.e. it was also unable to complete the project due to financial constraints.²²⁵

On the instruction of MHLG and numerous appeals from the aggrieved purchasers, Syarikat Perumahan Negara Berhad (SPNB) had taken over part of the project, i.e., Phase 1A from SLN, with the consent of the Selangor State Government and Saktimuna. Being a government-linked company ('GLC'), SPNB obtained funds from the Ministry of Finance ('MOF') to revive the project. The rehabilitation succeeded. However, this rescue was a welfare service, in that the available moneys in the hands of the end-financiers were insufficient to meet the rehabilitation costs. MOF had to top-up funds to ensure the completion of the rehabilitation. During the course of the rehabilitation, there were several problems faced by SPNB, and one of them was the refusal and failure of certain purchasers to give consent to SPNB to carry out the purported rehabilitation works. Thus, not all the units in Phase 1A had been fully rehabilitated and obtained CF. The remaining phases (Phase 1B and 2), except for Phase 3 which SLN had a joint-venture with Tanning Sdn. Bhd. and it was developed into a completed housing project now known as Taman Cheras Idaman, have as yet been revived. These phases (Phases 1B and 2) are still in the course of negotiation and study for rehabilitation, both by Saktimuna, the Official Receiver ('OR') (being the Kuala Lumpur Department of Insolvency—Jabatan Insolvensi, Kuala Lumpur) and the new chargee (Idaman Wajib Sdn. Bhd.).²²⁶

Analysis and Findings

In general, the legal issues for the above case study concerning planning permission, are quite similar to the first case study—Phase II of Taman Harmoni as elaborated above.

²²⁴ Jabatan Perancang Bandar dan Desa file number: PTU.U.L.1/2/364-Semt; Ministry of Urban Well-being, Housing and Local Government file number: KPKT/08/842/4274; Majlis Perbandaran Kajang file number: MPKj 6P/86/87.

²²⁵ Ministry of Urban Well-being, Housing and Local Government file number: KPKT/08/842/4274.

²²⁶ Ibid.

Based on the instant case study's legal observations, the authors find that in approving the planning permission, there were no local plan and structure plan (development plans) for the area, on which the project was to be implemented, which would have envisaged the problem of soil erosion, which could be referred to by the local planning authorities (State Director of the Selangor State JPBD, Shah Alam Selangor, MDUL and MPKj). Indeed there were references made to certain technical agencies, for example, the JPS, TNB and the Land/District Office but these agencies had not emphasized the possibility of soil erosion problems at the location of the project either. Besides, there was no reference made to MHLG, JAS, or the Department of Minerals and Geoscience to ascertain the capability and suitability of the developer and the project location.

The planning permission granted to the developer had also not addressed measures to avoid any possibility of future abandonment of the purported housing development project and ensuring the success of the development. For example, in respect of the geographical situation and the soil structure, this problem includes soil erosion problems to the adjacent land due to the flowing water of Sungai Long and the construction management and the financial management for carrying out the housing project.²²⁷

The above problem occurred, partly because the State of Selangor had yet, as has been explained in the first case study above, at the date of the application for planning permission, adopted TCPA *in toto* and the Planning Control (General) (Selangor) Rules 1996 only came into existence in 1996.

Alternatively, during the approval of planning permission, there was no emphasis, guideline, or consideration on factors leading to the abandonment. Thus, before the enforcement of TCPA and its rules, the planning practices were done on an *ad-hoc* basis—by referring to certain limited technical agencies (Ulu Langat District Office file number PTD.UL.1/2/334/82 Semt). The local planning authority too did not give considerations, particularly on the possibility of abandonment and providing its countermeasures.²²⁸

Even the current TCPA's provisions, for example section 22(2) of the TCPA too, does not provide the planning authority with a duty to refer to the relevant technical agencies—such as MHLG and the Department of Mineral

²²⁷ Syarikat Perumahan Negara Berhad file number: SPNB/Taman Lingkaran Nur 4.

²²⁸ Pejabat Tanah dan Daerah Ulu Langat file number: PTD.UL.1/2/334/82 Semt; Syarikat Perumahan Negara Berhad file number: SPNB/Taman Lingkaran Nur 4.

and Geoscience and JAS, when considering the application for planning permission.

Similarly, there was also no Environmental Impact Assessment Reports (EIA) carried out by the developer, particularly in respect of the soil structures, as the purported activities would not fall under the ‘prescribed activities’.

Likewise from the contentions and elaborations in the first case study, there is still a lack of mandatory, multi-criteria evaluation and multi-criteria decision making (MCDM) in the planning process and absence of comprehensive study/assessment/evaluation over housing development projects on part of the planning authorities, which has partly contributed to the abandonment of the project and its consequences.

Even if the above matters (the mandatory multi-criteria evaluation decision making and multi-criteria decision making (MCDM) in the planning process) exists in the development plans, the decisions in *Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* and *Chong Co Sdn. Bhd* which tend to undermine the importance of complying with the development plan as provided in section 22(2)(a) of the TCPA in dealing with the applications for planning permission, may mar the effectiveness of the purported planning permission, which the development plans could have provided measures for facing the problems of abandoned housing projects. Further, the ensuing consequences, emanating from this problem as illustrated in the first case study above, may also occur.

Just as much as has been elaborated in the first case study, insofar as the instant abandoned housing project is concerned, the local planning authority may be liable for negligence or breach of duty for failure to exercise due care in granting planning permission and for failure to exercise proper planning control which had partly caused abandonment of the project. This is being so, it is opined, as there is no immunity provision in any statutory provision, particularly in the TCPA, conferring immunity on the local planning authority, against any breach of duty and negligence on their part, as compared to and provided for the local authority pursuant to section 95(2) of the SDBA. However, as emphasised in the first case study, this legal action shall be subject to the provisions in the Public Authorities Protection Act 1948 (Act 198) (revised 1978), for example, pursuant to section 2(a) of this act, the legal action must be commenced within three years from the default of that authority.

CONCLUSION AND RECOMMENDATIONS

The planning authorities in Peninsular Malaysia must apply multi-criteria evaluation and multi-criteria decision making (MCDM) in the planning process involving housing development, recognize factors leading to housing abandonment and provide countermeasures for addressing the same and its consequences. So far there is none, insofar as the District of Hulu Langat and Mukim of Cheras are concerned. The development plan, especially the Local Plan, providing the multi-planning-criteria for housing development such as measures to avoid and to settle problems of abandoned housing projects and its consequences, has to be expeditiously gazetted to prevent any *ad hoc* planning.

Even though there is a dual administration of State Authority and planning authority, which has contributed to the inefficiency and ineffective control of land uses, alienation and subdivision of land and planning control, any problem emanating from this, can at least be minimized, if not eliminated, by way of better integration and coordination between the authorities--the State Authority, planning authority, building authority, housing authority (MHLG) and the other relevant technical agencies.

EIA report should also be submitted by the applicant developer according to the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 (P.U.(A) 362/87) of the Environmental Quality Act 1974, irrespective of the measurement or size of the housing project. For this purpose, such an amendment has to be made to item 7 of the Schedule Order to the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 of the Environmental Quality Act 1974 (Act 127).

As far as both of the housing projects are concerned (Phase II Taman Harmoni and Phase 1A Taman Lingkaran Nur), there was yet, at the time of the issuance of the relevant planning permission, any or comprehensive gazetted development plans (local and structure plans) dealing with and applying multi-criteria evaluation and multi-criteria decision making (MCDM) in the planning process involving housing development (especially, the suitability of the project's location and the counter-measures to face and prevent the problems and occurrences of abandoned housing projects), which the planning authority could refer to. Even the current gazetted Selangor Structure Plan, and the Cheras Local Plan too do not provide factors leading to housing abandonment and do not provide measures and methods to solve the problem and its ensuing consequences and losses.

In absence of the gazetted development plans, insofar as both housing projects are concerned, it was the discretionary practice of the planning authority, to refer to certain relevant technical agencies for comments and approval of any purported application for planning permission to undertake housing development (Rule 8 of the Planning Control (General) (Selangor) Rules 2001). However, this practice has yet been to be put into the mandatory provisions of the TCPA. The absence of such a mandatory statutory provision may lead to the local planning authority not referring to them for approvals or views or setting aside their conditions, views, and approvals/disapproval. The technical agencies include the JPBD, Department of Public Works ('JKR'), JPS, Sewerage Service Department ('JPP'), JAS (in term of the suitability project location for drainage purposes), Department of Health (JK), TNB, Department of Water Supply (JBA), District and Land Office, Highway Board (LLM), Department of Minerals and Geoscience (in respect of soil structures), MHLG (in respect of the capability of the applicant developer insofar as Act 118 is concerned) and other relevant agencies, for the purpose of commenting and reference over the proposed housing development to be carried out by the applicant developer. For this purpose, a new supplemental mandatory provision needs to be inserted into section 22(2) (Treatment of Applications) of the TCPA. The additional provision should also state the obligation and mandatory adherence to the development plans. Thus, the proposed provision should read:

Addition to Section 22(2) of the TCPA

*'In dealing with an application for planning permission, the local planning authority shall take into consideration...-
(bc) the necessary views of the technical agencies' (emphasis added).*

The word 'technical agency' should also be interpreted and inserted into section 2 of the TCPA as follows:

Addition to section 2 of the TCPA

'Technical agency' means any relevant authority which shall be consulted for necessary views, insofar as the local planning authority deems necessary, for the purpose of issuing any planning permission by the local planning authority''.

The planning permission and all the conditions stipulated should be made certain and not be subject to variation from the date of the issuance, during the course of construction, development and rehabilitation of the project until

the date of the application of CF/Certificate of Completion and Compliance ('CCC') by the qualified persons/Principal Submitting Person ('PSP'). This is to avoid any possible problems to the developer, as evident in both case studies, which had led to abandonment, unless the planning authority and the technical agencies agree to bear all the ensuing costs as a consequence to any change or variation made by the developers. Therefore, a new provision should be inserted into section 22 of the TCPA to the effect of the following:

Addition to Section 22(7) of the TCPA

'The conditions for the planning permission so granted, shall be irrevocable and shall not be subject to any variation unless the local planning authority or the technical agencies, as the case may be, shall bear all the costs and expenses to be incurred by any applicant consequent to the carrying out of the required variations except as otherwise provided in this Act'

Similar should be the case for the conditions of the approved building plan and other plans. To effect this suggestion, a new supplemental provision should be inserted into section 70 of the SDBA, viz clause 18A, which reads:

Addition to section 70 of the SDBA, i.e. section 70(18A)

'The plans so approved and the conditions so imposed by the local authority or the technical agencies, shall be irrevocable and final for the purpose of issuance of certificate of completion and compliance, pursuant to this Act or any By-laws made thereunder and if later in the event, there is any variation in the plans or conditions for the purpose of the issuance of the said certificate, required by the local authority or the technical agencies, as the case may be, the local authority or the technical agencies concerned shall make good any losses incurred as the result of such required variation'

Finally, regarding the human resource, inefficient administration, and logistics problems, it is suggested adequate priority, administrative revamps and monetary provisions should be provided by the State and Federal Governments to ensure the efficiency of the local authority and the technical agencies machinery.

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TAX POLICY AND ECONOMIC PROSPERITY

Amin Purnawan

INTRODUCTION

The effect of tax policy on economic prosperity has long been a matter of debate.²²⁹ The relationship between corporations, taxes and the state is interesting to study through the optics of corporate income tax. The regulation of corporate income tax is unique because it is one of the ways in which the state directly intervenes in corporate affairs. When corporate tax was first adopted, “in fact” there was a dominant view that tax was mainly used as a tool to regulate company management in relation to other stakeholders as well as the state.²³⁰ Taxation is a concrete, objective and real relationship between the state and its people.²³¹

Tax imposition is basically a state coercion of economic units to reduce their income by paying taxes. The results of tax payments by individual and corporate economic units constitute revenue for the state in the State Budget. The revenue is used to finance the availability of public goods and services that cannot be fulfilled by the public separately (private goods).

The rejection of state involvement in economic activity was expressed by Milton Friedman. The objection is over the concept of welfare state, for him the prosperity system for all is a “fraud against people who are still working and paying taxes”. He is one of the few economists who still believe strongly in classical capitalism. In his opinion, the affairs of the state were only a matter of the army and police, who protected the lives and property of

²²⁹ Joel Slemrod and Jon Bakija, *Taxing Ourselves A Citizen's Guide to the Debate over Taxes*, The MIT Press, Cambridge, London 2008, p. 99.

²³⁰ Reuven Avi-Yonah, *Corporations, Society, and The State: A Defence of The Corporate Tax*, Paper 04-006, John M. Olin Center For Law and Economics, University of Michigan, 2004, p. 1.

²³¹ Masdar Farid Mas'udi, Ro'is Syuriah PB NU, in Seminar and Book Review “Pajak itu Zakat” organized by Fakultas Syari'ah IAIN Walisongo in collaboration with Kantor Wilayah Direktorat Jenderal Pajak Jawa Tengah I, Semarang, 24 November 2010.

its inhabitants (“the state as a guard”). Especially the state must not interfere with the economy and collect higher taxes from its people.²³²

In fact, taxes are a very important source of income for a country. The tax not only functions as a source of government funds, but also functions as a tool to regulate the economy and welfare of the people. An effective taxation policy can play a role in maintaining economic balance and inflation.

The government is currently in a dilemma, on the one hand we want to reduce dependence on foreign debt to cover the deficit, and therefore increasing taxes is one solution. But on the other hand, overly depressed business world will cause investment sluggishness, which in the end is increasing unemployment.

The function and role of taxes for the development of a country is very important and vital. Therefore, the government is so serious in encouraging its citizens to obey paying taxes. As for the community, taxes are a burden that will reduce their wealth. However, both for government and society, the existence of taxes is not only economically sensitive but also politically.

The strong tax linkage with economic and political interests and goals is what makes it an icon that is not only important but also crucial. Even this connection often causes controversy, polemics, and social costs that are not small. Precisely taxation policy is an inseparable part of economic policy or state revenue policy (fiscal policy).²³³

This paper will discuss about how the influence of tax policy on people’s economic prosperity.

DISCUSSION

Tax collection by the taxation apparatus has several implications. First, paying taxes in real terms will reduce taxpayers’ money that can be spent (disposable income). Therefore taxpayer will always look for ways to reduce the burden of tax payments, if necessary avoid these obligations. Efforts by taxpayer can be in the form of tax planning (which is justified by law), or by tax evasion (which is a form of criminal acts in the taxation field).²³⁴

²³² Paul-Heinz Koesters, *Tokoh-tokoh Ekonomi Mengubah Dunia: Pemikiran-pemikiran yang Mempengaruhi Hidup Kita*, PT Gramedia, Jakarta, 1988, p. 253.

²³³ Syofrin Syofan, and Ansyhar Hidayat, *Hukum Pajak dan Permasalahannya*, Refika Aditama, Bandung, 2004, p. 3.

²³⁴ Hunter, T. Wilard, *The Tax Climate for Philanthropy*, Garamond/Pridemark Press Inc., USA, 1968.

Besides that there are efforts to avoid tax (tax avoidance) that is engineering that should still remain within the frame of the provisions of tax legislation. This means that tax avoidance can occur according to the contents of the provisions in the tax legislation itself.²³⁵

Second, relating to the provisions on tax rates or tax rates in general is very interesting taxpayer, because the rate is a variable that gives effect to the welfare of the taxpayer in the form of a reduction in income streams used to form assets in economic activities carried out by the taxpayer.

Third, the taxation apparatus in the setting of Indonesian taxation legislation is given a very large authority so as to give birth to a sub-ordinational connection construction. In more extreme terms the relationship between the tax authorities and taxpayer without a mechanism of checks and balances. From the point of view of the tax apparatus, the granting of authority to this superior position can be justified, because the constructed connection construction is between citizens and the state. However, such a view cannot be justified. Reduction of the state's position through the representation of the taxation apparatus has the potential to be negative and counterproductive. The personal error of the taxation apparatus has the potential to be justified because it was raised at the level of state action.²³⁶

Changes in perspective on taxes can be seen by comparing the views of experts, namely Jean Bodin (1530-1596), Thomas Hobbes (1588-1679), and Adam Smith (1723-1790). Bodin, an early thinker on state sovereignty, argued that a sovereign state should earn income from its wealth. Thomas Hobbes in *Leviathan* began to change the way of thinking by stating that taxes are the main source of state revenue. Hobbes argues that when a country cannot fund public facilities it means that the country is not making the best use of these facilities. But Adam Smith was very doubtful about state ownership, in his view, taxes should be the main source of state revenue. According to him, the tax law provides special instruments for the state to force its citizens to pay taxes, however the nature of tax coercion must be shared fairly as a tax burden.²³⁷

²³⁵ Fidel, *Cara Mudah & Praktis Memahami Masalah-Masalah Perpajakan Mulai dari Konsep Dasar sampai Aplikasi*, Rajagrafindo Persada, Jakarta, 2010.

²³⁶ Tri Budiyo, "Pemusatan Otoritas Aparatur Perpajakan dan Kejahatan Pajak" article in *Jurnal Hukum Terakreditasi*, Vol. XV No. 3, Desember 2003, FH Unissula, Semarang, p. 546.

²³⁷ Widi Widodo and Dedy Djefris, *Tax Payer's Rights*, Alfabeta, Bandung, 2008, p. 42-43.

Indonesia can be classified as a country that adopts a welfare state²³⁸. In the Preamble to the 1945 Constitution of the Republic of Indonesia, “Social Justice for All Indonesian People and National Purpose in particular is to advance public welfare”.²³⁹ The concept is not only as a legal ideal (*rechtsidee*) but also as a state ideal (*staatsidee*). The politics of national law must be able to encourage and fill all elements in the national legal system so that it works in accordance with the ideals of the nation, the goals of the state, and the ideals of the law as contained in the Preamble to the 1945 Constitution.²⁴⁰

Through activities in the field of human economics try to meet the welfare. Similarly, in fact the law was made for the welfare of humanity and not human beings for the law or the law for the law itself.²⁴¹ The economic development of a nation must be followed by legal development so that economic development can continue to be guarded and directed to achieve the prosperity of the people.

Duties and obligations of the welfare state or material law state are in the context of meeting the demands of society. That the legal function in the effort to realize public welfare has been stated in the Preamble to the 1945 Constitution which states, “Then, in order to form an Indonesian Government that protects all Indonesian people and all Indonesian bloodshed and to promote public welfare, educate the nation’s life and participate in carrying out world order based on independence, eternal peace and social justice, the National Independence was drafted in an Indonesian Constitution”.

There are two important things in the quote above, namely the principle of ‘the rule of law’ and the principle of ‘legal function’. The problem is how in order to achieve the above objectives, the two principles can work in balance, meaning that in this complex society, the rule of law principle remains the foundation in the effort to achieve the country’s goals which must fulfill the public interest efficiently, quickly and appropriately (sensibly). The

²³⁸ The welfare state appears as an answer to the social inequality that occurs in the liberal economic system. The state has *ermessen freies*, namely freedom to participate in all social, political and economic activities with the ultimate goal of creating public welfare (*bestuurszorg*). The state ideology has evolved from a Political state to a Legal State and finally a Welfare State. see Mahfud Marbun, *Pokok-pokok Hukum Administrasi Negara*, Liberty, Yogyakarta, 1987, p. 42.

²³⁹ According to the concept of the welfare state, the function of the state is not merely as a night-watchman state, or guardian of public security and order, but also bears the responsibility to realize social justice, public welfare and the greatest prosperity of the people.

²⁴⁰ Moh. Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi*, Pustaka LP3ES, Jakarta, 1998, p. 13.

²⁴¹ Satjipto Rahardjo, *Membedah Hukum Progresif*, Penerbit Buku Kompas, Jakarta, 2006, p. 151.

welfare and regulatory state is the state committed to programs, government is a problem solver, as well as the guardian of law.

In reality, the more the state can meet the demands of the people, the more the demands of the people which are often out of balance with the state's ability to fulfill them (state action creates expectation, demands increase faster than the system's ability to meet them). The hope of the community is growing constantly. The pattern of growth in community expectations as well as the pattern of growth of interests is very difficult to change, this often leads to a critical situation so that the 'modern welfare state is ungovernable'.

Increasingly excessive community expectations cannot always be fulfilled by the state, along with the non-availability of the state's need for legislation as a means and basis for fulfilling the demands of the community. Based on a review of the Income Tax Law Number 36 Year 2008, it turns out that to implement it requires approximately nineteen Government Regulations, twenty-six Minister of Finance Regulations, and seven Decrees of the Minister of Finance.²⁴²

Taxes are a mainstay for a country that has a determination to be independent in financing development. Ideally, the more developed a country is, the higher awareness of the importance of paying taxes is indicated by the high tax ratio. Efforts to increase our tax ratio is still low compared to other countries, the government needs to do to drive the economy.²⁴³ The development of the economy will be able to encourage the realization of the welfare function of the people by the state (welfare state).²⁴⁴

In addition, public awareness will be awakened if people feel the benefits of paying taxes. How is it that people are willing to pay taxes if the tax funds are not clear about their use. How can people be willing to pay taxes if the state does not pay attention to the welfare of its people?

People are willing to pay taxes if the proceeds from tax revenue are not corrupt. The money must be fully used and budgeted for projects that benefit the community. There are three things that need to be considered to increase tax revenue, namely improving tax regulations, improving taxation tools

²⁴² Fidel, *Pajak Penghasilan (Pembahasan UU No. 36/2008 tentang Pajak Penghasilan dengan Komentar Pasal Per Pasal)*, Carofin Publishing, Jakarta, 2008, p. 21.

²⁴³ Overcoming this dilemma, Abdul Asri Harahap (2004) initiated the need for a new taxation paradigm. Namely, prioritizing the empowerment of taxpayers, so that awareness and obligations must increase. The mandatory tax ratio is the value of success achieved.

²⁴⁴ Amin Purnawan, "*Politik Hukum RUU Pajak*", in Wacana Harian Suara Merdeka, Semarang, 16 Desember 2005, p. 6.

that include administration, work procedures, and code of ethics and making people aware of the importance of taxes by providing benefits to the public.

Tax awareness, according to Rochmat Soemitro, requires an understanding of the functions and benefits of taxation. This understanding will lead to tax awareness (tax consciousness), subsequently arises the tax mindedness, and finally there will be tax discipline, where taxpayers will fulfill their obligations honestly and on time.²⁴⁵

Tax as money collected from the people, then naturally the state returns the money for the benefit of the people, by building social facilities and excellent public service standards. According to Edi Slamet Irianto and Syarifuddin Jurdi,²⁴⁶ transparency which is the basis for taxation democracy has not been done by the government, meaning that the government still manages taxes privately and for the benefit of social projects that do not directly touch broad public interests.

In economic terms, there are two principles to measure the fairness of the distribution of tax burden associated with income levels. These two principles can be used to answer how the tax burden is distributed fairly. First, the benefit principle is related to how much benefit one gets from the state. Second is the ability to pay principle, where the tax burden is related to the economic ability of taxpayers.²⁴⁷

In a dichotomous manner, there are two main functions of tax in relation to state life and create a tendency for people's behavior. The two main functions are the budgeter function and the regularend function. According to Rochmat Soemitro²⁴⁸, what is meant by the budgeter function is a function located in the public sector and taxes here are a tool or a source to put as much money into the state treasury, which in time will be used to finance state expenditures. While what is meant by the regularend function is that taxes are used as a tool to achieve certain objectives that are located outside the field of state finance.

The regulatory function can be interpreted as an effort by the government to encourage economic activities and provide justice to the community. The

²⁴⁵ Rochmat Soemitro, *Asas dan Dasar Perpajakan*, Jilid I, Eresco, Bandung, 1986, pp. 20-21.

²⁴⁶ Edi Slamet Irianto dan Syarifuddin Jurdi, *Politik Perpajakan Membangun Demokrasi Negara*, UII Press, Yogyakarta, 2005, p. 128.

²⁴⁷ Joel Slemrod and Jon Bakija, *Taxing Ourselves fourth edition a Citizen's Guide to the Debate over Taxes*, The MIT Press Cambridge, Massachusetts, London, England, 2008, p. 61.

²⁴⁸ Rochmat Soemitro, *Pajak dan Pembangunan*, Eresco, Bandung, 1988, p. 104-108.

regulatory function is very important in creating a business climate and competitiveness. If the current tax system weighs heavily on the business world, it will weaken competitiveness and will reduce investor interest. The government is demanded to be able to set tax rates and tax objects and provide targeted incentives to encourage priority industries, including small and medium industries.

The era of global competition requires the establishment of a fair tax rate and considers the rates used by other countries to attract foreign investment and strengthen the competitiveness of domestic businesses. This reality shows the need for a balance between the functions of the budgeter and regularend.²⁴⁹

The taxation system of the Company and private persons as shareholders causes double taxation. This phenomenon creates a cumulative burden on corporations.²⁵⁰

The theory of deliberative democracy states that the drafting of a democratic law / regulation guarantees all the interests of the community, if in the process of drafting it gives access and opens communication with all people.²⁵¹ Taxes, although used as the main source of state revenue, must not be arbitrary at the expense of sacrificing the interests of others. This theory can be used as a consideration to make a provision that regulates tax collection that still balances the interests of taxpayers with the interests of the tax authorities. Giving the opportunity to the community to participate in the formulation of regulations is one of the characteristics of this theory so as to create a regulation in accordance with the aspirations of the people.

A good law or statutory regulation is fair, in this connection the rules underlying tax collection should be in accordance with the conditions of justice. Justice in taxation policy can be seen from: first, justice in the relationship between the government and taxpayers, second, justice from the allocation of tax burden on various groups of people.

The problem is what form of justice can be applied in the politics of tax collection law. This is because in granting authority to the state to collect taxes in the face of two interests, namely the interests of receiving state cash are faced with the interests of the ongoing corporation. In my opinion,

²⁴⁹ Miyasto, *Sistem Perpajakan Nasional dalam Era Ekonomi Global*, Pidato Pengukuhan Guru Besar FE Undip, 1997, p. 28.

²⁵⁰ Ibid, p. 32.

²⁵¹ Lili Raşjidi, *Dasar-dasar Filsafat Hukum*, PT.Citra Aditya Bakti, 1999, p. 23.

justice that can bridge it is proportional justice. This means that any material laws and regulations regarding tax collection must reflect the fairness of the proportional tax burden for each citizen (corporation) as well as the balance of rights and obligations between taxpayer and the tax authorities.

As a state of law the goal to be achieved is to advance public welfare and social justice for all people. An impartial law is a necessity, because the law made does have a purpose, and the alignments of the law are in accordance with the direction the lawmaker wants. In the view of Roscoe Pound, as a pioneer of the Sociological Jurisprudence, law has a duty as social engineering and must be seen as a social institution that functions to meet the social needs of the community. The legal concept was further developed by Mochtar Kusumaatmadja, in the middle of the New Order era, as a means of community renewal.

Mochtar Kusumaatmadja, views that in developing countries, such as Indonesia, the legal function as a means of community renewal is seen as appropriate, to spur people to participate in the process of state development. But in its further journey, the law was created only to serve the interests of lawmakers and policy makers only. Law, which in this case is defined as regulations products of authorized institutions (legislative and executive) and court / judge decisions and government policies (discretion) (including Local Government), are often complained of being impartial to the poor.

THE CONCEPT OF SOCIO-ECONOMIC JUSTICE IN ISLAM

Justice is the most important pillar in Islamic economics. The enforcement of justice has been emphasized by the Qur'an as the main mission of the Prophets sent by Allah (Qur'an Surah 57: 25), including the enforcement of economic justice and the elimination of income inequality.²⁵²

Allah, who revealed Islam as a system of life for all mankind, emphasized the importance of upholding justice in every sector, both economic, political and social. The commitment of the Qur'an regarding the enforcement of justice is very clear. This can be seen from the mention of the word justice in the Qur'an reaching more than a thousand times, which means the third-order word that is mostly called the Qur'an after the word Allah and *'Ilm*. In fact, Ali Shariati said, two-thirds of the verses of the Qur'an contain the necessity to uphold justice and hate cruelty, with the expressions of the words *zhulum*,

²⁵² http://ppa.ub.ac.id/index.php?option=com_content&view=article&id=3&Itemid=57, Agustianto, "Keadilan Ekonomi Islam", accessed 9 Oktober 2010.

ism, dhalal, and others.²⁵³ Therefore, the objectives of socio-economic justice and equitable distribution of income / welfare are considered inseparable parts of Islamic moral philosophy.

The commitment to upholding socio-economic justice to Western economic concepts (especially capitalism), is the result of social groups and political pressures. To realize socio-economic justice, they took several steps, mainly through taxation. Even though there are businesses through tax instruments, these steps, according to Milton Friedman, prove to be ineffective enough to overcome injustice, because in fact taxes always benefit employers, and tax officials along with their groups.²⁵⁴ So, the concept of socio-economic justice in Islam differs fundamentally from the concept of justice in capitalism and socialism. Socio-economic justice in Islam, besides based on spiritual commitment, is also based on the concept of universal brotherhood of fellow human beings.

The great commitment of Islam to brotherhood and justice, demands that all resources that become the holy mandate of God, be used to realize *maqashid shari'ah*, namely the fulfillment of the needs of human life, especially basic needs (primary), such as clothing, food, shelter, education and health. Brotherhood and justice also demand that resources be distributed fairly to all people through fair policies. Furthermore, in order to realize the ideals of socio-economic justice, Islam explicitly condemns the concentration of assets of wealth in certain groups and offers the concept of *zakat*, *infaq*, *alms*, endowments and other institutions, such as taxes, *kharaj*, *jizyah*, *dharibah*, export-import excise tax and so.

TAX POLICY AND ECONOMIC PROSPERITY: LEGAL PERSPECTIVES

Tax law, also called fiscal law, is a whole of regulations that cover the authority of the government to take someone's wealth and hand it back to the community through the state treasury, so that it is part of public law, which regulates the legal relations between the state and people or (legal) entities that are obliged to pay taxes (taxpayers).²⁵⁵

²⁵³ Majid Kahduri, *The Islamic Conception of Justice*, Baltimore: Johns Hopkins University Press, London, 1984, p. 10.

²⁵⁴ Lihat, Milton Friedman, *Capitalism and Freedom*, Chicago, The University of Chicago Press, 1962, p. 172.

²⁵⁵ Rochmat Soemitro, *Asas dan Dasar Perpajakan, Jilid I*, Eresco, Bandung, pp. 7-8.

The duty of tax law is to examine the conditions in society that can be linked to taxation, formulate them in legal regulations and interpret these legal regulations. In the meantime it is very important that it does not have to be taken for granted the economic background of the conditions in the society.²⁵⁶

Tax from a legal perspective, emphasizes more as an engagement arising from the law. That is, the attachment between the government (tax authorities) with the public (taxpayers) is based solely on the provisions of the Taxation Law (the principle of legality). In Indonesia, the principle of legality is contained in the provisions of Article 23A of the 1945 Constitution of the Republic of Indonesia which reads: "Taxes and other levies that are coercive for state purposes are regulated by law". This is in line with the tax philosophy in the United Kingdom which says: "No taxation without representation", while the tax philosophy in the United States says: "Taxation without representation is robbery".²⁵⁷

According to Miyasto, taxes have three main functions, namely:²⁵⁸

- a. Budgeter function, as one source of government revenue to finance development activities;
- b. Regulation function, whose role is to regulate resource allocation, income distribution and consumption;
- c. Stabilization function, a fiscal policy tool to maintain economic stability.

Tax has a very important role in the life of the state, especially in the implementation of development because the tax is a source of state revenue to finance all expenses including development expenses. According to R. Santoso Brotodihardjo, the function of the budgeter (the function of the budget) is a function that is located in the public sector, and taxes here are a tool (or a source) to put as much money into the state treasury as time will be used to finance state expenditure. These taxes will mainly be used to finance routine expenses, and if after that there is still leftover (commonly called a surplus), then this can be used to finance government investment.

²⁵⁶ Santoso Brotodihardjo, *Pengantar Ilmu Hukum Pajak*, Eresco, Bandung, 1989, p. 1.

²⁵⁷ Mardiasmo, *Perpajakan*, Edisi Revisi, Andi, Yogyakarta, 2001, p. 9.

²⁵⁸ Miyasto, "*Segi-segi Keadilan Kebijakan Fiskal dalam Pembangunan Nasional*", Makalah Seminar Nasional Perpajakan dalam rangka Dies Natalis Undip Ke-41, hosted by FE Undip Semarang, 18 Oktober 1997, p. 9.

The regulating function (regularend), that is to say, taxes are used as a tool to achieve certain goals which are located outside the financial sector and these regulating functions are aimed at the private sector. In his book entitled *Fiscal Policy, Foreign Exchange Control and Economic Development* (written in 1954), Prof. Soemitro Djojohadikoesoemo said that fiscal policy as a development tool must have a simultaneous goal, namely to directly find funds to be used for public investment.²⁵⁹

In its development, taxes are indirectly used to channel private saving towards productive sectors, as well as being used to prevent expenditures that hamper development or which are “wasteful” in various forms. Furthermore it is said that in order to achieve these objectives the Fiscal Policy as a development tool must be based on a combination of high tax rates (both direct and indirect taxes) with a flexibility that is prevalent in the taxation system in the form of tax exemptions and incentives encouragement to stimulate the expected private investment.

In addition to the aforementioned functions, taxes also have a stability function, where with the tax, the government has funds to carry out policies related to price stability so that inflation can be controlled. This can be done, among others, by regulating the circulation of money in the community, tax collection, the use of tax effectively and efficiently.

In addition, taxes also have a function of income redistribution. The tax that has been collected by the state is used to finance all public interests, including to finance development so that it can open up employment opportunities, which in turn can increase people’s income. As the main source of state revenue, taxes are used to finance state expenditures in carrying out state tasks such as personnel expenditure, goods expenditure, maintenance expenditure, infrastructure procurement and so on. Furthermore, tax revenue is also used to regulate economic growth, for example through granting tax relief for investors who will invest, imposing high import duties on imported goods in order to protect domestic production.

The nature of tax collection is to force taxpayers to meet their tax payments, and to those who do not meet their tax obligations, the state can collect them by force. That is, if the tax debt is not paid, then the tax debt can be collected by juridical violence, for example by sending a forced letter (*dwangschiff*) in the name of justice with an executorial title, followed by confiscation (*beslag*), and can also be carried out with hostage (*gijzeling*,

²⁵⁹ Rochmat Soemitro, *Asas dan Dasar Perpajakan*, Eresco, Bandung, 1986, p. 34.

lijfdwang, dwangsom), all of which are coercive instruments carried out by law (according to legal norms).²⁶⁰

Tax reform carried out by a country is a way to improve and enhance the global economy through taxes. Reforms in taxation will have implications for the extent of the tax base, in this case increasing the type of income as a tax object and affecting the imposition of tax rates, and efforts to improve tax administration become more perfect.²⁶¹

Since January 1, 1984, our country has entered a new era in the field of national taxation which replaced the taxation system inherited from the Dutch colonial government. Reasons for the state to carry out tax reforms include:²⁶²

- a. To stabilize an uncertain economy due to the influence of international and national economies.
- b. Efforts to divert the State Budget revenue sector from oil and gas to tax as a more promising source.
- c. Efforts to follow world regulations, especially in terms of funding (foreign loans) which require the existing tax structure must be adjusted to the conditions it should.

Through tax reform, it is expected to be able to create equality between taxpayers and tax authorities. During this time centralization of authority occurred at the Directorate General of Tax. The tax apparatus is still given excessive authority, namely collecting taxes, supervising taxpayers compliance and cracking down on taxpayers that is considered cheating.

The general principles of taxation are: efficiency, equity, neutrality, administrative feasibility need to balance between the four principles because of the possibility of conflicts of interest.

Horizontal equity is that people who have the same ability to pay taxes should bear the same tax burden. Whereas vertical equity that people who have a greater ability to pay taxes should bear a greater tax burden. This equity is mainly related to the sense of fairness.

The politics of national law in the field of taxation is contained in Article 23A of the 1945 Constitution of the Republic of Indonesia, which stipulates

²⁶⁰ Amin Purnawan, *Aspek Keadilan dalam Penagihan Pajak dengan Surat Paksa*, Postgraduate Thesis Diponegoro University, Semarang, 2003, p. 24.

²⁶¹ Sony Devano and Siti Kurnia Rahayu, *Perpajakan Konsep, Teori, dan Isu*, Kencana Prenada, Jakarta, 2006, p. 77.

²⁶² *Ibid*, pp. 77-78.

that, “taxes and other levies which are forcing the State’s requirements are regulated by Law”. This means that the tax levied by the government in carrying out the tax function to support tax revenue to the state treasury and also support the improvement of economic and social growth, must obtain the people’s approval through their representatives who sit in the People’s Representative Council.

The way to do it, the government can do, among others, through tax extensification and intensification. This relates to the need to increase the number of taxpayers, due to the fact that our tax ratio is still very low (not reaching 13% of Gross Domestic Product). By capturing new taxpayers, reducing tax rates and tax amnesty, it is hoped that it can accelerate economic recovery and a significant amount of tax revenue and can be used to improve people’s welfare.

In the practice of political modern countries, taxes become a source of state revenue that will be used to finance social, political, humanitarian and other community development projects, where the authorities request approval of political factions (political parties, mass organizations and other stakeholders). The state bases its policies on broad public aspirations. In the case of *zakat*, the expenditure is determined by religious orders, it must be separate from the public finances of the state - the important targets of *zakat* are humanity and Islam.²⁶³

The politics of national law development in the field of taxation, in the context of changing the tax law (legislation) must be in line with the basis and direction of politics. In this case, Bagir Manan²⁶⁴ believes there are four main targets for the development of laws and regulations, namely:

(1) continuing the renewal of laws and regulations from the colonial period (2) renewing laws and regulations that were formed after independence but were outdated (3) creating new legislation needed (4) entering into or entering into various international agreements in the national interest .

The state, thus through the government together with the People’s Representative Council if it is going to change the law in the field of taxation certainly remains on the corridor of legal certainty and justice with the aim of upholding the rule of law. For this reason, the establishment of tax law must

²⁶³ HM. Hidayat Nurwahid, “*Pengantar: Mencari Keadilan Politik Melalui Pajak*”, in Edi Slamet Irianto and Syarifuddin Jurdi, op. cit. p. xix.

²⁶⁴ Bagir Manan, “*Reorientasi Politik Hukum Nasional*”, Makalah delivered on Diskusi IKAPTISI UGM, Yogyakarta, 1999, p. 14.

pay attention to the right and correct legal principles and rules including its implementation. Considering that there are several laws that are formed that have similar characteristics to colonial law, if not the contents of the rules, the formulation of the rules, even the colonialist application (such as the General Provisions Law and Tax Procedures and the Income Tax Act relating to the tax collection system).²⁶⁵

Corporations are profit-seeking business institutions. This process demands competitive conditions as an efficient way to realize freedom in the economic field. Efficiency is a keyword in the context of a free market, that is, the ability to produce the highest quality goods or services at the lowest cost.²⁶⁶ If capital is taxed, capital will increase the selling price of the product.²⁶⁷

Economic activities are carried out by economic actors, both people and companies, continuously, openly, in order to obtain profits.²⁶⁸ The concept of Indonesian law in economic activities is in the context of achieving a just and prosperous society based on Pancasila, the Pancasila family economic concept, and the people's economic concept to defend the interests of the people.²⁶⁹ Therefore, legal reforms in the economic field must continue to be made in order to be adjusted to the pace of development of local, regional and global communities.

Economic development is very important for improving the level of community welfare. Therefore, in the context of improving welfare, Indonesia needs sustainable income growth which is basically sourced from increasing labor input, capital input, and improving productivity in the economy. An increasingly large share and expansion of the use of factors and improvements in productivity occur in the company as a capital fertilizer machine. Taxes must be regulated through legal mechanisms.²⁷⁰

The main requirement in carrying out a country's taxation system is the availability of a legal basis that underlies it. The basic principle in the tax

²⁶⁵ Bagir Manan, "Peranan Hukum Menuju dan Dalam Indonesia Baru", Makalah delivered on Munas KAHMI, Surabaya, 2000, p. 6.

²⁶⁶ Richard A Posner, *Economic Analysis of Law*, Fifth Edition New York: Aspen Publisher, 1998, p. 13.

²⁶⁷ Mahmud Abu Saud, *Garis-garis Besar Ekonomi Islam*, Gema Insani Press, Jakarta, 1991, p. 61.

²⁶⁸ Sri Redjeki Hartono, *Hukum Ekonomi Indonesia*, Bayumedia Publishing, Malang, 2007, p. 40.

²⁶⁹ Ibid, pp. 45-46.

²⁷⁰ Saut P. Panjaitan, "Politik Pembangunan Hukum di Bidang Investasi Suatu Keniscayaan Konstitusi Ekonomi", in *Jurnal Konstitusi Vol. 7 Nomor 2*, April 2010, pp. 52-53.

legal system is that the power to impose taxes is generally obtained by the imposition of constitutional sanctions with a condition that the taxation is regulated through the legal mechanism in the country concerned.²⁷¹

Emphasis on the principle of legality for taxation has been found in the constitutions of various countries in the world, including the constitution of Australia (s. 51), Belgium (Art. 170), Canada (Art. 93), France (Art. 34), Italy (Art. . 23), Mexico (Art. 31), and Spain (Art. 133).²⁷² Indonesia provides a constitutional basis for the taxation system in the 1945 Constitution of the State of the Republic of Indonesia Article 23A.

The most important issue when establishing principles of legality is how about the interpretation or interpretation of the principles themselves. Thuronyi identified five areas that could potentially lead to disputes, namely:²⁷³

- 1) Where taxes are imposed through administrative regulations (in Indonesia through the Minister of Finance Regulation / Minister of Finance Decree, Director General of Tax Decree, Director General of Tax Circular, and Director General of Taxes).
- 2) Where the tax authority is involved in an individual agreement with the taxpayer, for example an agreement to reduce the amount of tax owed due to incompetence or the taxpayer does not have enough funds to pay the actual amount owed. This can lead to debate that taxes are not levied through applicable legal mechanisms.
- 3) Where the tax authority has the discretion or administrative discretion that is not limited in deciding the granting of a privilege to certain taxpayers (tax privilege), such as granting tax amnesty to a particular taxpayer group.
- 4) Where there is a disagreement about the role of court judges required to provide proper interpretation of tax law in order to prevent the formation of new tax laws by their own decisions.
- 5) Where tax laws must be renewed every year.

Indonesia is still known as a high cost economy. Some variables which are thought to cause high cost economy include: 1) unfavorable trading

²⁷¹ Widi Widodo and Dedy Djefris, *Tax Payer's Rights*, Alfabeta, Bandung, 2008, p. 68.

²⁷² H. Arbutina, *Taxation in Croatia: Developments in the field of Taxpayer's Right and Obligations*, in Duncan Bentley, *Taxpayer's Right, Theory, origin and implementation*, AH Alphen aan den Rijn, Kluwer Law International, p. 221.

²⁷³ Victor Thuronyi, "*Comparative Tax Law*", in Duncan Bentley, *ibid.*, 1997, p. 222.

structure; 2) protection that is too long and; 3) levies that have nothing to do with production activities.

The government through various strategic policies has indeed made efforts to improve national economic efficiency. Various deregulation policies, trimming some types of fees that have nothing to do with production activities, simplifying the national and regional taxation systems are examples of these efforts. But there are still a number of things that can be done in order to improve efficiency, especially in the taxation field.

The national tax strategy in the second reform has begun to be maximally directed to fulfill two main functions of tax simultaneously, namely the budget function and the regulatory function. The provisions of national taxation in addition to trying to explore state revenue, are also directed at increasing efficiency, structure progressiveness and competitiveness of domestic products abroad. Nevertheless, there are still a number of things that still need attention in our taxation system, especially those related to efforts to improve the ability of domestic businesses to compete in the global market, strengthen the structure of the national economy, improve efficiency and further enhance fairness in taxation.

The strategy to reduce corporate income tax rates is intended not only to increase domestic investment, but also to strengthen the competitiveness of domestic entrepreneurs against foreign entrepreneurs in the international market. So that the tariff reduction does not result in a decrease in government revenue from the tax sector, the tariff reduction is followed by an increase in the tax base.²⁷⁴

According to Soemitro Djojohadikusumo the function of the budgeter and regulating is a form of fiscal policy. These two functions when juxtaposed will give the impression as if they are in conflict with one another. Emphasis on the function of the budgeter will give the impression of sacrificing the regular function. Instead the emphasis on regular functions gives the impression of sacrificing the function of the budgeter. The dynamics created between the two functions are tug-of-war. Such an impression is only true if the effect of this policy is seen in the short term. But in the long run it is not always true, because the emphasis on regular functions will actually lead to a multiplier effect (accelerating effect) on tax revenue (budgetary function).

From the description above, tax collection that has been carried out by the Government shows that the results of tax collection today, have been

²⁷⁴ Ibid.

able to finance approximately 80% of the State Budget, and the tax revenue target is always dynamic, because the amount of the revenue target always increases every year with Indonesia's macroeconomic conditions.

In line with economic, information technology, social and political developments, the Government needs to make changes to the Taxation Law. The amendment aims to provide more justice, improve services to taxpayers, increase certainty and law enforcement, and anticipate progress in the field of information technology and changes in material provisions in the field of taxation. In addition, the amendment is also intended to increase the professionalism of the taxation apparatus, increase the transparency of tax administration, and increase the voluntary compliance of taxpayers. At this time, the Government together with the People's Representative Council have completed amending the General Provisions Act and Tax Procedures, the Income Tax Act, and the Value Added Tax Law. In this case, the Tax Law must be able to provide the necessary guarantees to provide justice and legal certainty, both for the state and for its citizens including corporations.

As explained above, one of our national goals is to advance public welfare. To realize this goal, a sustainable source of financing is needed, with the main source of funding coming from tax revenue. In realizing this, participation from the whole community is needed.

The expectation of entrepreneurs / investors is the existence of incentives from the government. Namely the policy package that is providing convenience, both in terms of licensing, taxes, customs, interest rates and others. This is expected to reduce production costs, capital costs and increase competitiveness.

Such thinking is realistic, considering that if investment goes well, industries develop, absorb labor, people's purchasing power increases, and tax payments will flow from them. Indirectly the poor population can be reduced, through the use of taxes by various other institutions / departments.

CONCLUSION

The effect of tax policy on economic prosperity is very strong. The issue of justice and general welfare is a structural problem that cannot be evenly reached without state involvement. The role of corporations is very large in the country's tax revenue, on the other hand corporations are very vulnerable to government policies, such as the imposition of tax rates on corporations and dividends.

It is necessary to harmonize and synchronize tax regulations with corporate regulations and consider tax regulations of other countries. So it is necessary to carry out a political reconstruction of a fairer corporate tax law in accordance with Pancasila values through a gradual reduction in tax rates. Reformulation of double taxation on corporate income and dividend tax is final.

A country's taxation system consists of three elements, namely tax policy, tax law, and tax administration. These three elements support one another, inseparable. All three elements must be equally strong and equally stable so that they can sustain the taxation system.

In this study found the fact (social facts) that corporations in Indonesia bear a considerable tax burden but have not been offset by the fulfillment of taxpayer's rights from the tax authorities. So that it is necessary to rearrange the legal politics of Corporate Income Tax that can be done through changes to the Income Tax Act, especially in relation to the determination of a single tariff into a progressive rate, and the equalization of the tax burden through optimization of tax collection of taxpayer Individuals, encouraging creative industries (economic based knowledge), encouraging state-owned enterprises performance, and increasing sources of state budget revenue outside taxes, such as the optimal use of Indonesia's natural wealth for the greatest prosperity of the people.

The government needs to make efforts to increase competitiveness and encourage investment through business friendly tax law politics. With this business friendly, a conducive investment climate will be created later. The ideal body is if the tax does not interfere with economic activity. So it is necessary to reduce the Corporate Income Tax rates to increase compliance, expand the tax collection base (tax base) through intensification and extensification of personal income tax. Tax reform must be able to increase competitiveness, and the excitement of investing through the provision of appropriate tax incentives / facilities. Since, the development of the business world will increase tax revenue.

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THE DEVELOPMENT OF UNLAWFUL DOCTRINE OF CORRUPTION ACT IN INDONESIA

Sri EndahWahyuningsih

INTRODUCTION

Corruption is a very despicable act because its impact does not only cause enormous losses to the country's finances and the country's economy but also violates of the social and economic rights of the community at large. In Indonesia, corruption is widespread in society and escalating continuously from year to year, both from the number of cases that occur and the number of state losses.²⁷⁵ Besides, in terms of the quality of criminal acts, corruption is increasingly systematic with a broad scope that enters all aspects of people's lives. From the data on the handling of corruption cases in 2018, the Corruption Eradication Commission has held 30 arrest operations, with a total of 31 regional heads caught in corruption cases. Among them are instances of bribery, while the rest of them are related to cases that harm state finances, gratuities, and extortion.²⁷⁶

The increasing of uncontrolled corruption in Indonesia will bring disaster not only to the life of the national economy but also to the life of the nation and state in general. Widespread and systematic corruption is also a violation of social rights and economic rights of the community.²⁷⁷ Therefore, corruption can no longer be classified as an ordinary crime but has become an extraordinary crime (extra-ordinary crimes). In line with that, the eradication

²⁷⁵ Singgih, *Duniapun Memerangi Korupsi*, Pusat Study Hukum Bisnis Fak Hukum Universitas Pelita Harapan, Tangerang, 2002. p.8.

²⁷⁶ <https://www.liputan6.com/news/read/3860323/31-kepala-daerah-yang-ditangkap-kpk-sepanjang-2018>, retrieved on, 10 Agustus 2019.

²⁷⁷ Andi Hamzah, *Pemberantasan Korupsi Melalui Hukum Pidana Nasional dan Internasional*, PT Raja Grafindo Persada, Jakarta, 2005, p.34.

efforts can no longer be carried out usually but must be done in unusual ways (extra-ordinary measures), because corruption in Indonesia has entered an extensive area and has led to self-destruction.²⁷⁸

Until now, efforts to eradicate corruption continue, the results can be seen from the Corruption Perception Index (CPI) in 2018 that ranked Indonesia at 89 out of 180 countries, up to one rank from the previous year. While Thailand fell to 99th place, Singapore was still the cleanest country of corruption in Southeast Asia with a GPA of 85, followed by Brunei Darussalam (63), Malaysia (47) and Cambodia with a GPA of 20.²⁷⁹

Efforts to prevent and eradicate corruption in Indonesia have been carried out at both the State and municipal level. Since the establishment of the reform milestone in 1988, awareness of the importance of efforts to eradicate corruption has been encouraged by the community as well as the formal elite.²⁸⁰ The fundamental pillar was formed through TAP MPR RI No. XI / MPR / 1998 concerning State Administrators that are Clean and Corruption-Free, Collusion and Nepotism, Law No.28 of 1999 concerning State Administrators that are Clean and Free of Corruption, Collusion and Nepotism, TAP MPR RI No. VIII / MPR / 2001 concerning Recommendations on the Policy Direction on Eradication and Prevention of Corruption, Collusion and Nepotism. This provision aims to accelerate and better guarantee the effectiveness of eradicating Corruption, Collusion and Nepotism (*KKN*). Besides, in the field of legislative policy, efforts to prevent and eliminate corruption have also been carried out with the issuance of Law No.31 of 1999 concerning Eradication of Corruption, instead of Law No. 3 of 1971, as amended by Law No.20 of 2001 concerning Amendment to Law No.31 of 1999 concerning Eradication of Corruption Crimes.

The presence of these legal instruments is considered by many to be a breath of fresh air in the eradication of corruption which has penetrated massively in almost all aspects of people's lives. The reason is the formulation of acts against the law in a criminal act of corruption as confirmed in the

²⁷⁸ Sri Endah Wahyuningsih, *Reconstruction On Corruption Act And Shifting Burden Of Proof On The Settlement Of Corruption In Indonesia*, The 3th International Conference and Call Paper , Legal Development in Various Countries, Faculty of Law, Sultan Agung Islamic University, Unissula Press, 2017, file:///C:/Users/user/Downloads/Documents/2391-5211-1-SM_2.pdf, P.439. retrieved on, 14 Sept 2019.

²⁷⁹ <https://databoks.katadata.co.id/datapublish/2019/01/29/naik-1-poin-indeks-persepsi-korupsi-indonesia-naik-ke-peringkat-4-di-asean>, retrieved on 10 Agustus 2019.

²⁸⁰ S. Anwary, *Quo Vadis Pemberantasan Korupsi Di Indonesia*, AMRA, Jakarta, 2005. p.54

explanation of Article 2 paragraph (1) of Law no. 31 of 1999, includes actions against the law in a formal or material sense, even though the act is not regulated in legislation, but by the public, the operation can be criminalized.²⁸¹

The explanation of Article 2 paragraph (1) of Law No.31/1999 is an effort to overcome the impasse and limitations of the reach of the law in eradicating criminal acts of corruption due to the limited written legal regulations in anticipating the modus operandi of corruption which has increasingly developed increasingly sophisticated.²⁸²

However, with the decision of the Constitutional Court of the Republic of Indonesia dated March 13, 2006, which was registered with No.003 / PUU-IV / 2006, the formulation of the explanation of Article 2 paragraph (1) was cancelled relating to the unlawful material doctrine. That is, now based on Law No.31 of 1999, the unlawful doctrine in eradicating criminal acts of corruption is solely against the unlawful formal doctrine. In such a context, the test tool to determine whether or not there is an act against corruption is when the act violates the law (written law).²⁸³

As a result, there have been many adverse reactions from the public towards the Constitutional Court's ruling. No less the Attorney General and the Chairperson of the Corruption Eradication Commission (*KPK*) at the time, deeply regretted the emergence of the Constitutional Court's decision because it was considered a step back in eradicating corruption in Indonesia²⁸⁴. Unlike the two-state institutions, the Supreme Court chose not to comment on the Constitutional Court's decision but would answer it through the practice of resolving corruption cases handled by the court.²⁸⁵ From the perspective of legal science and legal practice, the Constitutional Court's decision was exciting to study and research to build

²⁸¹ Jimly Asshidiqie, *Model-model Pengujian Konstitusional di Berbagai Negara*, Konstitusi Press, Jakarta, 2005, p.56.

²⁸² Sri Soemantri, *Hak Uji Material di Indonesia*, Alumni, Bandung, 1997, p.23.

²⁸³ Agus Wibowo and Sri Endah Wahyuningsih, *The Implementation Of Role And Function Of The Press According To Law Number 40 Year 1999 Toward Law Enforcement Of Corruption In Indonesia Based On Justice Values*, Journal of Education and Social Sciences, Vol. 10, Issue 3, (June), ISSN 2289-9855, 2018, https://www.jesoc.com/wp-content/uploads/2018/10/KC10-ISSUE-3_409.pdf, 2018, p.71.

²⁸⁴ Robert Klitgaard et al, *Penuntun Pemberantasan Korupsi dalam Pemerintahan Daerah*, translated by Yayasan Obor Indonesia, Yayasan Obor Indonesia, Jakarta, 2005. P.54.

²⁸⁵ Leonard W Levy, *Judicial Review, Sejarah, dan Demokrasi: Sebuah Pengantar, dalam Judicial Review*, Editor Leonard W Levy, translated by Eni Purwaningsih, Nusa Media collaboration with Nuansa, Bandung, 2005, p.87.

critical awareness of all parties so that a clear understanding of the intent of the resolution, its implications and its impact on effective corruption eradication can be obtained in Indonesia.

UNLAWFUL DOCTRINE IN THE LAW NO. 31 OF 1999 CONCERNING THE ERADICATION OF CRIMINAL ACTIONS OF CORRUPTION AND ITS DEVELOPMENT

Elucidation of Article 2 paragraph (1) of Law No. 31 of 1999 states that what is intended by “against the law” includes acts against the law in a formal or material sense, even though the action is not regulated in statutory regulations, but if the work is deemed to be disgraceful because it is not in accordance with a sense of justice or the norms of social life in society, the act can be convicted. With the word “or” in the explanation, it can be seen that Law no. 31 of 1999 follows 2 (two) unlawful doctrine alternatively, namely: unlawful formal doctrine, or unlawful material doctrine.

Roeslan Saleh argued according to unlawful doctrine, what is called against material law is not only contrary to written law but also contrary to unwritten law. Conversely, unlawful formal doctrine argues that the law is contrary to written law only. So that according to unlawful material doctrine, in addition to meeting the legal requirements namely fulfilling all the elements mentioned in the formulation of the offence, the act must be felt by the community as not allowed or inappropriate²⁸⁶.

Regarding the unlawful doctrine, Roeslan Saleh stated: “According to the unlawful doctrine, what is called against material laws is not only contrary to written law but also contrary to unwritten law. Conversely, unlawful formal doctrine argues that the law is contrary to written law only. So according to the doctrine besides fulfilling the legal aspects, namely performing all the elements mentioned in the formulation of offence, the act must be felt by the community as not allowed or inappropriate²⁸⁷.”

There are two functions of unlawful material doctrine, namely:

1. Unlawful material doctrine in positive reception, which is an act, although by statutory regulations is not determined as against the law, but if according to the community’s judgment the act is against the law, the intended action remains an illegal act.

²⁸⁶ Roeslan Saleh, *Sifat Melawan Hukum Dari Perbuatan Hukum Pidana*, Aksara Baru, Jakarta, 1987, p.7.

²⁸⁷ Ibid.

2. Unlawful material doctrine in negative function, which is an act, although according to the laws and regulations is an act that is against the law, but if according to the community's evaluation the bill is not illegal, the intended action is an act that is not against the law.

According to Indriyanto Seno Adji, the unlawful formal doctrine is more focused on violations of written laws and regulations, whereas an act is said to have fulfilled the unlawful material doctrine if the act constitutes a violation of the standard norms of decency or dignity that exists in society. In other words, every action that is deemed or considered despicable by the community is a lawless act against the law. For Indonesian people, there had never been a time when the laws and constitutional thought the same²⁸⁸.

This view is a reaction to the opinion that states that the law is the constitution said further: "The thought that the law is the constitution we have never experienced. On the contrary, almost all original Indonesian law is unwritten law. It needs to be emphasized here that where most of our criminal law regulations have been contained in the Criminal Code and other laws, then the view of law and the unlawful above, only has meaning in excluding actions which, even though they are included in the formulation of the law, the law is not a criminal offence anyway. Usually, that is what is called the negative function of the unlawful material"²⁸⁹.

Quite a lot of supporters of the unlawful material doctrine among others: Von Liszt, Zudohna, Meyer, Zevenbergen, Van Hattum, Vos and Mulyatno. Hoge Raad can also be said to be an adherent to the unlawful doctrine such as the Huizen Veterinarian Arrest case given by Sudarto²⁹⁰, namely Arrest Hoge Raad 20 February 1933. A veterinarian in the city of Huizen deliberately put cows that are still healthy into a cage with cows that have been afflicted with mouth and nail disease, and this endangers the healthy cows. This act violates the provisions of Article 82 of the Livestock Law in the Netherlands.²⁹¹

When prosecuted, the veterinarian argued, his actions were in the interests of livestock in general, because the cows obviously would not be

²⁸⁸ Indriyanto Seno Adji, *Korupsi Kebijakan Aparatur Negara dan Hukum Pidana*, CV.Diadit Media, Jakarta, 20013, p.133.

²⁸⁹ Mulyatno in Indriyanto Seno Adji, *ibid*, p.134.

²⁹⁰ Sudarto, *Hukum dan Hukum Pidana*, Alumni, Bandung, 1981, p.114.

²⁹¹ Roeslan Saleh, *Sifat Melawan Hukum dari Perbuatan Hukum Pidana*, Aksara Baru, Jakarta, 2005. p.23.

able to avoid the disease. It is better because the cows have not had time to give milk so it will prevent the spread of the disease outbreak. It turns out that Hoge Raad said, the actions of veterinarians are not acts that can be convicted on account of that someone who commits an act threatened with criminal offence must be sentenced, if the law itself does not explicitly mention the reason for the eradication of the criminal must be convicted; maybe the element of breaking the law is not stated expressly so that the vet is free. As a doctor, he also has a justification for saving broader interests by following scientific instructions in veterinary medicine.

Based on the explanation above regarding the unlawful doctrine, there are two namely the unlawful formal doctrine and the unlawful material doctrine, and then there are scholars who adhere to the unlawful doctrine and some who adhere to the unlawful doctrine.

Because the explanation in Article 2 paragraph (1) states that what is meant by “unlawfully” includes acts that are not in accordance with a sense of justice or the norms of social life in society, even though these acts are not regulated in legislation, it can be seen that teachings against material law which are followed by Law No.31 of 1999 are teachings against substantial law in a positive function. The reason why the code follows the instructions against actual law is mentioned in the explanation to be able to reach various *modus operandi* of state finances and the increasingly sophisticated and complicated state economy.

However, according to Decision of the Constitutional Court No.003 / PUU-IV / 2006 impose a provision of criminal law without being formulated in writing in a legitimate manner in violation of the principle of legality, including imposing an illegal law provision, such as Article 2 paragraph (1) The Corruption Eradication Law is, according to the policy, against the law in material sense. The matter referred to violates Article 1 paragraph (1) of the Criminal Code. It is reasonable when the principle against substantial law is omitted in the Elucidation of Article 2 Paragraph (1) of the Corruption Eradication Law because it creates legal uncertainty, as guaranteed in the constitution of Article 28 D paragraph (1) of the 1945 Constitution.

The principle of legality as stated in Article 1 paragraph (1) of the Criminal Code which is the basis of the Constitutional Court to nullify the policy of violating material law in the Elucidation of Article 2 paragraph (1) of the Corruption Eradication Law, is inappropriate. The principle of legality is also known as *adagium nullum delictum noella poenapraevia sine lege poenali*,

in short *nullum crimen sine lege* means no crime without a law. So, the law establishes and limits which actions and penalties (sanctions) can be imposed on violators. According to Muladi, the Principle of Legality consists of:

- (1) *Nullum crimensine lege* (no crime without law) ;
- (2) *nulla poena sine lege* (no crime without law) ;
- (3) *nulla poena sine crimen* (no criminal without crime).

This principle also includes derivative tenets such as “*nullum crimen sine lege praevia*” (no crime without prior law) and “*nullum crimen sine poena legali*” (no crime without previous criminal set). Another related principle is the prohibition to apply “ex post facto criminal law” and its relation to the retroactive application of criminal law and criminal sanctions (a non-retroactive form of criminal law and criminal penalty)²⁹².

The principle of legality (principle of legality) is commonly known in Latin as “*Nullum delictum nulla poena sine praevialege*” (no offence, no criminal without prior regulation). The sentence came from von Feuerbach, a scholar of German criminal law (1775-1833). It was he who formulated in the Latin proverb in his book entitled “*Lechrbuch des peinlichenrecht*” (1801).²⁹³

According to its history in ancient Roman law which uses Latin, this proverbial unknown, also the principle of legality is unknown. In an essay in “*Tijdschrift v. Strafrecht*” on 45 pages 337 stated in Roman times that crime is known as *crimina extra ordinaria*, meaning crimes that are not mentioned in the law.

Among this extra-ordinary *criminaria* which is very well known is *criminastellionatus*, which *letterlijk* means: evil deeds, miscreant. So, there is no predetermined what is meant there. When the ancient Roman law was accepted in Western Europe in the Middle Ages (as we did during the colonial era, it received Dutch law), the notion of extra ordinal *crimina* was accepted by the ruling kings. And with the existence of this extra ordinal *crimina*, the possibility was held to use the criminal law arbitrarily according to the wishes and needs of the king himself.²⁹⁴

In the peak of reaction to absolute power (absolutism) of the kings, which is called safe Ancien Regime, there arises a thought about having to be

²⁹² Muladi, *Prinsip-Prinsip Pengadilan Pidana Bagi Pelanggar HAM Berat Di Era Demokrasi*, Seminar Paper, 27 April, 2000, p.16.

²⁹³ Moeljatno, *Asas-Asas Hukum Pidana*, Rineka Cipta, Jakarta, 2002., p.23.

²⁹⁴ *Ibid*, pp.24-25.

determined in wet acts which can be criminalized, so that the population can know first and will not do the deed the.

First of all, the thoughts found on the principle of legality were by Montesquieu in his book "*L'esprit des Lois*" (1748) and Rousseau in his book "*Dus Contract Social*" (1762). The principle first took the form of a statute in Article 8 of the "*Declaration des droits de l'homme et du citoyen*" (1789), a kind of the first constitution which was formed in the year of the outbreak of the French Revolution. It reads "No one should be convicted except for a wet stipulated in law and legally enacted". From the Declaration des droits de L '*homme et du citoyen*, this principle was included in Article 4 of the French Penal Code, under the rule of Napoleon (1801). And from here this principle is known by the Netherlands because of the occupation of Napoleon, so that it has a place in *Wetboek van Strafrecht* Netherland 1881, Article 1 and then because of the principle of concordance between the Netherlands Indies and the Netherlands, it is included in Article 1 WvS Netherland Indie 1918.²⁹⁵

Legality principle formulation by von Feurbach²⁹⁶ in Latin it is stated to be related to his theory known as the "*vom psychologischen Zwang*" theory, which advocates that in determining acts which are prohibited in the regulations not only about the types of actions that must be clearly written, but also about the kinds of crimes that are threatened . In this way, the person who is going to commit the prohibited act is known in advance what criminal will be imposed on him if the action is determined. Thus, in his mind, in his psychology, then *tem* or pressure is held not to do it, and if he does this, then if he is convicted the criminal can be seen as approved by himself. So, von Feurbach's stand on crime is that which is absolute. Same goes for retribution theory.

It is established on the description above the principle of legality that exists in the Criminal Code until now the desktop is to bound the sheer power (absolute) of the king in France at that fourth dimension, which was then used in the Netherlands and then Indonesia as a Dutch colony at that fourth dimension. If until now Indonesia still applies the principle of legality as in the colonial era first, it is actually not in accordance with the conditions of the Indonesian people who have been independent and recognize the source of written law and the law that live in society as a source of code to determine whether an act is considered despicable or not.

²⁹⁵ Ibid, p.25.

²⁹⁶ Sudarto, *Hukum Pidana I*, Yayasan Sudarto Fakultas Hukum UNDIP Semarang, 2015, p.25

Prof. Sudarto²⁹⁷ even stated that the principle of legality should be prepared progressively following the personality of Indonesia and the development of the revolution after studying the development of general criminal rules in the Criminal Code in various countries.

So, the principle of legality is historically a reaction to the arbitrariness of the authorities in the Ancient Regime era and the answer to the functional needs of legal certainty which was a necessity in a liberal country at that time. Even today, the attachment of the modern rule of law to this principle reflects the state that there is no unlimited state power over its people and that the power of the country is subject to the established legal rules.

However, based on the development of the state of Indonesia, the principle of legality was formally implemented right before Indonesia's independence. As for after Indonesian independence the principle of legality also develops following the condition of an independent Indonesia that recognises unwritten law as a source of law in the development of law in Indonesia which puts forward justice rather than legal certainty.

According to Loebby Loqman, in Article 1 paragraph (1) of the Indonesian Criminal Code the words "criminal legislation" are not criminal laws, this means not only the law in the formal sense, but also includes all provisions that are materially constituted by law laws such as Government Regulations, Presidential Decrees, Regional Regulations and other regulations that have the formulation of offences and threats of crimes, both within the scope of Civil Law and Administrative Law (Civil Penal Law and Administrative Penal Law)²⁹⁸.

The essence of the principle of legality, according to Barda Nawawi Arief, is about:

- a. Criminal law enforcement space, according to time
- b. Legal sources/basis (essential legalisation) can be convicted of an act. (so as "the basis of criminalisation or a judicial basis for criminalisation."²⁹⁹

In the case of the principle of legality seen as a matter of source / legal basis for declaring an act as a criminal act in the development after Indonesia's

²⁹⁷ Ibid., p.31.

²⁹⁸ Loebby Loqman, *Perkembangan Asas Legalitas Dalam Hukum Pidana Indonesia*, Seminar paper, BPHN and UNDIP, 26-27 April 2004, Semarang, p.8.

²⁹⁹ Barda Nawawi Arief, *Perkembangan Asas-Asas Hukum Pidana Dalam Konsep KUHP Perspektif Hukum Perbandingan Hukum Pidana*, Paper from Penataran Regional Hukum Pidana dan Kriminologi, UNDIP, April 2006, p.3.

independence (meaning developments outside the Criminal Code/WvS) the revival of living law or customary law as a source of law. According to Article 1 of the Criminal Code existing law (unwritten rule) cannot be used as a source of law.

He admits that customary law / unwritten law as a source of criminal law, as seen by the existence of Law No.1 Year 1951, in particular, Article 5 (3) sub b which states, among other things:

- *That an act which according to living law must be considered a criminal act, but which is incomparable in the Civil Criminal Code, is considered to be threatened with a sentence of no more than three months in prison or a five hundred rupiah fine, namely as a substitute sentence when the customary punishment is not followed by the convicted party and the substitution referred to is deemed commensurate by the judge with the magnitude of the guilty verdict;*
- *That an act which according to living law must be considered a criminal offence and which has a comparison in the Civil Criminal Code is then considered to be threatened with the same punishment as the comparative punishment most similar to the criminal act³⁰⁰.*

The recognition of the granting of a place to existing law or an unwritten law as the source of the law is even emphasized in general rules, namely in:

- a. The Judicial Power Law 14/1970 (which repealed Law No. 19/1964) which subsequently underwent changes based on Law No. 35/1999 states:
 - Article 23 paragraph (1): “all court decisions must contain the reasons and grounds for the decision, they must also contain certain articles of the relevant regulations or non-written legal sources”.
 - Article 27 paragraph (1): “Judges as law enforcement and justice, are required to explore, follow and understand the values of living law”.
- b. Judicial Power Law No.4 / 2004 (which revoked Law No. 14/1970 in conjunction with Law No. 35/1999) of Article 25 paragraph (1): “all court decisions must, in addition to the reasons and grounds for the decision, also contain certain articles of the relevant regulation or non-written legal sources which are the basis for judging. Article 28 paragraph (1): “Judges are required to explore, follow and

³⁰⁰ Ibid, p.5.

understand the legal values and a sense of justice that lives in the community”.

- c. Judicial Power Law No.48 / 2009 (which revoked Law No. 4/2004 jo.14 / 1970 jo. Law No. 35/1999)
 - Article 5 (1) “Judges and constitutional justices are obliged to explore, follow and understand the legal values and a sense of justice that lives in society”.
 - Article 50 (1) “The court’s decision must not only contain the reasons and grounds for the decision, but it also contains certain articles of the relevant statutory regulations or unwritten legal sources which are used as the basis for hearing”.
- d. Article 18 B (2) of the 1945 Constitution (4th Amendment):The state recognizes and respects the customary law community units along with their traditional rights as long as they are still alive and in accordance with the development of the community and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law.

The tendency to explore living values in society is not only a national mandate but also an international trend. In the 10th International Congress on Criminology (10th International Congress on Criminology) on September 4-9, 1988 in Hamburg, for example, speakers from Saudi Arabia and China were presented. From Saudi Arabia (Riyad), the speaker M.Aref presented about “Criminality and Crime Prevention in Developing Countries” which, among others, stated “Islamic Perspective for Crime Prevention”; and speaker M.Zeid (Riyad) presented the “Crisis of Penal Sanction in Contemporary Society” in which, among other things, addressed the “Revitalization of Islamic Societies”. Next, the speaker Xiang Guo (from Beijing, China) talked about “The Present Violent and Preventive Strategic in China”. “The Present Violent and Preventive Strategic in China”.³⁰¹

According to Barda Nawawi Arief, the interesting thing from the international tendency in making efforts to “rethink” and “explore the law”

³⁰¹ According to Barda Nawawi Arief, Efforts to improve the “*batang tarandam*” (ie the values of the law that lives in the community) for later review related to national law-making materials, is clearly a necessary academic world. It is a very ironic thing, rejected by the Faculty of Law more and more understood and controlled by the Criminal Code, the legacy of the invaders from the debate and control of legal values that live among their own people. What’s more agreed he still feels “asing” And even unconsciously have been hostile and killed him. Barda Nawawi Arief (I), Op. cit., p. 125.

to strengthen an integrated crime prevention strategy, is an appeal to make a “value-oriented approach”, both human values and values of cultural identity and religious, moral values. So, there is an appeal to make a “humanist approach”, “cultural approach” and “religious approach” integrated into a rational policy-oriented approach.³⁰²

Based on the explanation above it can be seen that the basis for criminalising an act or source of legality is that an action is not only a source of a written law but also an unwritten source of law that lives in society, not only to guarantee legal certainty but also guarantee a sense of community justice. So, in the spirit of the law in Indonesia not only know the code in writing but also includes the provisions of the unwritten rule that are still alive in the community (customary), so that the existence and recognition of customary law still plays a vital role in the legal system in Indonesia.³⁰³

The code must be able to accommodate justice, legal certainty and expediency. As an illustration of how truth is the spirit of the law that must be able to live it, is the view of Bismar Siregar which states: “If to uphold justice I sacrifice legal certainty, I will forgo that law. Law is only a means, while the goal is justice, why is the goal sacrificed because of the methods?”³⁰⁴

Therefore, the expansion of the principle of legality in the explanation of Article 2 paragraph (1) of Law no. 31/1999 is appropriate because it is based on:

1. The basis of the national legislative policy after independence
2. The foundation of scientific agreement / national seminar
3. Sociological foundation,
4. International and comparative foundation.

From the study of international materials and comparisons, there are forms of softening / shifting or shifting to the principle of formal legality, including:

1. He admitted “the general principles of law are recognised by the community of nations” as a source of law.
2. He acknowledges “forgiveness/forgiveness of judges” (“*judicial pardon/judicial pardon/dispensa de pen*”) as a form of “judicial

³⁰² Barda Nawawi Arief (II), *Bunga Rampai Kebijakan Hukum Pidana (Perkembangan Penyusunan Konsep KUHP Baru)*, Kencana Prenada Media Group, Jakarta, 2008, pp.327-328.

³⁰³ Sri Endah Wahyuningsih, *Perbandingan Hukum Pidana Dari Perspektif Religious Law System*, Unissula Press, 2013, p.6.

³⁰⁴ Didik Sunaryo, *Kapita Selekta Sistem Peradilan Pidana*, Universitas Muhammadiyah Malang, Malang, 2005, p.27.

corrective to the legality principle” (among others seen in the Netherlands, Greece, Portugal).

Based on the description above, the development of the legal system must depart from the principle of balance between the interests of the state to maintain order, and in terms of legal protection for the community or between legal certainty and the value of justice. Therefore, the Constitutional Court Decision No.003 / PUU-IV / 2006 insofar as it was revoked of the lawlessness teachings is inappropriate because it contradicts the development of the principle of legality after Indonesia’s independence. In our world of justice, we still see many decisions that are based on the teachings of lawlessness because the lessons of the disorder are not yet fully agreed upon. The objections are:

1. Legal certainty will be shaken or sacrificed;
2. in the extreme, this will give the judge to act arbitrarily; or the judge will have a challenging task to consider the sense of justice and public confidence in the unwritten legal provisions³⁰⁵.

On various occasions, scholars also affirmed that the existence of the principle of legality also applies the “lexcerta” principle (laws must be formulated as clearly and as sharply as possible and must be reliable). In this connection related to two functions at once, namely:

- (1). Protecting function (protecting people from the unlimited exercise of power); and
- (2). Instrumental role (within limits set by law, the activity of power by the government is expressly permitted)³⁰⁶. According to Muladi, the overall objectives of the legality principle are:
 - (1). Strengthening legal certainty;
 - (2). Creating justice and honesty for the defendant;
 - (3). Making effective the “deterrent function” of criminal sanctions;
 - (4). Prevent abuse of power; and
 - (5). Strengthening the application of the “rule of law.”³⁰⁷

Sudarto argues if there are issues regarding unwritten laws that are contrary to written law, then it is necessary to consider seriously how far the

³⁰⁵ Teguh Pasetyo and Abdul Hakim Barkatullah, *Politik Hukum Pidana Kajian Kebijakan Kriminalisasi dan Dekriminalisasi*, Pustaka Pelajar, Yogyakarta, 2005, p.37.

³⁰⁶ Muladi, *Prinsip-Prinsip Pengadilan Pidana Bagi Pelanggar HAM Berat Di Era Demokrasi*, Op. cit. p.16.

³⁰⁷ Ibid.

customary law can set aside the written rules, which were made legally. Is it true what is deemed to be fair/right by all people in general?³⁰⁸.

Vos, Utrecht, and Sudarto stated that the teachings about the lawlessness teachings are only taken up by their adverse functions. It means recognising the possibility of things outside the law that can eradicate the lawlessness of acts that meet the formulation of the law. But do not be reversed, which considers an action to remain a crime even though the law does not threaten it in the law if the work is contrary to other standards of living in society. If this is taken, it means taking a positive function, and it will be contrary to the principle of legality³⁰⁹.

According to Sudarto, the consequence of accepting the principle of legality for the Criminal Code is adhering to the nature of the law in a negative function. He said: "A country that recognises the principle of *nullum delictum* in the real sense is impossible to adhere to the teachings of material lawlessness in a positive function ³¹⁰.

Based on the description above, it can be taken that the opinion of the three scholars above is in line with the decision of the Constitutional Court, which is not adhering judges unlawful doctrine in positive function, but as Prof. Sudarto wants the possibility of applying the unlawful doctrine in its negative role.

It also needs to be stated about the existence of the opinions of the authors who are pro and cons of the presence of the principle of legality in the Indonesian Penal Code. Almost all the writers mentioned in this paper can be classified as adhering to the law of legitimacy, and specifically for Indonesia, it can be called a writer, namely Utrecht, who objected to adopting the law in Indonesia. The reason is that there are so many actions which should be convicted (*strafwaardig*) not convicted because of the policy. Likewise, this principle prevents the enactment of traditional criminal law that still alive and will live³¹¹.

In the opinion of Andi Hamzah, the existence of the principle in the Indonesian Penal Code is a dilemma, because it is seen from one perspective as illustrated by Utrecht about the customary law that is still alive, and in

³⁰⁸ Sudarto, *Hukum dan Hukum Pidana*, Jilid I, Loc.Cit. p.81.

³⁰⁹ Teguh Prasetyo, Op. cit.

³¹⁰ Sudarto. Loc.cit., p.82.

³¹¹ Leden Marpaung, *Tindak Pidana Korupsi Pemberantasan dan Pencegahan*, Djambatan, Jakarta,2004, p.8

the opinion of Andi Hamzah it is impossible to fully codify it because of differences between the customs of various ethnic groups, but seen from another aspect, namely legal certainty and protection of human rights from uncommon and unfair treatment by the authorities and judges so that the principle is needed. Moreover, as a developing country whose experience and knowledge of the judges are often viewed as imperfect, it is hazardous if this principle, and then³¹².

The application of the principle of legality does vary from country to country. According to Prof. Muladi depends on whether the government is democratic or tyrannical, variations also depend on the family law adopted, the continental European system tends to apply the principle of legality more rigidly than its application in countries that adhere to the Common Law system, because in Continental European countries the principle of legality becomes a tool to limit power after the French Revolution. In Common Law countries, the principle of legality is not so prominent, because the principles of the Rule of Law have been achieved with the development of the concept of “due process of law” which is supported by good procedural law, this has even begun in 1215 with the formulation of Magna Chart). The analogy is not only permitted but is also the basis of the Common Law update³¹³.

Because Indonesia as a former Dutch colony is included in the Civil Law System /Continental European law, then in the Criminal Code we also adhere to the principle of legality formally and are still a fundamental principle in the Indonesian criminal law system, this is especially so for legal certainty and as individual protection against the arbitrariness of the authorities. However, this principle has shifted along with Indonesia’s independence which recognises the source of law that lives in society as a source of law, especially in the era of reform and globalisation such as the current development of crime so rapidly including the mode of operation.

Therefore it is natural that the expansion of the principle of legality is accommodated in the Criminal Code Bill (*KUHP Concept*) that provides the principle of legitimacy in the material sense as a complement to the law of legitimacy in the formal sense as a basis for convicting someone, because the 2018 Bill of the Criminal Code is based on the idea of balance, both the balance between interests society with individual interests and between the

³¹² Ibid, pp.8-9

³¹³ Muladi, *Prinsip-Prinsip Pengadilan Pidana Bagi Pelanggar HAM Berat Di Era Demokrasi*, Loc.Cit, p.17.

value of justice and the value of legal certainty. In the 2018 Penal Code Draft it says:

Article I

- (1) No single act can be convicted or subject to criminal sanctions and actions except for the strength of the criminal laws and regulations that had existed before the bill was carried out.
- (2) In determining the existence of a criminal offence, the analogy is prohibited.

Section 2

- (1) The provisions referred to in Article 1 paragraph (I) do not reduce the application of the law that lives in the community which determines that a person is worthy of a sentence even though the act is not regulated in the legislation.
- (2) The law that lives in the community as referred to in paragraph (1) applies in the place where the law lives and as long as it is not regulated in this law and accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles recognized by civilized society.³¹⁴

In connection with the law of legality, there are indeed many opinions that are pros and cons to the existence of this principle. Hart argues that legal principles do not have definite and permanent contents; these principles also cannot be judged apart from the historical dimensions and social context in which they are included. In his opinion that the instrumental aspects and aspects of protection, two sides of the criminal law, which must always be weighed against each other³¹⁵.

Based on the above in weighing both sides, there will be two camps of interests competing for each other. The first faction is the interests of the state to maintain order, and this must be upheld, while the second faction is in terms of legal protection for the community.

According to Rummelink, the principle of legality is: *“een vederlich tevookeurvoor de beweging van de grotere rechts bescherming, but in the sense of” het gezich puntmoetkun nendominer endatwanner bate van de*

³¹⁴ RUU KUHP February 2018

³¹⁵ Komariah Emong Sapardjaja, *Ajaran Sifat melawan Hukum Materiel Dalam Hukum Pidana Indonesia*, Alumni, Bandung, 2002, p. 7.

rechts gemeens chaponvermij delijk is. (the principle of protection only has very little prevention, but most opinions state that for the sake of the legal community it is inevitable).³¹⁶

In contrast to the above advice, Peters opposes the undermining of the principle of legality that determines the quality and legal character of criminal law: “..... the principles of law a relative autonomous value, which must always be put forward as a touchstone on positive law. The principles of law are not something that will be able to stem criminal crime modestly and mannerly, but rather the principles of law are aimed at providing norms of control over state actions³¹⁷.”

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³¹⁶ Roeslan Saleh, *Sifat Melawan Hukum dari Perbuatan Hukum Pidana*, Op. Cit. p.32.

³¹⁷ Ibid.

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SELECTED LEGAL ISSUES IN SIGNING INTERNATIONAL TREATIES: THE CASE OF MALAYSIA

Ahmad Nasyan Azrae

INTRODUCTION

The international community is built of interacting and cooperating independent states. These states will interact on the international plane in a variety of situations, some of which can give rise to treaty-relations. Treaty signing is a routine process and constantly concluded by states to foster closer ties with their counterparts. Nonetheless, issues relating to treaty signing can be crucial. A treaty is not merely an international agreement that creates contractual obligation between two or more independent countries, but it carries legal implication on the state-parties and may create law on its people.

Being an active member of the international community, the Malaysian government continuously negotiates, signs and ratifies international treaties in an effort to establish good relations with the other states. The treaties pursued by the government may be categorized into three forms, namely multilateral, regional and bilateral. Multilateral treaties denote treaties that are participated by countries on a global or near global scale. These include the United Nations Convention on Law of the Sea 1982, the Convention on the Elimination of All forms of Discrimination Against Women 1979, the Agreement Establishing the World Trade Organization and its Annexes, and many more. Meanwhile, regional treaties are concluded by states within a given region to facilitate activities and cooperation on a regional basis among member-states that share common interests. This can be illustrated by referring to Malaysia's participation in several treaties under the framework of the Association of Southeast Asian Nations (ASEAN) such as the ASEAN Charter 2007 and the ASEAN Trade in Goods Agreement 2009. Last but not the least, the treaties are also concluded bilaterally between two countries that

normally incorporate trade initiatives and some substantive foreign policies. For example, Malaysia's bilateral partners include Pakistan, New Zealand, India, Chile, Australia and Turkey.

The long lists of treaties signed by the government may have its own effects and impacts on the country's sovereignty. More often than not, the country's participation in international treaties raises alarming concerns that require proper legal analysis. This chapter highlights selected legal issues relating to the signing of international treaties and accordingly explain the legal positions of Malaysia in respond to the matters raised. The discussions are organized into several headings. The first heading defines the meaning of international treaties and explain the key legal aspects of international treaties. The next heading highlights some of the issues and tensions arising from treaty signing involving Malaysia. This is followed with the main discussion in the subsequent heading that analyses selected issues relating to treaty signing from the context of Malaysia's legal position. Finally, the chapter concludes by summarizing some of the key points discussed.

WHAT IS AN INTERNATIONAL TREATY?

A 'treaty' is a legally binding agreement created between the subjects of international law, namely the states and international organizations, which are recognized as having treaty-making capacity. There exist a large number of discourses that define 'treaties'. For instance, Oppenheim defines international treaties as "agreements, of a contractual character, between states, or organizations of states, creating legal rights and obligations between the parties".³¹⁸ Meanwhile, according to Schwarzenberger, a treaty means "a consensual engagement which subjects of international law have undertaken towards one another, with the intent to create legal obligations under international law".³¹⁹

The legal definition of treaty can be found in the Vienna Convention on the Law of Treaties 1969 ('Vienna Convention 1969'). Art. 2(1)(a), Vienna Convention 1969 defines treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and

³¹⁸ Lassa Oppenheim, *International Law, Vol. 1: Peace*. In Hersch Lauterpacht (editor) (8th Ed.), ELBS & Longmans 1955.

³¹⁹ Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Vol. 1*, Stevens 1949.

whatever its particular designation”.³²⁰ The international agreement between states referred to above may be concluded under various designations including treaty, convention, charter, agreement, covenant, statute, pact, protocol, accord, exchange of notes, etc.

By and large, treaty is an important document in international law. Abdul Ghafur Hamid notes that “treaty is the most useful instrument through which all kinds of international transactions are concluded”.³²¹ Treaties are used by states to organize international trade, delineate boundaries, resolve differences, set up international and regional organizations, etc.³²² Moreover, the multilateral treaties are considered as the best medium for imposing binding and precise rules in various areas of international law.

The essence of treaties as the main source of international law was underlined in the Statute of the International Court of Justice (‘ICJ Statute’). Art. 38(1) provides that in deciding international disputes, the International Court of Justice (ICJ) shall refer to the following sources of law: (a) international conventions or treaties establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) the judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Although the provision is silent on the hierarchical order of the sources of the international law, but scholars rank international treaties as taking precedence over other sources. This is because treaties are the only means by which states consciously create law for themselves.

Treaties as a source of law may be explained under two situations. First, treaties concluded by a substantial number of states which stipulate the general rules of international conducts are called ‘law-making treaties’ and shall be regarded as sources of international law. Second, treaties between

³²⁰ See also the definition of treaty under the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986. Art. 2(1) (a) refers the term ‘treaty’ to mean ‘an international agreement governed by international law and concluded in written form: (i) between one or more States and one or more international organizations; or (ii) between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation’.

³²¹ Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach* (4th ed.), Sweet & Maxwell, Singapore 2019.

³²² Ibid.

two or only few states that deals with a special matter directly affecting the particular states are categorized as ‘treaty-contracts’. This type of treaties akin to the normal contracts under the domestic law and acts as a source of legal transactions for the states. Nonetheless, they still create binding obligations on the parties thereto, and hence constitute particular law for the state-parties.

The obligation for observing treaties is enshrined under the doctrine of *pacta sunt servanda*, which means ‘agreements must be kept’.³²³ This rule is reaffirmed in Art. 26, Vienna Convention 1969 that reads “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” The rationale behind this obligation is because states have consented to the terms of the treaties and all legal undertakings arising from the treaties entered. In other words, the state-parties subscribed themselves to the treaties, which in turn act as laws governing their relationships. Accordingly, it follows that a treaty will not create obligations on a state who has not given its consent to the treaty.³²⁴

AN OVERVIEW OF MALAYSIA’S EXPERIENCE IN TREATY SIGNING: ISSUES AND CONTROVERSIES

Malaysia’s experience in signing international treaties has not always been a straight forward case. While most of the international treaties signed by the government are well received by the peoples, few are faced with disapproval and strong confrontation from the public. Often, the signing of an international treaty drew hostility from the opposition parties, which escalated the matter into a political discourse.

In the last five years, there has been at least three crucial occasions relating to treaty signing that drew tensions and public outcry. The first of these events was the signing of the now discontinued Trans-Pacific Partnership Agreement (‘TPPA’), which was considered one of the world’s biggest multinational trade deals. After years of negotiation, Malaysia, under the ruling of the then *Barisan Nasional* government, had joined 11 other pacific nations in signing the TPPA on 4 April 2016. The government’s agreement to the TPPA had drawn strong oppositions from different factions within the country. Mainly, those who objected the TPPA criticized the negotiating process, which were considered done in secrecy in the absence of public consultation and for

³²³ Bryan A. Garner (Editor in Chief), *Black’s Law Dictionary* (8th Ed.). Thomson West, Minnesota 2007, p. 1140.

³²⁴ Art. 34, Vienna Convention 1969.

being ‘non-democratic’ so as to undermine the national, economic and the *Bumiputera* interests. Besides, the objections were made on the pretext that a number of local laws and policies were required to be amended in order to bring them in line with the TPPA.

The polemic continues as the newly elected *Pakatan Harapan* (‘PH’) government announced its commitment to sign few human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination (‘ICERD’). The announcement ignited mixed reactions from the public and has escalated into a political debate that challenged the new government. The protests came as the majority Malays perceived ICERD as contradicting with the Federal Constitution that will jeopardize the privileges of the Malay Rulers, the Malays, the *bumiputeras* and Islam. Above and beyond, these groups viewed ICERD as the opening door for foreign powers to intervene the national sovereignty. In the end, the pressures have faltered the PH government, forcing them to retract their decision from signing the ICERD.

The highlight in the series of these events arose when the PH government officially acceded to the Rome Statute of the International Criminal Court 1998 (‘Rome Statute’) on 4th March 2019. In its press statement, the government accredited the role of the International Criminal Court (‘ICC’) as complementing the existing domestic laws in combating international crimes. However, the signing of the Rome Statute was met with strong criticism, including from the royalties. The Rome Statute was perceived to have touch on the position of the monarchy and the immunities of the *Yang di-Pertuan Agong*. The government was alleged to have acted in contrary with the Federal Constitution when signing the Rome Statute for undermining the Conference of Rulers since the interests of the rulers were affected. Additionally, it was alleged that the PH government has not tabled the matter to be deliberated by the lawmakers in the Parliament before signing the Rome Statute. The immense pressure ‘forced’ the government to withdraw from the Rome Statute on 5th April 2019, slightly one month after acceding to the treaty.

SELECTED LEGAL ISSUES IN SIGNING A TREATY

The above overview highlights some of the issues and controversies faced by the government in signing international treaties. The signing of international treaties was challenged on a number of grounds. For instance, the opposition criticized the treaty negotiating process which undermine

public consultation, parliamentary debates and views from the Conference of Rulers. Some opposed treaty signing by centering their assessments on the 'negative' impacts of the treaties on the local sentiments and its far-reaching effect in changing the local laws. More important than that, treaties were also opposed for being inconsistent with the Federal Constitution. This heading will examine selected issues in a signing a treaty, and explain the legal positions of Malaysia in addressing the issues raised.

WHICH ORGAN(S) OF THE GOVERNMENT POSSESS THE CAPACITY TO SIGN TREATIES ON BEHALF OF MALAYSIA?

Malaysia practices separation of powers between the three main organs of the government, namely the legislature, the judiciary and the executive.³²⁵ The concept of separation of powers are not explicitly spelt out in the Federal Constitution, rather this is assumed from the provisions of the Federal Constitution itself. According to Art. 39, Federal Constitution, the executive authority is vested in *Yang di-Pertuan Agong*, which is exercisable by him or by the Cabinet of Ministers or any Minister authorized by the Cabinet. The legislative authority is provided under Art. 44, Federal Constitution, which confers the legislative authority in the Parliament, comprising the *Yang di-Pertuan Agong* and two *Majlis* (i.e. Houses of Parliament) to be known as the *Dewan Negara* (Senate) and the *Dewan Rakyat* (House of Representatives). Meanwhile, the third authority is underlined in Art. 121, Federal Constitution, which confers the judicial power in the court, consisting of the Federal Court as the highest court in Malaysia, followed by the Court of Appeal, the two High Courts of co-ordinate jurisdiction (the High Court in Malaya and the High Court in Sabah and Sarawak), and such inferior courts as may be provided by federal law.

In general, the treaty-making power has not been clearly addressed by the Federal Constitution, whether it is conferred on the executive, the legislative or the judiciary. Nevertheless, a careful reading from the Federal Constitution suggests that the treaty-making power is exercisable by the executive body

³²⁵ See, for instance, the case of *Lim Kit Siang vs. Dato' Seri Dr. Mahathir Mohamad* [1987] 1 MLJ 383: Salleh Abbas, CJ explained that a government comprised of three main organs, namely the legislative body, the executive and the judiciary. See also *Loh Kooi Choon vs. Government of Malaysia* [1977] 2 MLJ 1: Raja Azlan Shah, FCJ, identified the doctrine of separation of powers as one of the key concepts underpinning the Federal Constitution. The doctrine of separation of powers claims that no single individual or body can exercise full sovereign powers due to the fact that such powers are divided between the three main organs of the government, namely the legislature, the judiciary and the executive.

of the federal government, as opposed to the thirteen constituent states which form Malaysia.

Art. 74 (1), Federal Constitution provides that the Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List set out in the Ninth Schedule of the Federal Constitution. Item 1 of the Federal List to the Ninth Schedule listed the external affairs as one of the area falling under the legislative power of the Parliament. Matters included in the external affairs are treaties, agreements and conventions with other countries and the implementation of treaties, agreements and conventions with other countries.³²⁶ Furthermore, Art. 76(1)(a), Federal Constitution extends the power of the Parliament to make laws for the states constituting Malaysia for the purpose of implementing any treaty, agreement or convention between Malaysia and any other country, or any decision of an international organization of which Malaysia is a member. The wordings used to describe the legislative powers of the Parliament are no more but limited to the making of or enacting laws in respect of international treaties,³²⁷ as opposed to executing or signing the treaties.

Conversely, the executive powers are extensive. Basu reiterated that the executive authority refers to “the residue of governmental function that remains after legislative and judicial functions are taken away”.³²⁸ Such authorities cover the power to implement policies, maintain peace and security, supervise the civil service, and determine foreign policies.³²⁹ The executive powers are defined under Art. 80(1), Federal Constitution. Essentially, the executive authority of the federal government extends to all matters with respect to which the Parliament make laws. This covers all matters listed under the Federal List and the Concurrent List to the Ninth Schedule. Accordingly, the executive authority of the federal government has the power to oversee the external affairs including treaties, agreements and conventions with other countries and the implementation of treaties, agreements and conventions with other countries. Unlike Arts. 74(1) and 76(1) of the Federal Constitution, Art. 80(1) was broadly drafted

³²⁶ See further Item 1, List 1 (Federal List), Ninth Schedule, Federal Constitution.

³²⁷ See also Art. 73(a), Federal Constitution: The legislative powers conferred on the Parliament allows it to make laws for the whole or any part of Malaysia and laws having effect outside as well as within Malaysia.

³²⁸ Durga Das Basu, *Introduction to the Constitution of India (4th Ed.)*, Prentice Hall 1996, p. 132.

³²⁹ Ibid; Abdul Aziz Bari, *Malaysian Constitution: A Critical Introduction*, Kuala Lumpur, The Other Press 2003, p. 100.

so as conferring the executive body a wide power to execute and sign international treaties.

This conclusion imports further question as to whether the executive is required to consult with other entities or organs before signing a treaty. The issue was addressed by the court in the case of *Government of the State of Kelantan vs. the Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj*.³³⁰ The case came following the signing of the Malaysia Agreement on 9 July 1963 by the Governments of the Federation of Malaya, United Kingdom, North Borneo, Sarawak and Singapore for the formation of Malaysia. The Kelantan Government submitted that by constitutional convention, the Rulers of the individual states must be consulted before the Agreement is signed as it significantly brings substantial changes to the Federal Constitution. Since the consultation was not made, the Kelantan Government requested the court to declare the Malaysia Agreement 1963 and the Malaysia Act (which implemented the Malaysia Agreement) as null and void. The High Court rejected the contention and held:

“The Malaysia Agreement is signed ‘for the Federation of Malaya’ by the Prime Minister, the Deputy Prime Minister and four other members of the Cabinet. This was in compliance with Articles 39 and 80(1) of the Constitution and there is nothing whatsoever in the Constitution requiring consultation with any State Government or the Ruler of any State.”

The power of the executive to sign international treaties is in line with the rules laid down in the Vienna Convention 1969. Art. 7(2)(a) provides that the Head of State, Head of Government and Minister for Foreign Affairs is considered as representing a State and may legally perform all acts relating to the conclusion of a treaty. In the context of Malaysia, the Head of State refers to the *Yang di-Pertuan Agong* as the Supreme Head of the Federation (Art. 32(1), Federal Constitution), the Head of the Government refers to the Prime Minister that presides over the Cabinet (Art. 43(2)(a), Federal Constitution) and Minister for Foreign Affairs being a member of the Cabinet of Ministers (Art 43(1) and (2)(b), Federal Constitution). All three institutions referred to above are part of the executive organ of the government in accordance with Art. 39, Federal Constitution. Any other

³³⁰ [1963] MLJ 355 (High Court).

persons other than the three named institutions are required to produce full appropriate powers as state representatives for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the state to be bound by a treaty.³³¹

In summary, the treaty-making power lies exclusively in the hand of the executive arm of the federal government. Conversely, the Parliament exercising the legislative power of the government are conferred with the power to give domestic legal effect to the treaties signed by the executive body.

WHETHER A TREATY SIGNED BY THE GOVERNMENT WILL AUTOMATICALLY BIND MALAYSIA?

A treaty carries significant implication on state-parties, and its creation usually takes years of negotiation and deliberation before an agreement may be reached. Technically, a treaty will not create binding obligation merely by relying on one single act of signing an instrument. This is because the creation of a treaty undergoes several stages before it becomes enforceable and binding on the state. These processes are explained in detail in the Vienna Convention 1969, for which Malaysia is a state-party.³³² In this context, the Vienna Convention 1969 employs different terms to reflect different stages of the creation of treaties. They include adoption, authentication, expressing of consent, entry into force, and registration and publication. Each phase carries different legal implications on the participating states.

The adoption of treaties refers to the expression of consent by the participating states on the form and contents of the treaty. This is normally effected through ‘initials’ put down by the legal representatives of the participating states. Art. 9, Vienna Convention 1969 requires all participating states to express their consent when adopting the text of the treaty. Nevertheless, the provision allows the text to be adopted by the vote of two-thirds of the States present and voting in case of a multilateral treaty held at an international conference.³³³ In essence, the act of adoption does not amount to consent to be bound by the treaty. This is implied from Art. 2(1),

³³¹ Art. 7(1), Vienna Convention 1969. See also paragraph (2)(a) and (b) which confers on the heads of diplomatic missions and representatives accredited by States to an international conference or to an international organization limited power to adopt the text of a treaty without the need of producing appropriate full powers.

³³² Malaysia acceded to the Vienna Convention 1969 and becomes a party to the same on 27 July 1994.

³³³ See further in Art. 9(2), Vienna Convention 1969.

Vienna Convention 1969 which classifies a state that took part in the adoption stage as a 'negotiating State'.³³⁴

A treaty needs to have a final text before the negotiating states can decide to express their consent to the treaty. This process is called 'authentication' of the text of the treaty which certify that the material document contains the authentic and definitive version that can no longer be modified. According to Art. 10, Vienna Convention 1969, authentication may be effected through such agreed procedures, or by the signature, signature *ad referendum* or initialing by the representatives of the relevant States of the text of the treaty or of the Final Act of an international conference. Like adoption, the authentication of the text of a treaty does not amount to consent to be bound by a treaty.

The next phase in the creation of treaties is expressing consent to be bound by the treaties. Art. 11, Vienna Convention 1969 lists out few means for states to express their consent to be bound by treaties. States may express their consent to be bound by a treaty by signature (Art. 12), or exchange of instruments constituting a treaty (Art. 13), or ratification, acceptance and approval (Art. 14), or accession (Art. 15), or by any other means agreed by the parties. Each means of expressing consent to be bound by the treaties are unique and requires different explanations.

For instance, Art. 12(1), Vienna Convention 1969 provides that the consent of a state to be bound by a treaty is expressed by the signature of its representative when the treaty provides that signature shall have that effect or when the negotiating States agreed or implied that signature should have that effect. Art. 12(2)(a) further clarifies that the initialing of a text constitutes a signature of the treaty. An initial or a signature may be seen as the common ways of expressing consent, but technically it carries different effects depending on the context in which they were used. A signature used in the context of authenticating the legal text of the treaty fall short of creating a binding effect on the state. Likewise, a treaty which is signed subject to ratification creates no more than an authentication of its text. However, if a treaty is not subject to ratification, or in the absence of a contrary provision, a treaty must be presumed to operate and binding on signature in accordance with Art. 12, Vienna Convention 1969.

³³⁴ See also Art. 24(4), Vienna Convention 1969: The adoption of the text of a treaty is significant in so far as its established the provisions regulating the authentication of text of the treaty, the establishment of states' consent to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty.

Another example of the legal means of expressing consent to be bound by treaties is ‘ratification’.³³⁵ A treaty signed subject to ratification denotes that signature alone does not constitute an expression of consent to be bound the treaties. Ratification is necessary if the particular state requires local legislation before the treaty enters into force for that state, or to obtain consent from the parliament in accordance with the constitutional law of the relevant state.³³⁶ Additionally, ratification provides opportunity for the contracting state to re-examine the overall effect of the treaty on their interests and to gather public opinion for the obligation that the state is about to undertake.³³⁷ If a treaty is signed subject to ratification, the state’s consent to be bound by the treaty is completed when the instrument(s) of ratification are exchanged between the contracting States (for bilateral treaty), or deposited with the depositary (for multilateral treaty).³³⁸

According to Art. 2(1)(f), Vienna Convention 1969, a state that has expressed consent to be bound by the treaty is called the ‘contracting state’, regardless of whether or not the treaty has entered into force. As a contracting state, the law imposes certain obligation that must be observed. This is clearly stated under Art. 18(b), Vienna Convention 1969, where a state that has expressed its consent to be bound by a treaty is obligated to refrain from taking any actions that would defeat the object and purpose of the particular treaty prior to its entry into force. Similar obligation is imposed on the state that has signed a treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, unless they clearly wished-for not to become a party to the treaty.³³⁹

In principle, a state is only bound by a treaty once the treaty has entered into force. The state is referred to as a ‘party’ to the treaty, for which its consent to be bound by the treaty has been established and the treaty has entered into force for that state.³⁴⁰ This position is supported by Art. 28, Vienna Convention 1969, which specifies that the provisions of a treaty

³³⁵ See further Art. 2(1)(b), Vienna Convention 1969: “ratification” means ‘the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty’.

³³⁶ Abdul Ghafur Hamid @ Khin Maung Sein, 2019.

³³⁷ Ibid.

³³⁸ Art. 16, Vienna Convention 1969.

³³⁹ Art. 18(a), Vienna Convention 1969.

³⁴⁰ See further Art. 2(g), Vienna Convention 1969.

shall “not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

The manner and date in which a treaty enters into force is provided under Art. 24, Vienna Convention 1969. Generally, a treaty will enter into force on a date so agreed by the negotiating states. Most of the time, a treaty will include a clause specifying the manner and date for the treaty to enter into force. However, in the absence of an agreement or definite provision, a treaty enters into force when consent to be bound by the treaty has been established for all the negotiating States. Additionally, if a state expresses its consent to be bound by a treaty on a date after the treaty has entered into force (e.g. in case of expressing of consent by way of accession), the treaty shall enter into force for that state on the date when its expresses its consent, or on a later date as determine by the treaty.

A treaty which has entered into force are required to be transmitted to the Secretariat of the United Nations (‘UN’), who shall then register, record and publish the same to give publicity to the treaty relations. This obligation is imposed on all UN members in pursuant to Art. 102(1), UN Charter and Art. 80(1), Vienna Convention 1969. Nonetheless it is important to understand that the act of registration carries no effect on the status of the instrument as a treaty.³⁴¹ A treaty, whether or not it is registered, is binding on all parties once it entered into force. Failure to register a treaty may however restrict the application of the treaty on the state parties. Art. 102(2), UN Charter, stresses that a state may not invoke a non-registered treaty or agreement to which it is a party before any organ of the UN. Hence for instance, a UN member may be barred from relying on a treaty to which it is a party if a matter arising from the treaty is heard before the ICJ.

In summary, the ‘signing’ of a treaty does not automatically create binding obligations on a state to observe the treaty. This is because, the creation of treaties is made through several processes. The act of signing may imply adoption, authentication, or express of consent to be bound by treaties. Technically, the adoption and authentication of the text of treaties creates no binding obligation on the signing states. Likewise, the act of signing for the purpose of expressing of consent to be bound by treaties does not create binding obligation on the

³⁴¹ Abdul Ghafur Hamid @ Khin Maung Sein, 2019, p. 213; D.N. Hutchinson, *The Significance of the Registration or Non-Registration of an International Agreement in Determining Whether or Not It Is a Treaty*. In *The Law of Treaties*, Routledge, pp. 133-164).

signing states, although it may impose certain obligation on the contracting states to honor the object and purpose of the particular treaty prior to its entry into force. Accordingly, a treaty creates binding obligation on the state-party once it has entered into force for that state.

WHETHER A TREATY SIGNED BY THE GOVERNMENT CREATES LAW FOR THE CITIZEN OF MALAYSIA?

One of the essential character of treaties is they serve as sources of international law. This is embodied in Art. 38(1)(a), ICJ Statute, which requires the ICJ, in deciding international disputes, to refer to the international conventions or treaties that establishes rules governing the relationship between the disputing states. In fact, the overall reading of Art. 38, ICJ Statute implies that treaties sit at the highest hierarchy among the sources of international law. As previously discussed, treaties as sources of international law bind the parties, namely the states (or the governments), based on the doctrine of *pacta sunt servanda*. The scope of application of treaties on state-parties is explained in Art. 29, Vienna Convention 1969 which ties the term ‘party’ to its territoriality. The provision reads that a treaty is binding on the state-party in respect of its entire territory. On the contrary, the application of treaties on the individuals are left out from the above description.

The status of individuals under international law has now been altered. International law, which was primarily established to regulate the relations of state, has now grown to recognize individuals as the subjects of international law. The most dominant areas regulating the individuals are international human rights and international crimes. This recognition gives individuals certain rights and imposes certain duties at international law. Nevertheless, in no way this recognition confers on the individuals the right to conclude international treaties. Despite the prevalent views recognizing individuals as having limited international legal personality, individuals are mainly treated as subjects of the national law and fall under the local jurisdiction of a state.

For example, in Malaysia, the citizens are duty-bound to observe the local laws, failing which they will face legal consequences. The Malaysian law may be classified into two, namely written and unwritten law. The written law consists of the Federal Constitution and the constitutions of each state forming Malaysia, legislation enacted by the Parliament and the State Legislative Assemblies, subsidiary legislation made by the authorized persons

or bodies and emergency Ordinances made by the *Yang di-Pertuan Agong*.³⁴² The unwritten law comprises the principles of English law applicable to local circumstances, judicial decisions of the superior courts and the superseded superior courts, as well as customs of the local inhabitants that were accepted as law by the courts.³⁴³ The other category of laws applicable in Malaysia is the Islamic Law, which is only applicable to the Muslim.³⁴⁴ The above classification excludes the international law from the long list of the Malaysian law.

The co-existence of international law and the national law is an issue worth addressing to determine their application on the individuals. The relationship between international law and national law may be examined under two dominant theories, namely 'monist' and dualist theories. The 'monist' theory perceives international law and national law as part of one single order. Under this framework, international law is automatically incorporated into state's national legal system without the need of express approval by the local laws. In other words, international law (that include treaties) can be directly applied in the domestic sphere of state and automatically bind the citizens. Most importantly, international law is superior and prevails over the national law. In contrast, the 'dualist' theory understands international law and national law as two separate legal systems that exist and operate independently of each other. The international law governs the inter-states relationship; while the national law regulates the relationship of individuals within a given state. It follows that, the international law (that include treaties) can only be applied into the national legal system when it is adopted as part of the national law via express means of local legislation. Once adopted as part of the national law, all rights and duties arising from the international law will be applicable to the individuals within a state.

The above discussion does not in any way resolves the conflicting issues arising from the inter-relation of international law and the national law. This is because the application of international law in the national legal system is a complicated matter. For instance, Fitzmaurice contends that the inconsistency of the national law with the international law does

³⁴² Wu Min Aun, *The Malaysian Legal System (3rd Ed.)*, Pearson Malaysia Sdn. Bhd., Petaling Jaya 2005, pp. 109-121; Lee Mei Pheng, *General Principles of Malaysian Law (5th Ed.)*, Penerbit Fajar Bakti Sdn. Bhd., Shah Alam 2005, pp. 17-41.

³⁴³ Ibid.

³⁴⁴ Ibid.

not invalidate the local laws, but a state that fails to act on the domestic plane in a manner required by international law may entail international responsibility.³⁴⁵ Moreover, a state cannot simply be generalized as ‘monist’ or ‘dualist’ because the practices of one state in accepting international law may vary according to the different sources of international law, in particular international treaties and customary international rules. Nonetheless, the monist/dualist discourse is still useful in explaining how a state accepts international law into its national legal system.

As far as Malaysia is concerned, the Federal Constitution is silent in respect of the reception of international law into the national legal system. However, it can be implied from the practice that Malaysia adhered to the doctrine of transformation in accepting international treaties signed by the government. The doctrine treats international law, in particular international treaties, as not being a part of the national law. An act of transformation via local statute or an Act of Parliament, known as the enabling Act, is needed to transform treaties into the local laws.³⁴⁶ Accordingly, a treaty is not a law regulating the individuals or the citizens of Malaysia unless and until it is transformed into local laws by an enabling Act made by the Parliament.

This conclusion is reflected in a number of local statutes passed by the Parliament that incorporate and give domestic legal effects to the provisions of the international treaties. For instances: the Carriage of Goods by Sea Act 1950 (Act 527) gives legal effect to the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1924 (‘Hague Rules’);³⁴⁷ the Geneva Conventions Act 1962 (Act 512) gives legal effect to the four Geneva Conventions of 1949 relating to the protection of the victims in the case of armed conflicts;³⁴⁸ the Diplomatic Privileges (Vienna Convention) Act 1966 (Act 636) gives legal effect to the Vienna Convention on Diplomatic Relations 1961;³⁴⁹ and the Exclusive Economic

³⁴⁵ Sir Gerald Fitzmaurice, *The General Principles of Law*, Hague Recueil, 92, 1957-II, pp. 68-94.

³⁴⁶ Malcolm N Shaw, *International Law (7th Ed)*, Cambridge University Press, Cambridge 2014, p. 100.

³⁴⁷ See Art. 2 and the First Schedule of the Carriage of Goods by Sea Act 1950 for the local application of the Hague Rules 1924.

³⁴⁸ See further details in sections 2 and 3(1), as well as the First, Second, Third and Fourth Schedules of the Geneva Conventions Act 1962 that enacted the four Geneva Conventions concluded on 12 August 1949.

³⁴⁹ See, in particular, section 3(1), Diplomatic Privileges (Vienna Convention) Act 1969 that provides for the reception of the Vienna Convention on Diplomatic Relations 1961 with certain modification.

Zone Act 1984 (Act 311) gives legal effect to certain provisions of the United Nations Convention on Law of the Sea 1982.³⁵⁰

Accordingly, it may be summarized that Malaysia adhered to the dualistic approach in accepting the international treaties into its national legal system. This conclusion is consistent with the earlier discussion concerning the power of the Parliament in giving domestic legal effects to international treaties. A treaty is operative in Malaysia and binding on the citizens once it is introduced into the national legal system via an Act of Parliament. Hence, in the absence of local law adopting a treaty, the treaty signed by the government will not bind the individuals.

WHAT IS THE EFFECT OF A TREATY SIGNED THAT IS INCONSISTENT WITH THE LOCAL LAWS?

Generally, the international treaties signed by the government are treated as excluded from the sources of the Malaysian law. The separation between international treaties and the local laws are derived from the 'dualist' theory. As discussed previously, the 'dualist' theory understands international law and national law as two separate legal systems that exist and operate independently of each other. Both legal systems are intended to govern different subject-matters, namely the international law (including treaties) governs the inter-states relationship, and the national law regulates the relationship of individuals within a given state. However, in reality, both legal systems may regulate on similar issues and consequently produce conflicting effects. Fitzmaurice foresees the conflicting effects produced by the two legal systems. He submits that the inconsistency of the national law with the international law does not in any way invalidate the local laws.³⁵¹ Rather, a state that fails to act on the domestic plane in a manner required by international law (e.g. failure to observe a treaty) may entails international responsibility.³⁵² In this context, Art. 27, Vienna Convention 1969 prohibits a state-party from invoking the provisions of its internal law as excuse for its failure to perform its obligation under a treaty.

³⁵⁰ See, for instance, section 3(1), Exclusive Economic Zone Act 1984, which recognized the exclusive economic zone of Malaysia an area of the sea extending to a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea is measured. This is in line with Art. 57 of the 1982 Convention which limits the extent of the exclusive economic zone claimable by the coastal state to a distance of 200 nautical miles to be measured from the baselines.

³⁵¹ Sir Gerald Fitzmaurice, 1957.

³⁵² Ibid.

In Malaysia, international treaties may only be applied into the national legal system when it is adopted as part of the national law via express means of local legislation. This is inferred from the doctrine of transformation which requires the Parliament to pass local statute to enact international treaties and give domestic legal effect to its provisions.

The above explanation gives rise to two situations, namely the status of the enacted and un-enacted treaties. Firstly, the un-enacted treaties are not transformed into the local laws. In deciding a case submitted before it, the court is not under an obligation to refer to the un-enacted treaties. This principle was enunciated in the case of *PP vs. Wah Ah Jee*,³⁵³ where the Supreme Court ruled that the Malaysian courts are not under duty to refer to the international treaties when deciding a case. Rather the courts are only required to look at the local legislation when searching for the relevant sources of law, which exclude the un-enacted treaties. It follows that the issues of inconsistency of the un-enacted treaties with the local laws carries no significant weight for the reason that they are not treated as local laws in the first place.

Secondly, the enacted treaties which have been given domestic legal effects via local legislation must be treated in the same footing with the local laws. In this context, the enacted treaties form the integral part of the legislation. The general rules governing the application and legality of legislation are similarly applicable to the enacted treaties. The inconsistencies of the enacted treaties with the local laws must be determined in accordance with the provisions of the Federal Constitution. Art. 4(1), stresses that the Federal Constitution is the supreme law of Malaysia and any law passed after Merdeka Day which is inconsistent with the Federal Constitution shall, to the extent of the inconsistency, be void. Further, Art. 75 underlines that if any law made by the states is inconsistent with a federal law, the federal law (including the enacted treaties) shall prevail and the State law shall, to the extent of the inconsistency, be void.

Therefore in summing up, upon signing, the international treaties are not included as part of the local laws. Under the dualistic view, they operate outside the scope of the national legal system. The un-enacted treaty will not come into contact with the local laws, and hence their inconsistencies bring no significant impact to the treaty itself. Conversely, the enacted treaty is treated as an itegral part of legislation and any issues on the inconsistency of the enacted treaties with other local laws must be construed in accordance with the Federal Constitution.

³⁵³ (1919) 2 FMSLR 193.

CONCLUSION

In conclusion, international treaties are regarded as the heart of the international law. They are constantly negotiated and concluded as states continuously forge close cooperation between themselves. More important than that, international treaties are legally accepted as the primary source of international law regulating the relationship between states. The role and the status of treaties in the international plane is a settled practice; however, the signing of treaties and the effects of treaties on the domestic level remains unresolved and occasionally invites disagreement and oppositions.

In the context of Malaysia, there exist no direct provisions from the Federal Constitution that confers the right to conclude treaties on any particular institution or body. However, a careful reading on the related provisions indicates the treaty-making power lies in the hand of the executive arm of the federal government. This is mainly exercisable by the Prime Minister and the Minister for Foreign Affairs in pursuant to the Vienna Convention 1969. Nonetheless, the Federal Constitution is silent on whether any interested institutions, such as the *Yang di-Pertuan Agong* and the Conference of Rulers, should be consulted before a treaty is signed. Conversely, the role of the Parliament has been clearly defined in the Federal Constitution to which it is conferred with the power to give domestic legal effect to the treaties signed by the executive body.

In the context of its application, the treaties, upon signing, carry different legal impacts not only on the state and the government, but also on the individuals and the local laws. Technically, a treaty binds the government as a state-party when it has entered into force. The individuals or the citizens of Malaysia are not bound by the treaties entered into by the government. This is because, Malaysia treated international treaties as separated from the local laws. However, if a local statute is legislated to enact an international treaty, the latter will be treated as an integral part of the legislation and subsequently create law for the individuals. It is only when a treaty is transformed into local laws that the citizens are duty-bound to observe the provisions of the treaty. Besides, the facts that a treaty has entered into force does not mean that it automatically influences the local laws. A treaty may internally affect the local laws once it is transformed as such by the local statute. Whether or not the enacted treaties have 'valid' force of law in Malaysia must be examined in accordance with the Federal Constitution to determine its validity and consistency with the existing local laws.

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