UNIVERSITAS SULTAN AGENG TIRTAYASA

NURANI HUKUM

Journal of Legal Studies

Volume 5 No.2, December 2022 http://dx.doi.org/10.51825/nhk.v5i2

Nurani Hukum : Jurnal Ilmu Hukum	Vol 5 No.2	Page 93-210	Serang, December 2022	E-ISSN 2656-0801	P-ISSN 2655-7169

NURANI HUKUM
JURNAL ILMU HUKUM

Jurnal Fakultas Hukum Universitas Sultan Ageng Tirtayasa
P-ISSN: 2655-7169 | E-ISSN: 2656-0801

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Nurani Hukum is a **member of**

Asosiasi Pengelola Jurnal Hukum Indonesia 2022

NURANI HUKUM
JURNAL ILMU HUKUM

Jurnal Fakultas Hukum Universitas Sultan Ageng Tirtayasa

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Website
https://jurnal.untirta.ac.id/index.php/nhk/index

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FOREWORD

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Journal Nurani Hukum: Journal of Legal Studies Volume 5 No.2 December 2022 addresses law in general, as well as different legal and scientific fields. Some of the themes from this edition's special studies include civil, criminal, constitutional, and international law.

The publication of this journal is undeniably the product of many people's efforts. Also, we would like to thank all members of the peer reviewer and the editorial board who have worked tirelessly to ensure the publication of the Journal Nurani Hukum: Journal of Legal Studies. We hope the articles in this journal will be useful and enlightening to all of us.

Sindangsari, December 2022

Editorial Team

NURANI HUKUM : JURNAL ILMU HUKUM
Volume 5 Number 2, December 2022
P-ISSN: 2655-7169 | E-ISSN: 2656-0801
http://dx.doi.org/10.51825/nhk.xxx

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P-ISSN: 2655-7169 | e-ISSN: 2656-0801
https://jurnal.untirta.ac.id/index.php/nhk/index

Should the JCPOA be Revived? An Analysis of the Iran Nuclear Deal

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Article Info:
|Submitted: 28 August 2022 **|Revised**: 23 December 2022 **|Accepted**: 26 December 2022

Recommended Citation: *Chicago Manual of Style 17th edition (full note)*
Yordan Gunawan, *et-all*, "Should the JCPOA be Revived? An Analysis of the Iran Nuclear Deal", *Jurnal Nurani Hukum : Jurnal Ilmu Hukum*, Vol. 5 No. 2, (December, 2022)", P.93-105

ABSTRACT

The Joint Comprehensive Plan of Action (JCPOA) is referred to as one the peaceful settlement of the international dispute in the form of a multilateral agreement restricting Iran's nuclear development in exchange for the lifting of economic sanctions. However, some issues have emerged since the agreement entered into effect. The United States withdrew from the agreement and reimposed the economic sanctions against Iran, consequently affecting Iran's commitment to its nuclear obligations. State Parties' initiative to reinstate the agreement in its original form is invalid under international law since the issue is Iran and the United States' actions. In this research, the authors examined the termination and establishment of a new agreement as a strategy to overcome existing issues. The research methodology combines qualitative research with normative legal research. The results showed that the JCPOA is a "treaty of contract" agreement that binds only the State Parties and must be terminated because the unilateral United States withdrawal and Iran's loosening of compliance obligations effected the agreement to run out of control, preventing it from achieving its targeted purpose. After the agreement is terminated, a new agreement on Iran's nuclear program should establish in accordance with international law.

Keywords: *Iran, JCPOA, New Agreement, Termination Agreement, United States.*

ABSTRAK

Joint Comprehensive Plan of Action (JCPOA) disebut sebagai salah satu usaha penyelesaian damai sengketa internasional dalam bentuk perjanjian multilateral untuk membatasi pengembangan nuklir Iran dengan imbalan pencabutan sanksi ekonomi oleh negara penandatangan lainnya. Namun, beberapa masalah muncul sejak perjanjian tersebut berlaku. Dimulai dengan Amerika Serikat yang menarik diri dari perjanjian dan memberlakukan kembali sanksi ekonomi terhadap Iran dan lalu mempengaruhi komitmen Iran sendiri terhadap kewajiban nuklir sebagaimana tertuang dalam jalan JCPOA. Di lain pihak, inisiatif negara-negara penandatangan untuk mengembalikan perjanjian dalam bentuk aslinya sebetulnya dianggap tidak sah menurut hukum internasional, terutama jikalau mereferensi tindakan pelanggaran yang dilakukan oleh Iran dan Amerika Serikat. Dalam penelitian ini, penulis mengkaji pengakhiran perjanjian dan pembentukan perjanjian baru sebagai strategi untuk mengatasi permasalahan yang ada. Metodologi penelitian menggabungkan penelitian kualitatif dengan penelitian hukum normatif. Hasil penelitian menunjukkan bahwa JCPOA merupakan perjanjian "*treaty of contract*" yang hanya mengikat negara pihak. JCPOA harus diakhiri karena penarikan diri secara sepihak oleh Amerika Serikat dan pelonggaran kewajiban akan kepatuhan oleh Iran menyebabkan perjanjian lepas kendali sehingga mencegah tercapainya tujuan yang ditargetkan. Setelah perjanjian diakhiri, perjanjian baru tentang program nuklir Iran seharusnya dibuat sesuai dengan norma hukum internasional yang berlaku.

Kata Kunci: *Amerika Serikat, Iran, JCPOA, Perjanjian Baru, Pengakhiran Perjanjian.*

Introduction

Some issues in relationships between states (including with international organizations) can no longer be settled by reference to international customs. Realizing this, states establishing connections with one another incorporate these diverse issues into an international agreement.[1]

In general, the substances of international agreements are divided into two categories: (1) treaty of contract; and (2) law-making treaties. A treaty contract is an agreement with purely legal consequences, including the parties' rights and obligations. A law-making treaty is an agreement that establishes legal norms and rules for the entire international community. An international agreement will grant specific rights and obligations in the international field that are expressly mentioned in the articles of the agreement, as considered from the perspective of the agreement's substance. Some examples of international agreements that give rights and obligations to non-parties include (1) the United Nations Charter and (2) the Vienna Convention on the Law of Treaties 1969.[2]

One of the international agreements that exclusively confers rights and obligations on State Parties is the Iran Nuclear Deal, which is formally known as the Joint Comprehensive Plan of Action (JCPOA), was signed on July 14, 2015, by Iran, the five permanent members of the United Nations Security Council (China, France, Russia, United Kingdom, and the United States), and Germany – collectively referred to as P5+1.[3] The United Nations Security Council (UNSC) approved this agreement by adopting Resolution 2231 on July 20, 2015, in order to strengthen its practical foundation and enforcement. This resolution serves as a guarantee for the implementation of the JCPOA and urges all State Parties to fulfill their duties.[4]

The JCPOA imposes restrictions on Iran's nuclear development in exchange for the lifting of economic sanctions against Iran. In this agreement, Iran committed not to enrich uranium that may be used to make nuclear weapons. Iran also committed to implementing an "Additional Protocol" granting inspectors from the International Atomic Energy Agency (IAEA), the United Nations' nuclear watchdog, full access to its nuclear facilities, including potentially undeclared sites. In exchange for this agreement, the P5+1 and the United Nations have agreed to lift nuclear-related sanctions against Iran.[5]

The JCPOA emphasizes an all-encompassing commitment to cooperation. However, cooperation between the parties of this agreement has not been straightforward from the beginning. In 2018, the United States unilaterally withdrew from the JCPOA without the consent of the State Parties and used the mechanism to reimpose suspended sanctions against Iran. This does not violate the terms of the Iran Nuclear Deal because unilateral withdrawal is not regulated by the agreement. Meanwhile, Iran believes the United States has violated the agreement. By enriching uranium to near-weapon

[1] Dragana Nešović and Dušan Jerotijević, "Role and Importance of International Agreements in Regulating International Relations in Modern Conditions," *Ekonomika* 64, no. 3 (2018): 89–102, https://doi.org/10.5937/ekonomika1803089n.

[2] Mehak Jain, "Concept of Treaties in International Law," *Ipleaders*, June 2020.

[3] Kali Robinson, "What Is The Iran Nuclear Deal?," *Council on Foreign Relations*, July 2022.

[4] United Nations Security Council Resolution 2231 (2015).

[5] *Op. Cit.*

levels and seeking to remove 27 IAEA surveillance cameras from its nuclear facilities, Iran violated many of the agreement's restrictions on its nuclear program due to a misunderstanding.[6] The actions of Iran and the United States make this agreement not run comprehensively.

Samin Ustiashvili's research, International Law Perspective on the JCPOA and Post-JCPOA, analyzes a legal and impartial assessment of Iran's action in the missile test and the United States' response to the implementation of new sanctions in the post-conflict period. According to the research, the State Parties cannot sue for violating the commitments of the other State Parties on the basis that they have violated each other, and they must rely on the mechanism outlined in the JCPOA agreement. In addition, this research addresses the United States government's efforts to weaken the JCPOA.[7]

The Iran Nuclear Deal plays a significant role in maintaining global stability and conduciveness, so the United States' decision to withdraw from the agreement, followed by the re-imposition of sanctions against Iran, are actions that are actually contradictory, which causes Iran to violate the agreement because the sanctions imposed have disrupted its economic condition. The remaining State Parties to the agreement are not in a strong position to convince Iran to comply with its commitments.

The explanation in the previous paragraph shows that the absence of a solution to the issue might be taken into consideration to determine the ideal solution to the existing issues. Since April 2021, the State Parties have made efforts to reinstate the agreement as a strategy to overcome existing issues. However, the reinstatement is an effort to reinstate the Iran Nuclear Deal to its original form. In actuality, Iran and the United States are responsible for the JCPOA crisis, not the substance of the agreement. Therefore, reinstatement is a futile attempt.

By terminating the current agreement and establishing a new agreement, this issue will be effectively resolved. This research examines the termination and establishment of new agreements under international law.

Methodology

The research employs normative legal research, which uses legal sources in the form of laws and regulations, court decisions, contracts or agreements, and legal theory to examine the relationship between practical applications and theoretical research in outcoming the issues that will be the subject of this research.[8] In the implementation of this research, the authors referred to the NPT and JCPOA agreements. Furthermore, the study employed qualitative research, which examines data on the research object in the form of ongoing proceedings, international law, and the opinions of legal experts.[9] As part of this type of research, the authors referred to the Vienna Convention on the Law of Treaties as the foundation of the termination and establishment of a new agreement.

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[6]David Gritten, "Iran Removes Nuclear Watchdog's Cameras after Criticism," *BBC News*, June 2022.

[7] Samin Ustiashvili, "International Law Perspective on the Jcpoa and Post-Jcpoa," *International Journal of Science Academic Research* 02, no. 04 (2021): 1322–26.

[8] Sezai Caglayan, "Hukuk Araştırmasında Teorik ve Normatif Çerçeveler: Teorinin Uygulamaya Aktarımı," *Hacettepe Hukuk Fakültesi Dergisi §* (2021), https://doi.org/10.32957/hacettepehdf.947172.

[9]Haradhan Kumar MOHAJAN, "Research Methodology in Social Sciences and Related Subjects. Journal of Economic Development, Environment and People," *Journal of Economic Development, Environment and People* 7, no. 1 (2018): 23.

Discussion

1. JCPOA and International Law

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) regulates global nuclear development, which was an agreement signed on July 1, 1968, that the aim is to restrict nuclear weapons ownership. Additionally, the NPT seeks to guarantee the right of all State Parties to develop nuclear weapons for peaceful purposes to support human health, water resource management, food security, protection of the environment, nuclear power infrastructure development, and nuclear safety and security.[10]

More than 170 sovereign states participate in the NPT and are divided into two categories, namely Nuclear Weapon States (NWS) and Non-Nuclear Weapon States (NNWS). The agreement defines the NWS as states that had tested nuclear devices prior to January 1, 1967. China, France, the United Kingdom, the Soviet Union, and the United States are the five permanent members of the Security Council as the NWS.[11]

The draft of NPT's text obligated the five of the NWS to achieve general and complete disarmament and not to transfer nuclear weapons to the NNWS (Article I). The NNWS – all others – were obligated not to receive or otherwise acquire nuclear weapons (Article II) and accepted comprehensive IAEA safeguards (Article III). Iran concluded a comprehensive safeguards agreement with the IAEA in 1974.[12] This agreement became effective on March 5, 1970, after ratification by the United Kingdom, the Soviet Union, the United States, and forty other states, including Iran.[13]

Numerous nuclear laws in the field of international law have been implemented, including multinational, regional, and bilateral agreements. This is a consideration of the significance of nuclear regulation so that every state can develop nuclear weapons for peaceful purposes. Iran has a legitimate right under the NPT to utilize nuclear energy for peaceful purposes.[14]

In 2003, the IAEA reported that a high-grade uranium factory had been uncovered in Natanz, Iran. According to the IAEA report, Iran is extremely secretive about its nuclear program and does not let the IAEA inspections of its development facilities. Since the IAEA report until 2015, the UNSC has adopted seven resolutions (Resolution 1696, 1737, 1747, 1803, 1835, 1929, and 2224).

The essence of the resolution is to stop Iran's nuclear program, request that Iran report to the IAEA on its nuclear development programs, and permit the IAEA inspections to determine if Iran's nuclear development is peaceful or not. In addition, based on Iran's Comprehensive Safeguards Agreement with the IAEA, the IAEA can request access to Iran's (and any other State Parties) undeclared nuclear facilities through a special inspection if the IAEA Director General deems it necessary to verify the accuracy and completeness of information submitted by Iran. When confronted with situations or conditions that could result in a special inspection, the agency is required to confer with Iran.

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[10] Bill Palmer, "The IAEA Peaceful Uses Initiative and the NPT," *U.S. Department of State*, January 2019.

[11] Ambassador Thomas Graham, "The Nuclear Non-Proliferation Treaty: Delayed Review–Issues Old and New," *Journal for Peace and Nuclear Disarmament* 4, no. 1 (2021): 186–95, https://doi.org/10.1080/25751654.2021.1921499..

[12] Treaty on the Non-Proliferation of Nuclear (NPT) 1968.

[13] *Op. Cit,* p. 188.

[14]Hassan Soleimani Mehdi Khazaie, Mousa Mousavi Zanouz, "The Joint Comprehensive Plan of Action (Jcpoa): Results and Achievements," *PalArch's Journal of Archaeology of Egypt* 18, no. 4 (2021): 2344–56.

The Comprehensive Safeguards Agreement between Iran and the IAEA does not stipulate a timeline for resolving disputes over special inspections, but the Director General will typically submit the issue to the IAEA Board of Governors.[15]

The UNSC Resolution 1929 authorized broader financial and economic sanctions against Iran, such as banning foreign investment in Iran's energy sector, restricting credit for trade with Iran, banning arms sales to Iran, and blocking financial transactions with Iran's banks.[16] However, the Iranian government did not attempt to comply with these international demands.

To overcome the nuclear conflict with Iran, Iran and the P5+1 adopted a gradual approach through negotiations. By participating in these nuclear negotiations, Iran considers the diplomatic path as a win-win solution to ensure that a strict vigil was kept on Iran's nuclear program, lest Iran develops a nuclear weapon and at the same time, tough and crippling economic sanctions against Iran were to be revoked giving Iran the much needed economic relief.[17]

Iran's consideration is supported by Chapter VI of the United Nations Charter, which states: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation."[18]

The JCPOA is the result of negotiations that represented a significant turning point in the Iran nuclear conflict. Furthermore, the JCPOA brought in a brief period of prosperity that addressed Iran's domestic and public concerns while sustaining the regime, preserving Iran's right to civil nuclear energy, and increasing the state's status as a responsible regional power. Iran's primary motivation for signing the agreement was its economic benefits.[19] The JCPOA agreement was signed on July 14, 2015, and ratified by the UNSC Resolution 2231 on July 20, 2015.

Article 2 Paragraph 1 (a) of the Vienna Convention of 1969 defines an international agreement as a written international agreement between two or more states that are governed by international law, whether in the form of a single instrument or two or more related instruments and whatever its particular designation.[20]

The Convention specifies that international agreements are written agreements between states. Iran and the other State Parties are sovereign states with the authority to enter into agreements. In line with paragraph I of the JCPOA's Preamble and General Provisions, the Iran Nuclear Agreement has been adopted by the parties, signed by all State Parties, and ratified by UNSC Resolution 2231. The JCPOA Agreement has a total of 159 pages, composed of 21 pages of the main text and 5 pages of attachments. Five pages are divided into the preface, introduction, and general provisions or agreements in the primary text. There are four subsections on the remaining 15 pages: Nuclear, Sanctions,

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[15] Kalsey Davenport, "IAEA Urges Iran to Cooperate," 2020.

[16]Seyed Hossein Mousavian and Mohammad Mehdi Mousavian, "Building on the Iran Nuclear Deal for International Peace and Security," *Journal for Peace and Nuclear Disarmament* 1, no. 1 (2018): 169–92, https://doi.org/10.1080/25751654.2017.1420373..

[17]Abdullah Alarqan, "United States Position Towards Iran After the Nuclear Deal (2015-2019)," *Humanities & Social Sciences Reviews* 8, no. 1 (2020): 210–19, https://doi.org/10.18510/hssr.2020.8130..

[18] United Nations Charter 1945.

[19]Kulsoom Belal, "Uncertainty over the Joint Comprehensive Plan of Action: Iran, the European Union and the United States," *Policy Perspectives* 16, no. 1 (2019): 23–39, https://doi.org/10.13169/polipers.16.1.0023.

[20] Vienna Convention on the Law of Treaties 1969.

Implementation Plans, and Dispute Resolution Mechanisms. There are 5 attachments:

1) Nuclear-Related Activities;
2) Sanctions-Related Obligations;
3) Peaceful Nuclear Cooperation;
4) Joint Commission; and
5) Execution Plan.[21]

Articles 1 (a) and (b) of the Vienna Convention of 1986: (a) treaties between one or more States and one or more international organizations, and (b) treaties between international organizations.[22] The JCPOA is an agreement classified as such by multiple states and international organizations. The agreement binds Iran with the P5+1 and the UNSC, which supports the agreement by adopting UNSC Resolution 2231.[23] This argument asserts that Iran's relationship with the P5+1 and the United Nations is an issue of international law that can be the subject of international agreements.

The State Parties of the JCPOA presented the agreement at the 7488th meeting of the UNSC, which resulted in Resolution 2231. The resolution is for one of the UNSC's authorities to take the necessary steps to maintain international peace and security. Through this resolution, the UNSC has the ability to impose sanctions as specified in Chapter VII of Article 41 of the United Nations Charter.[24]

This resolution contains 104 pages and two attachments, one of which is the JCPOA in its entirety. In this resolution, the UNSC ensures that Iran's nuclear program is solely for peaceful, non-military objectives so as to maintain international peace and security. Indirectly, this agreement is in line with the objectives of the NPT.[25]

Article 2 of the UNSC Resolution 2231 states: "Calls upon all Member States, regional organizations and international organizations to take such actions as may be appropriate to support the implementation of the JCPOA, including taking actions commensurate with implementation plan set out in the JCPOA's and this resolution and by refraining from actions that undermine implementation of commitments under the JCPOA."[26]

All documents of the JCPOA are attached to UNSC Resolution 2231. This demonstrates the significance of the JCPOA as an attachment to UNSC Resolution 2231. Without UNSC Resolution 2231, the JCPOA cannot be implemented. However, without the JCPOA, UNSC Resolution 2231 will lose its meaning, subjectivity, and purpose.[27]

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[21]Mojtaba Mireh Gini and Maryam Sedaghat, "A Review of Inconvertibility of Iran Nuclear Deal into an International Treaty," *Budapest International Research in Exact Sciences (BirEx) Journal* 1, no. 2 (2019): 86–94, https://doi.org/10.33258/birex.v1i2.230..

[22]Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986.

[23] Paul K. Kerr, "Iran's Nuclear Program: Tehran's Compliance with International Obligations," Verification and Monitoring of the Nuclear Agreement with Iran: Resources and Challenges § (2016).

[24] Faramarz Yadegarian, "Iran ' s Countermeasures to US Withdrawal from JCPOA and the Trigger Mechanism" 2, no. 2 (2019): 89–110.

[25] Yordan Gunawan, "Transboundary Haze Pollution in the Perspective of International Law of State Responsibility," *Jurnal Media Hukum* 21, no. 2 (2014): 170–180, https://doi.org/10.18196/jmh.v21i2.1185.

[26] Mirko Sossai, "'The Dynamic of Action and Reaction' and the Implementation of the Iran Nuclear Deal," *Questions of International Law* 66, no. 1 (August 2018) (2020): 5–22.

[27] Jovan, "The United States Unilateral Withdrawal from the Restrictions

The UNSC Resolution 2231 should be considered in its whole, from the preamble to the attachment, along with subsequent statements and practices of the UNSC members. In this circumstance, the JCPOA cannot be ruled out as an attachment to UNSC Resolution 2231.

Both are instruments that are connected. The achievement of this resolution is contingent on the implementation of the JCPOA by the State Parties. The UNSC Resolution 2231 and the JCPOA are binding sources of international law for State Parties. This is based on the general principle of *Pacta Sunt Servanda*, which applies to all international agreements and demands compliance with the agreement in good faith by all parties. In addition, it is based on Article 25 of the UN Charter, which states: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with present Charter."[28]

Even though the JCPOA cannot stand alone as an international agreement, this is based on the following explanation. However, the presence of the UNSC Resolution 2231, which adopted the JCPOA, rendered the agreement's terms enforceable. Therefore, based on UNSC Resolution 2231, the JCPOA State Parties must comply with the resolution's commitments and be bound by the duties resulting from the agreement's terms.[29] The JCPOA is an agreement "treaty of contract" that solely binds the parties to the agreement.

2. Termination of the JCPOA Agreement under International Law

The JCPOA does not include a clause regarding unilateral withdrawal from the agreement by State Parties. In addition, the JCPOA "Dispute Resolution Mechanism" lacks an acceptable definition of unilateral withdrawal.[30] If a country withdraws unilaterally from the agreement, then its acts cannot be classified as violations and remain internationally valid. In practice, there is a possibility for one of the parties not to be able to properly fulfill the agreement which has determined all the rights and obligations.[31]

As was the case in 2018, the United States unilaterally withdrew from the JCPOA without the consent of the State Parties and reimposed suspended sanctions against Iran.

By limiting the incentives for non-compliance to be penalized, a State Party's withdrawal from an agreement enables it to end cooperation with other State Parties to the agreement. The JCPOA does not include a clause regarding unilateral withdrawal, so the United States cannot violate the agreement's provisions, cannot be asked to justify its non-compliance before a court established by the agreement, and cannot be subject to sanctions under the agreement. The other State Parties cannot participate in reciprocal acts of non-compliance in accordance with international law. In addition, Jean Galbraith accepted that the president has the constitutional authority to withdraw

of Iran's Nuclear Program in JCPOA 2015 under International Law."

[28]Jessica Priscilla Suri, "The United Nations Security Council Resolution on Sanctions Towards Individual from the Perspective of International Law," *Padjajaran Journal of International Law* 3, no. 2 (2019): 216.

[29] *Op. Cit*.

[30] Naimeh Masumy, "Revisiting the Joint Comprehensive Plan of Actions: The Role of Arbitration in Reviving a Broken International Agreement," *Opinio Juris*, January 2022.

[31] Hazar Kusmayanti, Yola Maulin, and Eidy Sandra, "Breach of Notarial Deed for Peace under Indonesian Civil Law Perspective," *Jurnal Media Hukum* 26, no. 1 (2019): 34–46, https://doi.org/10.18196/jmh.20190121.

the United States from most international agreements.[32]

The United States' withdrawal coincides with the end of cooperation with the agreement's other State Parties. In this regard, the United States is able to impose nuclear and economic sanctions on Iran. In response, Iran demanded guarantees from the E3 states (France, Germany, and the United Kingdom) and other State Parties. However, the efforts of the E3 states (France, Germany, and the United Kingdom) and other State Parties have been ineffective in the face of maximum pressure from the United States, which aims to deprive Iran of more rights to its nuclear program as well as restrict its ballistic missile program and regional control.[33]

Consequently, in the fourth year of the JCPOA (May 8, 2019), Iran began to loosen its commitment to the JCPOA's nuclear terms. The unilateral withdrawal of the United States and the loosening of Iran's compliance obligations caused the JCPOA to run out of control.

Iran executed the loosening of compliance in violation of many of the agreement's restrictions on its nuclear activity. Iran's violations include attempting to remove 27 IAEA surveillance cameras and enriching uranium to near-weapons levels. These violations damaged the JCPOA over time.[34]

Negotiations to revive the agreement and reinstate the JCPOA began in right earnest in April 2021. At the end of the eighth round of negotiations in January 2022, the State Parties of the JCPOA, including the United States, convened in Vienna. In addition to the Vienna negotiations, there was also a round of indirect negotiations hosted at Doha on 28-29 June.[35]

The reinstatement of this agreement aims to return the JCPOA to its original form and bring the United States back into the agreement.[36] However, procedures connected to agreements are not included in the JCPOA "Dispute Settlement Mechanism". Furthermore, reinstatement is not a step towards overcoming existing issues, as issues are caused by actions committed by Iran and the United States and not by the substances of the JCPOA. Therefore, the resolution is invalid under international law.

The crisis of the JCPOA weakness is a cause that must lead to the termination of the agreement. Section 3 of the Vienna Convention of 1969 defines the termination of an agreement and the grounds or justifications that may be used to terminate an agreement.

Article 60 Paragraph 3 (b) of the Vienna Convention of 1969 permits the termination of an agreement based on a violation of a term essential to the realization of the agreement's object or purpose. Iran agreed to two essential terms of the JCPOA, as follows: (1) Iran committed not to develop enriched uranium (HEU) or plutonium, both of which are used in the production of nuclear weapons; (2) Iran will make attempts to persuade the international

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[32] Laurence R. Helfer, "Introduction to Symposium on Treaty Exit at the Interface of Domestic and International Law," *AJIL Unbound* 111, no. 2017 (2017): 425–27, https://doi.org/10.1017/aju.2017.102.

[33] Arash Davari, "U.S.-Iran Relations under Maximum Pressure: A Narrow Path to Negotiations," *Middle East Brief Brandeis University*, no. 137 (2020).

[34] Kenneth Katzman, Kathleen J. McInnis, and Clayton Thomas, "U.S.-Iran Conflict and Implications for U.S. Policy," *Congressional Research Service*, 2020.

[35] Rajeev Agarwal, "With JCPOA Revival Uncertain, Iran Is Slowly and Surely Making the Nuclear Deal Irrelevant," *WIO NEWS*, August 2022.

[36] Michael Crowley, Steven Erlanger, and Farnaz Fassihi, "U.S. and Iran Weighing 'Final' E.U. Offer on Nuclear Deal," *The New York Times*, August 2022.

community that its nuclear facilities at Natanz, Fordow, and Arak are used solely for peaceful purposes or energy production. In addition, Iran is bound by this agreement to limit the number and types of centrifuges that can be operated, as well as the level and quantity of enriched uranium. Iran also agreed to sign the "Additional Protocol", which provides inspectors from the IAEA, the United Nations' nuclear watchdog, unlimited access to its nuclear facilities and potentially undeclared sites.[37] However, Iran's actions violated these two essential terms, undercutting the agreement's purpose. Consequently, the JCPOA has to be terminated.

Article 59 (1) of the Vienna Convention 1969 permits for the termination of a prior international agreement if a new agreement is to be negotiated. After the agreement has been successfully terminated, it is possible to establish a new agreement.

The new agreement can be established on the steps of the Vienna Convention of 1969. The following are the steps involved in establishing an international agreement:

(1) Negotiation is the beginning phase of forming an international agreement, which is conducted by representatives of states who have been appointed and armed with full power documents. This document is not required to be submitted to state representatives if the representative of the state does not have the authority to represent his country during the negotiating phase. Using a diplomatic forum, multilateral international accords are negotiated, with the eventual result being the ratification and adoption of the agreement's text. This is in accordance with Article 9 (1) of the Vienna Convention of 1969, which stipulates that the adoption of the text treaty takes place by the consent of all States participating in its drawing up.

(2) Signatory meets the requirements of Article 12 of the Vienna Convention of 1969. In a two-stage international agreement, the signatory serves as an indication that the parties are bound, whereas, in a three-stage international agreement, the signatory serves as an authentication of the text of the agreement so that the international agreement can go into effect immediately, but the parties are not yet bound. In the practice of two-stage international treaties, a nine-month grace period is typically granted for signings. If the deadline has passed, the party who wishes to be bound by the agreement must do so through accession. In a three-stage international agreement, the signature serves as a type of agreement text authentication. In a three-stage international agreement, ratification is required;

(3) Ratification means, in each case, the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty, as outlined in Article 2 (1) of the 1969 Vienna Convention on the Law of Treaties.

Recommendations for policy substance in the new agreement concerning Iran's nuclear program, including (1) regulation of Iran's nuclear movement activities; (2) arrangements related to compensation for State Parties that violate the agreed-upon terms of the agreement; and (3) fundamental arrangements related to the withdrawal of State Parties that were not previously regulated in the 2015 JCPOA.

[37] Sheriff Ghali Ibrahim and Mike Owoh Benjamin, "Impact Of U.S. WITHDRAWAL FROM THE JOINT COMPREHENSIVE PLAN OF ACTION (JCPOA) ON THE GULF REGION AND THE WORLD," *African Journal of Law, Political Research and Administration* 5, no. 3 (2020): 248–53.

The framework of the 2015 JCPOA, which has been terminated, might be used as the foundation and structure for a new agreement. Thus, rather than establishing new negotiations, the JCPOA framework permits broader discussions and negotiations.

Conclusion

The JCPOA is an international "treaty of contract" agreement adopted by the United Nations Security Council (UNSC) Resolution 2231, which provides rights and obligations for the State Parties. The United States' withdrawal does not constitute a violation because the agreement lacks a unilateral withdrawal clause. On the other hand, Iran's activities constitute a violation of the terms that are essential to the realization of the agreement's objective or purpose. As a result of Iran and the United States' actions, the initiative taken by other State Parties to reinstate the agreement is not legally acceptable under international law. The issue is not with the agreement's substance but with Iran and the United States' actions which infringed the norm of public international law.

Therefore, the most effective settlement is to terminate the JCPOA in accordance with the rules of terminating an international agreement and establishing a new agreement regulating Iran's nuclear program. Establishing a new agreement will be more binding on all State Parties and provide a mechanism for resolving unexpected disputes or violations, such as the withdrawal of State Parties in the future.

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JURNAL NURANI HUKUM : JURNAL ILMU HUKUM
Volume 5 Number 2, December 2022, pg 106-118
Fakultas Hukum, Universitas Sultan Ageng Tirtayasa, Serang-Banten, Indonesia
P-ISSN: 2655-7169 | e-ISSN: 2656-0801
https://jurnal.untirta.ac.id/index.php/nhk/index

The Alignment of Indonesian Laws with International Legal Instruments on the Rights of Persons with Disabilities

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Article Info:
|Submitted: 01 November 2022 **|Revised**: 23 December 2022 **|Accepted**: 26 December 2022

Recommended Citation: *Chicago Manual of Style 17th edition (full note)*
Ramadani Fitri Sihombing, Nurlaily, Rina Shahriyani Shahrullah, "*The Alignment of Indonesian Laws with International Legal Instruments on the Rights of Persons with Disabilities*", *Jurnal Nurani Hukum : Jurnal Ilmu Hukum*, Vol. 5 No. 2, (December, 2022)", P.106-118

ABSTRACT

Indonesia promulgated Law No. 8 of 2016 concerning Persons with Disabilities and established the National Action Plan on Human Rights (RANHAM) and Persons with Disabilities (RANPD). At international level, Indonesia ratified the Convention on the Rights of Persons with Disabilities through Law No. 19 of 2011 and it is also committed to achieve Sustainable Development Goals by 2030. The commitment is realized by the National Action Plan for SDGs which also focuses on persons with disabilities. This study aims to analyze the national legal instruments including the national action plans to ascertain their alignments and compliances with the international legal instruments. This study adopts a normative law research by using secondary data which is analyzed based on the content analysis. It finds that all national legal instruments align and comply with the obligations to respect, protect, and fulfill the rights of persons with disabilities mandated by the international legal instruments. Yet, it is unfortunate that the Optional Protocol to the Convention on the Rights of Persons with Disabilities has not been ratified by Indonesia even though it is a significant legal instrument to strengthen the implementation and monitoring of the CPRD.

Keywords: *Persons with Disabilities, National Action Plans, Human Rights, Indonesia.*

ABSTRAK

Indonesia menerbitkan Undang-Undang Nomor 8 Tahun 2016 tentang Penyandang Disabilitas dan menetapkan Rencana Aksi Nasional Hak Asasi Manusia (RANHAM) dan Penyandang Disabilitas (RANPD). Di tingkat internasional, Indonesia telah meratifikasi Konvensi Hak-Hak Penyandang Disabilitas melalui Undang-Undang Nomor 19 Tahun 2011 dan juga berkomitmen untuk mencapai Tujuan Pembangunan Berkelanjutan (TPB) pada tahun 2030. Komitmen tersebut diwujudkan dengan Rencana Aksi Nasional untuk TPB yang juga fokus pada penyandang disabilitas. Kajian ini bertujuan untuk menganalisis instrumen hukum nasional termasuk rencana aksi nasional untuk memastikan keselarasan dan kesesuaiannya dengan instrumen hukum internasional. Penelitian ini mengadopsi penelitian hukum normatif dengan menggunakan data sekunder yang dianalisis berdasarkan analisis isi. Ditemukan bahwa semua instrumen hukum nasional menyelaraskan dan mematuhi kewajiban untuk menghormati, melindungi dan memenuhi hak-hak penyandang disabilitas yang diamanatkan oleh instrumen hukum internasional. Namun, sangat disayangkan Protokol Opsional dari Konvensi Hak-Hak Penyandang Disabilitas belum diratifikasi oleh Indonesia meskipun merupakan instrumen hukum yang signifikan untuk memperkuat pelaksanaan dan pemantauan Konvensi.

Kata Kunci: *Penyandang Disabilitas, Rencana Aksi Nasional, Hak Asasi Manusia, Indonesia*.

Introduction

Approximately 15 percent of the world's population are people with disabilities. They are considered the largest minority group in the world. About 82 percent of people with disabilities are in developing countries and live below the poverty line and often face limited access to health, education, training, and decent work.[1] Persons with disabilities are classified as one of the vulnerable groups. They often receive discriminatory treatments, and their rights are often not fulfilled.[2]

In principle, persons with disabilities in Indonesia have the same position, rights and obligations similar to those of non-disabled persons.[3] This is in line with the constitutional mandate under Article 28I paragraph (2) of the 1945 Constitution of the Republic of Indonesia which reads "Everyone has the right to be free from discriminatory treatment on any basis and is entitled to protection against such discriminatory treatment".[4] Some of these human rights have been explicitly and implicitly contained in the 1945 Constitution. To implement and further regulate the human rights mandated by the 1945 Constitution,[5] Indonesia has enacted Law No. 8 of 2016 concerning Persons with Disabilities. This Law constitutes a special law (*Lex Specialis*) to govern the rights of persons with disabilities in Indonesia which imposes the obligations on the government to realize the rights of persons with disabilities including ensuring the fulfillment of the rights of persons with disability in all aspects of life.[6]

Article 1 (1) of Law No. 8 of 2016 concerning Persons with Disabilities (Persons with Disabilities Law/PwD Law) defines that "Persons with disabilities are any person who has long-term physical, mental, intellectual and/or sensory impairments who may face various challenges and barriers in their interaction with their surroundings to be able to fully and effectively participate together with other citizens on the basis of equal rights".[7] It further classifies Persons with disabilities into 4 (four) groups, namely:

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[1]Arie Purnomosidi, "Konsep Perlindungan Hak Konstitusional Penyandang Disabilitas Di Indonesia," *Refleksi Hukum: Jurnal Ilmu Hukum* 1, no. 2 (2017): 161–74, https://doi.org/https://doi.org/10.24246/jrh.2017.v1.i2.p161-174.

[2]Bambang Widodo, "Upaya Memenuhi Hak Penyandang Disabilitas," Direktorat Jenderal HAM Kementerian Hukum dan HAM RI, 2020.

[3] Frichy Ndaumanu, "Hak Penyandang Disabilitas: Antara Tanggung Jawab Dan Pelaksanaan Oleh Pemerintah Daerah," *Jurnal HAM* 11, no. 1 (2020): 131–50, https://doi.org/http://dx.doi.org/10.30641/ham.2020.11.131-150.

[4]"The 1945 Constitution of the Republic of Indonesia," n.d., https://jdih.bapeten.go.id/unggah/dokumen/peraturan/116-full.pdf.

[5]Reko Dwi Salfutra, "Hak Asasi Manusia Dalam Perspektif Filsafat Hukum," *PROGRESIF: Jurnal Hukum* 12, no. 2 (2018): 2146–58, https://doi.org/https://doi.org/10.33019/progresif.v12i2.977.

[6]Arrista Trimaya, "Upaya Mewujudkan Penghormatan, Pelindungan, Dan Pemenuhan Hak Penyandang Disabilitas Melalui Undang-Undang Nomor 8 Tahun 2016 Tentang Penyandang Disabilitas," *Jurnal Legislasi Indonesia* 13, no. 4 (2016): 401–9.

[7] "Law Number 8 of 2016 concerning Persons with Disabilities," n.d., & "Presidential Regulation Number 53 of 2021 concerning the National Action Plan for Human Rights 2021–2025," n.d., https://peraturan.bpk.go.id/Home/Details/37251/uu-no-8-tahun-2016#:~:text=bahwa%20Negara%20Kesatuan%20Republik%20Indonesia,warga%20negara%20dan%20masyarakat%20Indonesia

1) Physical disabilities mean person with mobility functions impairment, including, among others, amputation, acute flaccid paralysis or paralyzed, paraplegia, cerebral palsy (CP), stroke-related paralysis, leprosy-related paralysis, and dwarfism.
2) People with intellectual disabilities means a person with intellectual impairment due to below-average level of intelligence, among others are learning difficulties, mental deficiency, and down syndrome.
3) Person with "mental disabilities" means a person with impairment in the mental, emotional, and behavioral functions, among others:
   a. Psychosocial disabilities, among others schizophrenia, bipolar, depression, anxiety, and personality disorder; and
   b. Developmental disabilities that affect their social interaction capacity, among others are autism and hyperactive.
4) Persons with sensory disabilities means a person with impairment in one of the five senses, among others are visual disability, hearing disability, and/or speech disability.

Persons with disabilities constitute citizens of Indonesia, consequently the same as other citizens, they have inherent rights to be protected, respected, and appreciated without discrimination. Article 1 (3) of PwD Law stipulates that "discrimination is any distinction, restriction, harassment or exclusion on the basis of disability that has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of the rights of Persons with Disabilities".

It is obvious that the PwD Law explicitly states that persons of disabilities can exercise their rights, and these are also protected and provided by Law No. 39 of 1999 concerning Human Rights. Article 1 (1) of Human Rights Law defines "human rights mean a set of rights bestowed by God Almighty in the essence and being of humans as creations of God which must be respected, held in the highest esteem and protected by the state, law, Government, and all people in order to protect human dignity and worth".[8] It is apparent that human rights provided by this Law without any discrimination regardless skin color, gender, language, culture, and nationality. In other words, they are inherent in everyone as a human being.[9]

In the context of human rights, one of the main responsibilities of the government is to promote, protect, respect, and fulfill human rights. These responsibilities cover all aspects of people's lives and are universal in accordance with the character of human rights.

In this regard, the state must fulfill its obligations for the rights of its citizens thoroughly and without exception. At the national level, Indonesia promotes, protects, respects, and enforces the rights of persons with disabilities under the 1945 Constitution, Law No. 39 of 1999 concerning Human Rights and Law No. 8 of 2016 concerning Persons with Disabilities.

At international level, Indonesia ratified the Convention on the Rights of Persons with Disabilities (CRPD) through Law No. 19 of 2011 concerning Ratification of the Convention on the

[8] "Law No. 39 of 1999 concerning Human Rights," n.d., https://www.refworld.org/docid/4da2ce862.html

[9] Rhona K. M. Smith et al., *Hukum Hak Asasi Manusia* (Yogyakarta: Pusat Studi Hak Asasi Manusia Universitas Islam Indonesia, 2008).

Rights of Persons with Disabilities.[10] It is a starting point in improving the protection and promotion of the rights of persons with disabilities. The Convention emphasizes the general rights and specifications of persons with disabilities, and it also regulates the mandate and obligations of the state party in fulfilling the rights of persons with disabilities, including adjusting national policies, realizing a disability inclusive environment, providing reasonable accommodation and accessibility in various sectors, both physical and non-physical.[11]

In addition, as a member of international community, Indonesia has a high commitment in implementing the Sustainable Development Goals (SDGs). SDGs is a global and national commitment to improve the welfare of the community by covering 17 goals, namely The 17 sustainable development goals (SDGs) to transform our world: Goal 1: No Poverty, Goal 2: Zero Hunger, Goal 3: Good Health and Well-being, Goal 4: Quality Education, Goal 5: Gender Equality, Goal 6: Clean Water and Sanitation, Goal 7: Affordable and Clean Energy, Goal 8: Decent Work and Economic Growth, Goal 9: Industry, Innovation and Infrastructure, Goal10: Reduced Inequality, Goal 11: Sustainable Cities and Communities, Goal 12: Responsible Consumption and Production, Goal 13: Climate Action, Goal 14: Life Below Water, Goal 15: Life on Land, Goal 16: Peace and Justice Strong Institutions, and Goal 17: Partnerships to achieve the Goal. Out of 17 goals, Goal 4, 8, 10, 11 and 17 explicitly mention Persons with Disabilities.

The commitment of Indonesia to achieve the SDGs was reflected by the issuance of the Presidential Regulation (*Peraturan Presiden/Perpres*) No. 59 of 2017 concerning the Achievement of the Sustainable Development Goals which was signed by the President of the Republic of Indonesia on July 4, 2017.[12]

The Presidential Regulation regulates the composition of the National Coordination Team which involves government and non-government elements in Implementing Team membership and Working Groups and other stakeholders based on their roles and their respective duties. The Presidential Regulation also adopts the 17 goals and 169 targets.[13]

To continuously achieve the SDGs in 2030, the government recently issued a Presidential Regulation (*Peraturan Presiden*/Perpres) No. 111 of 2022 concerning the Achievement of the Sustainable Development Goals.[14] Article 1 of the Regulation states that "Sustainable Development Goal is the global development agenda to end poverty, improve welfare, and protect the

[10] "Law No. 19 of 2011 concerning Ratification of the Convention on the Rights of Persons with Disabilities," n.d., https://www.bphn.go.id/data/documents/11uu019.pdf

[11] Hilmi Ardani Nasution and Marwandianto, "Memilih Dan Dipilih, Hak Politik Penyandang Disabilitas Dalam Kontestasi Pemilihan Umum: Studi Daerah Istimewa Yogyakarta," *Jurnal HAM* 10, no. 2 (2019): 161–78, https://doi.org/http://dx.doi.org/10.30641/ham.2019.10.161-178.

[12] "Presidential Regulation (*Peraturan Presiden/Perpres*) Number 59 of 2017 concerning the Achievement of the Sustainable Development Goals," n.d., https://peraturan.bpk.go.id/Home/Details/72974/perpres-no-59-tahun-2017

[13] Badan Pusat Statistik, *Indikator Tujuan Pembangunan Berkelanjutan (TPB) Indonesia 2019* (Jakarta: Badan Pusat Statistik, 2019).

[14] "Presidential Regulation (Peraturan Presiden/Perpres) Number 111 of 2022 concerning the Achievement of the Sustainable Development Goals," n.d., https://peraturan.bpk.go.id/Home/Details/227039/perpres-no-111-tahun-2022

planet, through the achievement of 17 (seventeen) goals by 2030.

Yet, it is questioned whether these national laws are aligned with the mandates and spirits of international legal instruments pertaining to the rights of persons with disabilities. In this conjunction, the study aims to analyze the alignment of Law No. 8 of 2016 concerning Persons with Disabilities with the Convention on the Rights of Persons with Disabilities which was ratified by Law No. 19 of 2011 concerning Ratification of the Convention on the Rights of Persons with Disabilities. It also examines the alignments of National Action Plans for Human Rights and Sustainable Development Goals (SDGs).

Methodology

This study adopts a normative law research which focuses on legal principles and the synchronization of legal instruments.[15] It is merely used a secondary data which has the following general characteristics: 1) secondary data are generally in a ready-made state; 2) the form and content of secondary data have been formed and filled in by previous researchers; 3) secondary data can be obtained without being bound or limited by time and place.[16]

The said secondary data consists of primary law material, namely the legal materials that have binding power in general (laws) or have binding power for interested parties such as conventions, legal documents and judges' decisions. The primary legal materials in this study are Law No. 19 of 2011 concerning Ratification of the Convention on the Rights of Persons with Disabilities, Law No. 8 of 2016 concerning Persons with Disabilities, Presidential Regulation No. 53 of 2021 concerning the National Action Plan for Human Rights 2021 – 2025, Regulation of the Minister of National Development Planning/Head of Bappenas No. 3 of 2021 concerning the National Action Plan for Persons with Disabilities.[17] Secondary law materials which provide explanations of primary legal materials such as books, journals, reports in the printed or electronic medias are also utilized by this study. All data is analyzed by using a qualitative approach based on the content analysis.

Discussion

1. The Alignment of Law No. 8 of 2016 Concerning Persons with Disabilities with the Convention on the Rights of Persons with Disabilities (CRPD)

The ratification of the CRPD by the Indonesian government is in accordance with the 1945 Constitution of the Republic of Indonesia which sets the state goals, that is to participate in implementing the world order based on independence, eternal peace and social justice. In this regard, Indonesia as a member of international community has committed to participate in complying with international instruments, including the CRPD to uphold human rights to promote the world order. This is emphasized in the Elucidation of Law No. 8 of 2016 concerning Persons with Disabilities (PwD Law) which explicitly states that "The enactment of Law No. 19 of 2011 on the Ratification of the

[15] Abdulkadir Muhammad, *Hukum Dan Penelitian Hukum* (Bandung: Citra Aditya Bakti, 2004).

[16] Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Raja Grafindo Persada, 2011).

[17] "Regulation of the Minister of National Development Planning/Head of Bappenas Number 3 of 2021 concerning the National Action Plan for Persons with Disabilities," n.d., https://peraturan.bpk.go.id/Home/Details/219477/permen-ppnkepala-bappenas-no-3-tahun-2021

Convention on the Rights of Persons with Disabilities on 10 November 2011 shows commitment and seriousness of the Indonesian Government to respect, protect, and fulfill the rights of Persons with Disabilities that is expected to eventually increase the wellbeing of Persons of Disabilities".

Article 1 of CRPD stipulates its purposes, that is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity". These purposes are aligned and further elaborated by Article 3 of the PwD Law. The aims of the Law are:

1) To realize the respect, advancement, protection, and fulfilment of human rights and fundamental freedom of Persons with Disabilities in full and equal manner;
2) To ensure measures in the respect, advancement, protection, and fulfilment of rights as inherent dignity in any Persons with Disabilities;
3) To realize better quality, fair, of physical and mental wellbeing, independent, and dignified standards of living for Persons with Disabilities;
4) To protect Persons with Disabilities from abandonment and exploitation, harassment and all forms of discrimination, as well as violation of human rights; and
5) To ensure that the exercise of respect, advancement, protection, and fulfilment measures for the rights of Persons with Disabilities to develop themselves and utilize all their abilities in accordance with their talents and interests in order to enjoy, to take part as well as to contribute optimally, in a safe, flexible, and dignified condition in all aspects of life of the nation, the state, and the community.

Article 3 of the CRPD and Article 2 of the PwD Law both set their general principles. Table 1 show the similar principles of the two legal instruments.

Table 1. The General Principles of the CRPD and the PwD Law

Convention on the Rights of Persons with Disabilities	Law No. 8 of 2016 concerning Persons with Disabilities
a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons	a. Respect for inherent dignity
b. Non-discrimination	b. Individual autonomy
c. Full and effective participation and inclusion in society	c. Non-discrimination
d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity	d. Full participation
e. Equality of opportunity	e. Human diversity and humanity
f. Accessibility	f. Equal opportunity
g. Equality between men and women	g. Equality
h. Respect for the evolving capacities of children with disabilities and respect for the right of children	h. Accessibility

with disabilities to preserve their identities	
	i. Evolving capacities and identities of children [with disabilities]
	j. Inclusion
	k. Special treatment and Extra protection

Source: Convention on the Rights of Persons with Disabilities and Law No. 8 of 2016 concerning Persons with Disabilities

Unlike the CRPD, the principles are not elaborated by the PwD Law. Yet, all principles under the CRPD are adopted by the PwD Law. Interestingly, an additional principle is introduced by the PwD Law, namely "Special Treatment and Extra Protection". However, it is unfortunate that the PwD Law does not define what is meant by "Special Treatment and Extra Protection".

As the consequences of ratifying the CRPD and transforming it into the national legal system by the enactment of the PwD law, Indonesia is mandated to comply with all provisions of the Conventions with the obligations to respect, protect and fulfill the rights of persons with disabilities is carried out on the basis of the principle of *pacta sunt servanda* and good faith as provided under Article 26 of the Vienna Convention 1969 (Vienna Convention on the Law of Treaties).[18]

Accordingly, the substances of the PwD Law must be aligned with those of the CRPD. The CRPD provides the civil and political rights for persons with disabilities which include "accessibility, recognition before the law and legal capacity, access to justice, participation in public life (including the right to vote)". In relation to the economic, social, and cultural rights of persons with disabilities, the CRPD contains "respect for the family, right to education, right to health, habilitation and rehabilitation, work and employment, and adequate standard of living and social protection". In align with these rights, the PwD Law provides an exhausted rights list under Article 5.

These rights consist of the general rights of persons with disabilities under Article 5(1) of the PwD Law, namely "right to "life, free from stigma, privacy justice and legal protection, education, employment, entrepreneurship, and cooperative, health, politics, religion, sports, culture and tourism, social welfare, accessibility; public service, protection from disaster, habilitation and rehabilitation, [price] concession, be recorded/data collection, live independently and involved in the community, [freedom of] expression, communication, and obtaining information, migrate and change nationality; and be free from any discrimination, abandonment, abuse, and exploitation.

By virtue of the rights under Article 5 of the PwD Law, it can be submitted that the Law does not define the term "Special Treatment and Extra Protection", but it provides a special treatment for persons with disabilities, namely "price concession". In addition, Article 5 of the PwD Law adds special rights for women and children in addition to their general rights. These can be regarded as special treatment and extra protection for them. Table 2 shows these rights below.

[18] Nurhidayatuloh et al., "Forsaking Equality: Examine Indonesia's State Responsibility on Polygamy to the Marriage Rights in CEDAW," *Jurnal Dinamika Hukum* 18, no. 2 (2018): 182–93, https://doi.org/http://dx.doi.org/10.20884/1.jdh.2018.18.2.810.

Table 2. Rights to Special Treatment and Extra Protection for Women and Children with Disabilities under the PwD Law

Women Disabilities	Children with Disabilities
For reproductive health;	To receive special protection from discrimination, abandonment, harassment, exploitation, as well as sexual violence and crimes
To accept and refuse the use of contraception;	To receive care and nurture from immediate or foster families for their optimum growth and development
To receive extra protection from multiple discrimination; and	For their interests to be protected in decision-making
To receive extra protection from any act of violence, including sexual violence and exploitation.	To be treated humanely according to child's dignity and rights
	To have their special needs fulfilled
	To receive equal treatment as other children in order to achieve social integration and individual development
	To receive social facilitation.

Source: Article 5(2) and Article 5(3) of Law No. 8 of 2016 concerning Persons with Disabilities

Aside from a special treatment for women and children with disabilities, all persons with disabilities as part of Indonesian citizens deserve special treatments. The special treatments can be categorized into 2 (two) meanings, namely:

1) Special treatment as a form of protection from the risk of being vulnerable to various acts of discrimination and protection from human rights violations. This treatment is a form of maximum effort in respecting, promoting, protecting and fulfilling universal human rights.
2) Special treatment as a form of taking sides with disability groups by providing special treatment and more optimal protection as compensation for the conditions they experience in order to minimize or eliminate the impact of their disability so that it is possible for them to enjoy, play a role and contribute optimally and fairly with dignity in all walks of life in society, nation and state.

Based on the discussions, it is obvious that the PwD Law has transformed and adapted the principles and substances of the CRPD to comply with the obligations to respect, protect and fulfill the rights of persons with disabilities mandated by the CRPD. Furthermore, the PwD Law provides more specific provisions to fulfil and enforce the said rights. The CRPD has an optional protocol (Optional Protocol to the Convention on the Rights of Persons) that stipulates two procedures to strengthen the implementation and monitoring of the CPRD. The first allows individuals to submit petition to the CRPD Committee, claiming violations of their rights; and secondly to authorize the CRPD Committee to conduct investigations into the serious violations

of the CRPD.[19] It is unfortunate that Indonesia has not been a party to this Protocol.

2. The Manifestation of Law No. 8 of 2016 Concerning Persons with Disabilities in the National Action Plan and Its Alignment with Sustainable Development Goals (SDGs)

In relation to the obligations of government to respect, promotion, protection, enforcement and fulfillment of human rights (*Penghormatan, Pemajuan, Perlindungan, Penegakan, dan Pemenuhan Hak Asasi Manusia*/P5 HAM), it has the legitimacy to issue legal products to implement the P5 HAM. One of the government's concrete efforts is to continuously issue the regulations pertaining to the National Action Plan for Human Rights (*Rencana Aksi Nasional Hak Asasi Manusia*/RANHAM). Presidential Regulation (Perpres) No.75 of 2015 concerning RANHAM 2015-2019 has been updated by the issuance of the Presidential Regulation No. 53 of 2021 concerning the National Action Plan for Human Rights 2021 – 2025. It is the 5th generation of RANHAM and constitutes a continuation of the previous RANHAM, namely 1st generation launched in 1998, 2nd generation in 2005, 3rd generation in 2011, and 4th generation in 2015.[20]

RANHAM is a document that contains strategic objectives that are used as a reference for ministries, institutions, and provincial and district/city regional governments for the purpose of implementing P5 HAM in Indonesia. RANHAM 2021-2025 (5th generation of RANHAM) focuses on 4 (four) target groups, namely: (i) women; (ii) children; (iii) persons with disabilities; and (iv) indigenous people's groups. The vulnerable groups that are targeted in the 5th generation of RANHAM are based on the dynamics that occur in society, such as:

1) Women's groups: there are several regions in Indonesia that have not maximized the protection and fulfillment of women's rights in various fields of development.
2) Group of children: there are still children in special situations who do not get basic rights and public services, especially in the fields of population administration, education, and health. In addition, children are still very vulnerable to physical and sexual violence, exploitation, and discrimination, including in the field of employment.
3) Disability groups: the implementation of respect, protection, fulfillment, enforcement and promotion of disability rights is still not effective and optimal, even though Law Number 8 of 2016 concerning Persons with Disabilities has in fact been in existence, yet certain areas have not yet optimized the facilities for disability groups.
4) Indigenous people groups: there is no adequate legal protection framework for *adat* groups and there are still violations of land rights for *adat* community groups.[21]

It is obvious that the 5th generation of RANHAM prioritizes PwD among its focus groups. It also asserts that the enforcement of Law Number 8 of 2016 concerning Persons with Disabilities is still far from being satisfied and optimum. However, it does not mean that

[19] Komisi Nasional Hak Asasi Manusia, *Mendorong Pengesahan Optional Protocol CRPD Dalam Rangka Pemenuhan HAM Penyandang Disabilitas* (Jakarta: Komisi Nasional Hak Asasi Manusia, 2016).

[20] I Wayan Sulpai, "Implementasi Rencana Aksi Nasional Hak Asasi Manusia (RANHAM): Pencapaian Dan Tantangan," Sekretariat Kabinet Republik Indonesia, 2022.

[21] *Ibid.*

the challenges and issues faced by persons with disabilities are not properly handled by the government through the previous RANHAM. The Cabinet Secretariat (*Sekretariat Kabinet*) of Indonesia reports that the implementation of 1st – 4th generation of RANHAM has resulted in several achievements, including:

1) The issuance of regulations and policies that guarantee the rights of women, children, persons with disabilities, and indigenous groups;
2) Increased understanding of government officials on human rights;
3) Implementation of human rights instruments in central and local government policies;
4) Increasing the accessibility of persons with disabilities and other vulnerable groups to participate in the civil, political, economic and cultural fields; and
5) There are efforts to handle allegations of human rights violations for women, children, persons with disabilities, and indigenous groups.

In addition to RANHAM, the government also establishes the National Action Plan for Persons with Disabilities (RANPD) 2021 – 2025. The Regulation of the Minister of National Development Planning/Head of Bappenas No. 3 of 2021 governs the National Action Plan for Persons with Disabilities (RANPD). This National Action Plan is valid for 5 years as a derivative of the Master Plan for Persons with Disabilities which is valid for the next 25 years.[22]

There are seven strategic targets of the RANPD, namely: (1) Data collection and inclusive planning for persons with disabilities, (2) A barrier-free environment for persons with disabilities, (3) Protection of political rights and access as well as justice for persons with disabilities, (4) Empowerment and independence for persons with disabilities, (5) The realization of an inclusive economy for persons with disabilities, (6) Education and skills for persons with disabilities, (7) access and equitable distribution of health services for persons with disabilities.[23]

At national level, Indonesia implements RANHAM and includes persons with disabilities as its focus. In the international context, the government also implements the National Action Plan (RAN) to achieve Sustainable Development Goals (SDGs). Sustainable Development Goals (SDGs) are an international agenda compiled by the United Nations (UN) with involving 194 countries, civil society, and various stakeholders from all over the world. Indonesia as part of the world community is committed to implement the SDGs and align with its national development.[24]

To achieve the SDGs, the government establishes the National Action Plan for SDGs (*Rencana Aksi Nasional Tujuan Pembangunan Berkelanjutan*/RAN TPB). The RANTPB is an activity which is prepared and collaboratively planned between government and non-government to be used as guidelines for implementing the SDGs nationally. Implementation principles of SDGs are used as the basis for the preparation of the RANTPB, such as the principle of "no one left behind"

[22] Hendra D., "Rencana Aksi Nasional Disabilitas, Gerbang Menuju Indonesia Inklusif," Solider, 2021.

[23] Srikandi Syamsi, "Mengupas Rencana Aksi Nasional Penyandang Disabilitas," Solider, 2021.

[24] Badan Pusat Statistik, *Indikator Tujuan Pembangunan Berkelanjutan (TPB) Indonesia 2019*.

and the principle of inclusiveness which means that the RAN TPB is prepared by involving all parties, both ministries/institutions, philanthropy, academics, experts, organizations Civil Society, the media and so on. Its implementation emphasizes benefit everyone, especially vulnerable groups such as women, children's groups, youth, the poor and persons with disabilities. RANTPB is an operational elaboration of the development agenda of SDGs in Indonesia.[25]

It is apparent from the discussions that the National Action Plans relating to persons with disabilities (RANHAM and RANPD) aim to concretely and contextually realize the PwD Law. In this conjunction, RANTPB in a wider scope also supports the ultimate aims of this Law as it is previously mentioned that Goal 4, 8, 10, 11 and 17 of SDGs explicitly mention Persons with Disabilities.

Conclusion

It can be concluded from the above discussions that the transformation of the CRPD through the PwD Law evidences the alignment of between the national and international legal instruments relating to persons with disabilities. The alignment is clearly reflected by the adoption of principles and provisions of the CRPD in the provisions of PwD Law both directly and indirectly.

It is also concluded that the National Action Plans, namely RANHAM, RANPD and RANTPB are all aligned and interconnected to improve the rights of persons with disabilities by respecting, promoting, protecting, enforcing and fulfilling the said rights.

It is highly recommended that Indonesia should ratify the Optional Protocol to the Convention on the Rights of Persons to strengthen the implementation and monitoring of the CPRD, hence the enforcement of the rights of PwDs can be optimally realized.

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[25] Badan Pusat Statistik.

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JURNAL NURANI HUKUM : JURNAL ILMU HUKUM
Volume 5 Number 2, December 2022, pg 119-126
Fakultas Hukum, Universitas Sultan Ageng Tirtayasa, Serang-Banten, Indonesia
P-ISSN: 2655-7169 | e-ISSN: 2656-0801
https://jurnal.untirta.ac.id/index.php/nhk/index

Distance Education and Learning (DEL) in The Master of Law Program in Facing Challenges in The Era of Disruption

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Article Info:
|Submitted: 3 November 2022 **|Revised**: 30 November 2022 **|Accepted**: 26 December 2022

Recommended Citation: *Chicago Manual of Style 17th edition (full note)*
Sri Wahyu Kridasakti, *et-all*, "*Distance Education and Learning (DEL) in The Master of Law Program in Facing Challenges in The Era of Disruption*", *Jurnal Nurani Hukum : Jurnal Ilmu Hukum*, Vol. 5 No. 2, (December, 2022)", P.119-126

ABSTRACT

Facing the Industrial Revolution 4.0/5.0 the development of information and communication based on the internet and digital encourages people's lives more advanced and various functions of life are more effective and efficient, the use of internet and digital media makes the boundaries that can hinder movement and distance can be removed and bring the world closer to unlimited reach. In the development of Education, it is also encouraged to be able to adapt by leaving the conventional education system to a system based on distance education and learning/DEL, in distance education and learning/DEL the education system will be carried out openly and remotely which will eliminate distance and restrictions for someone in the learning and teaching process, therefore education will be faster, efficient, precise and low cost. This research is legal research with normative juridical approach, the data used are primary data and secondary data are analyzed using quantitative analysis. The first result: the use of distance education and learning/DEL is a form of educational transformation in the face of the era of disruption, where the education system is carried out remotely using the help of instruction technology based on transformation, research, assessment, evaluation and memory subsystem with the help of internet technology. Second: distance education and learning/DEL is able to be a solution for geographical and topographical problems in Indonesia, so that anyone can achieve a master of law with the help of distance education and learning/DEL technology.

Keywords: *Distance Education and Learning/DEL, Legal Studies, Disruption*

ABSTRAK

Menghadapi Revolusi Industri 4.0/5.0 perkembangan informasi dan komunikasi berbasis internet dan digital mendorong kehidupan masyarakat lebih maju dan berbagai fungsi kehidupan lebih efektif dan efisien, penggunaan internet dan media digital menjadikan batas-batas yang dapat menghambat pergerakan dan jarak dapat dihapus dan membawa dunia lebih dekat ke jangkauan tak terbatas. Dalam pengembangan Pendidikan juga didorong untuk dapat beradaptasi dengan meninggalkan sistem pendidikan konvensional ke sistem berbasis pendidikan jarak jauh dan pembelajaran/DEL, dalam pendidikan jarak jauh dan pembelajaran/DEL sistem pendidikan akan dilaksanakan secara terbuka dan jarak jauh. yang akan menghilangkan jarak dan batasan bagi seseorang dalam proses belajar mengajar, sehingga pendidikan akan lebih cepat, efisien, tepat dan biaya rendah. Penelitian ini merupakan penelitian hukum dengan pendekatan yuridis normatif, data yang digunakan adalah data primer dan data sekunder dianalisis menggunakan analisis kuantitatif. Hasil pertama: pemanfaatan pendidikan dan pembelajaran jarak jauh/DEL merupakan bentuk transformasi pendidikan dalam menghadapi era disrupsi, dimana sistem pendidikan dilakukan dari jarak jauh dengan menggunakan bantuan teknologi pembelajaran berbasis transformasi, penelitian, penilaian, evaluasi dan subsistem memori dengan bantuan teknologi internet. Kedua: Pendidikan dan Pembelajaran Jarak Jauh/DEL mampu menjadi solusi atas permasalahan geografi dan topografi di Indonesia, sehingga siapapun dapat meraih gelar Magister Hukum dengan bantuan pendidikan jarak jauh dan teknologi pembelajaran/DEL.

Kata Kunci: Pembelajaran Jarak Jauh, Ilmu Hukum, Gangguan

Introduction

The development of science is carried out in order to answer the needs of human reality and the growing pattern of life, thus demanding the development of science that is in harmony with the development of human life[1]. This requires science to continue to innovate in response to changes in society[2], innovation here according to Thomas Kuhn is a form of shifting paradigm. Shifting paradigms is a transformation from a less developed traditional state to a better life in the hope of achieving a developed, thriving and prosperous society[3] . The change of society will be marked by the necessity of people leaving the old ways, people will be required to sacrifice their personal interests for the sake of development and economic growth of the country, there are conflicts of interest between one another and there are many individual sacrifices for the interests of the country[4] .

Today, with the internet changing society, which was once a conventional pattern of life towards modernization with a marked digital society, this is a phenomenon of multiple Disruption from e-Commerce, e-Govt, e-Budgeting, e-legal proceeding, e-shopping, e-Transaction and the Covid-19 Pandemic is a manifestation of these changes and disruptions. This requires people to open up to the development and dynamics of life in the era of digital society[5] , the use of digital means makes changes in society from the aspect of information and communication technology that cannot be avoided, digital technology plays an important role and contributes to economic growth, social, and cultural development of society. Even in the future, digital technology can affect future social conditions, such as medical services, education, government, and other aspects of life[6].

Facing the digital era for the world of education, especially legal education must follow developments in the face of the digital era, because the development of the challenges of the future for the world of Legal Education is to enter the digital networking system[7] . This is not easy because the world of Legal Education has not put legal experts as agents for economic chance[8] , but only limited to legal professionals who are only able to memorize articles and memorize legal principles so that they are not able to play a role for the development of the country. The problem that will arise in the future is whether the world of legal education in Indonesia is ready to anticipate change? Therefore, legal education, especially Master of legal science education, needs to examine the possibility of competency engineering in legal education programs, especially at the master of legal science level, where the world of Legal Education is required

[1] Parsudi Suparlan, "Masyarakat Majemuk Dan Perawatannya," *Antropologi Indonesia*, no. 63 (July 21, 2014), https://doi.org/10.7454/ai.v0i63.3397.

[2] Benjamin N. Cardozo and Roscoe Pound, "Interpretations of Legal History," *Harvard Law Review* 37, no. 2 (December 1923): 279, https://doi.org/10.2307/1328642.

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[7] Nanang Sasongko, "Profesi Akuntansi : Masa Kini Dan Tantangan Masa Depan," *Jurnal Ilmiah Akuntansi*, 2002.

[8] Erman Rajagukguk, *Perubahan Hukum Di Indonesia, Persatuan Bangsa, Pertumbuhan Ekonomi, Kesejahteraan Sosial* (Jakarta: Universitas Indonesia, 2004).

to have the ability to materialize the increasingly complex legal substance, but also able to compensate for the mastery of expertise in the virtual application system. In the future, the professionals resulting from the master of law education must have specific abilities in the field of reaction legal consequences be it transnational legal contract issues, transaction-crimes, transnational legal system and responsive legal theory and even progressive legal theory.

As a competency engineering of legal education, the master of legal science program must be able to develop a distance education and learning/DEL-based educational process, this application is the answer to conventional (non-DEL) education methods in Master of legal Science Education. With distance education and learning/DEL-based education, the learning process is carried out by methods with open and distance education so that the education system will be effective and efficient. so that it will produce legal professionals who can overcome legal issues faced according to the needs and challenges of work in the millennial era. Indicators of professionalism and toughness are that legal professionals will have adequate legal insight in carrying out work duties based on professional ethics, have the ability to intercultural values, and practically master legal norms related to labor agreement issues and resolving emerging legal disputes.

Methodology

The research method used in this study is to use normative juridical methods combined with library data sourced from primary, secondary, and tertiary data. The data collected were analyzed systematically, for further analysis was carried out using descriptive analysis method which is a secondary data processing related to the problems in this study which will be compiled, explained, and interpreted to answer the application of distance education and learning/DEL-based education in Master legal science where the learning process is carried out by open and distance.

Discussion

1. The concept of Distance Education and learning / DEL in the system of Education and Distance Learning

Based education distance education and learning/DEL is a system of Education and distance learning, this system is a system change from the conventional education system in the learning system so that it becomes more effective and efficient. Distance education and learning/DEL provides a focused learning process for the development, delivery, control, evaluation, and feedback of Distance Education, according to Banathy the observation level of the Distance education and learning/DEL education system is based on :

1) Scope of participants on a large scale.
2) The structure runs based on the technology system.
3) The education system is done remotely.
4) Education is done by changing the social system.

Distance education and learning/DEL is a model of the distance education system, where distance education here presents a dependency between the digital system, society and the state. This education Model is designed to include lifelong learning by distance learning, this education system can also be used to design, implement, and evaluate distance learning programs so that the application of this education system requires a wider scope and services.

In the history of Distance education and learning/DEL model is a system

adopted from the idea of food provision services at Kansas State University in 1970, the basic idea is where we are in the kitchen in the house that requires interaction and interrelation between cooking equipment, lighting, heating, water supply, storage facilities, disposal, food, dishes and cookbooks in a production system in the kitchen.

The Model of food production system in this kitchen inspires to be a model of Distance Education and learning/DEL by using the help of instruction technology based on transformation, research, assessment, evaluation and memory subsystems with the help of internet technology. Distance education and learning/DEL is a criticism of the education system in the past where teachers designed linear curricula, teaching materials and supported by audio and visual or printed means. After that students come and students are presented with lessons and instructions and then students go home, qualitative results such as competence and performance are indirect because learners are not intended for synergistic relationships between elements involved in the learning process.

In the era of internet and digital technology, Distance education and learning/DEL is developed based on the internet so that learning can be done remotely, human input includes not only teachers and facilitators, but also students as active participants in the transformation process. If the learner is competent in a skill, knowledge, and attitude, then in Distance education and learning/DEL all of these things are supported by Web designers, curriculum planners, site facilitators, and audio-video broadcast technicians. Input comes from computer systems and video as a support for distance education, more and more students learn the method of Distance education and learning/DEL then the need for classrooms can be reduced because the media space can be done by means of distance teaching space, video equipment and computer infrastructure. So that the learning process is more efficient, low cost and saves time.

Distance education and learning/DEL is a form of transformation that since 1997 is applied in the education system, this learning system continues to be developed throughout the world with email and internet media by conducting educational systems through cooperation, interactive learning and comments between students and teachers. Communication in the classroom is related to the content, delivery and socialization of teaching materials, so that planning, knowledge, experience, and evaluation will be improved continuously. Each student and teacher are bound to each other in communication files, personal data, performance criteria, benchmark data, testing, assessment and evaluation records stored in memory records provided by the service provider.

2. Urgency Distance Education and Learning / DEL for Master of Law Program

Regulation of the Minister of National Education of the Republic of Indonesia No. 30 of 2009 concerning the implementation of study programs as a legal basis in the organization of educational programs, in relation to this it is possible for every educational institution to organize a Master of Legal Sciences (MIH) Program. Facing the challenges and developments of Information Technology and digital, it is possible that there will be social, political and governance changes in the era of disruption or the era of the Industrial Revolution 4.0/5.0 which will greatly affect the disruption of national growth, human rights issues, democratization,

socio-cultural diversity, information technology and demands for improvement changes have an impact on social and government governance.

Facing the challenges of the era of disruption, quality human resources are needed to support social changes and the needs of the world of work and create good governance, to improve the quality and quantity of Human Resources, Master of law education must create professionals in the field of law who are able to adapt to the developments and problems faced in the era of disruption, namely virtual transactions with all their implications. Mastery of e-legal-transaction skills in the context of transnational legal contracts, transaction-crimes, transnational legal systems and responsive legal theory and even progressive legal theory. To answer these challenges, master of law education is expected to contribute efficiency and effectiveness in providing access to educational services, so that the use of educational information technology to improve the quality of human resources.

The development of Information Technology, internet and digital bring changes to human life so as to bring social and legal changes that are interrelated, these problems do not only occur in developing countries but also occur throughout the world. Facing these conditions, it is necessary to provide competency training for legal professionals at the master's level of legal science needs to be done collaboratively, with the engineering program provided must be related to the needs of basic and advanced skills needed by prospective legal professionals at the master's level so that they are sensitive to the development of society in the era of disruption.

Answering this, it should improve the quality of educational services, both administrative and learning, can use information technology in the context of distance and open education systems to be easier for the fulfillment of various engineering designs of student's competencies. In this case, Distance education and learning/DEL can be used as an instrument model for the development of Distance Education based on information technology in an open and distance education system for the master of Law program, Distance education and learning/DEL can be a virtual intelligence in national and global education methods, especially in the master of Law program.

Distance education and learning/DEL will be able to become a means of value entity of educational components and elements that provide open access for prospective students to attend education without any age restrictions, study time restrictions, educational background restrictions and, restrictions on how to learn. Distance education and learning/DEL is also expected to be an educational platform that provides a 'distance barrier' in the learning and teaching process between tutors and students, so that later Master of law education will transform into open and distance education by applying high flexibility to students.

In the application of Distance education and learning / DEL in the master of Legal Sciences program, it will form a learning model with a distance learning system, this requires that learning and teaching are applied that do not require face-to-face meetings (single-mode of distance learning). However, the learning and teaching process is done with the concept of Dual mode of distance and can also use the concept of Blended-Mode of distance learning which is the integration of various tutorial models between Tuton-TTM-Printed Materials-Audio-Visual Materials-Computer Assisted Instructional (CAI), simultaneously (Integrated Above the Line – On the Line – Below the Line). This

is made possible by the progress of Science and information technology that can be utilized as a medium of tools to manage the education system including the learning and teaching process at the University.

Distance education and learning / DEL in the master of Legal Sciences program will utilize computer technology and information can be utilized as a solution to various problems of space and time barriers to access to education, through the utilization of digital environment design. The use of computer technology and information can form a creative and innovative learning with a wider range of educational access can be done through the process of learning and teaching fun and learning does not seem less interesting, monotonous and boring. Distance education and learning/DEL is expected to be able to create distinctive characteristics as an impersonal, mass and interactive media, as well as allowing synchronous and asynchronous or delayed communication, and with these characteristics allows students to communicate with learning resources more diverse and broader, when compared to using conventional media.[9] Distance Learning Education and learning/DEL utilizes teaching materials packaged in the form of information and Communication Technology-based media, such as e-learning which is an information and Communication Technology-Based Learning media.

By applying Distance education and learning/DEL in the master of Legal Sciences program, positive values will be obtained, namely:

1) Students are required to be independent of a certain time and responsible for the implementation of learning;
2) Students can study independently with quick access;
3) Collaboration, synergy and cooperation of various institutional aspects will contribute to efficiency and effectiveness in providing access to national and global education services;
4) Strengthening access to education services makes educational institutions capable of alleviating the Indonesian nation from the decline of discrimination, exploitation, poverty and the threat of disintegration due to the influence of information globalization.

The application of Distance education and learning/DEL will be the answer to the challenges of the distribution of population composition at the geographical level of the land is very separated (scattered) in Indonesia, the use of Information Technology Education Distance education and learning/DEL is able to improve the quality of Human Resource competencies that can be useful for reducing poverty and disintegration in Indonesia. With the existence of Distance education and learning / DEL, the use of educational information technology to improve the quality of human resources through master of law education will be the appropriate technology that can be used quickly, precisely and evenly in various parts of Indonesia.

Conclusion

Distance education and learning/DEL is an educational concept based on distance programs, so that the

[9] Afandi Sitamala and Danial Danial, "Boosting International Humanitarian Law Active Class Participation; Lesson Learned from Blended Learning Policy (Kemendikbud Circular No.4 2020)," *Nurani Hukum* 5, no. 1 (July 12, 2022): 84–92, https://doi.org/10.51825/NHK.V5I1.15924.

learning and teaching process becomes faster, effective and efficient. The concept of Distance education and learning/DEL in Master of law education in Indonesia is expected to be able to answer the challenges and geographical barriers in Indonesia, Distance education and learning/DEL can create an open and distance education by applying high flexibility to students based on appropriate technology that can be reached by all Indonesian people.

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JURNAL NURANI HUKUM : JURNAL ILMU HUKUM
Volume 5 Number 2, December 2022, pg 127-136
Fakultas Hukum, Universitas Sultan Ageng Tirtayasa, Serang-Banten, Indonesia
P-ISSN: 2655-7169 | e-ISSN: 2656-0801
https://jurnal.untirta.ac.id/index.php/nhk/index

Legal Protection of Minority Shareholders Through Derivative Lawsuits

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Article Info:
|Submitted: 30 September 2022 **|Revised**: 20 November 2022 **|Accepted**: 26 December 2022

Recommended Citation: *Chicago Manual of Style 17th edition (full note)*
Adi Widjaja, "*Legal Protection of Minority Shareholders Through Derivative Lawsuits*", *Jurnal Nurani Hukum : Jurnal Ilmu Hukum*, Vol. 5 No. 2, (December, 2022)", P.127-136

ABSTRACT

One of the principles known in legal science is the principle of "majority rule Minority Protection", this principle emphasizes that minority shareholders are considered for their interests and rights. This is because with a minority position, they tend to be less protected rights compared to majority shareholders. The legal protection of the majority shareholders is quite guaranteed, especially through the general meeting of shareholders (RUPS). While the protection of minorities this is a new thing and get less attention. The problem in this study is the regulation of legislation against minority shareholders in closed companies in Indonesia and how the legal remedies of minority shareholders related to violations of their rights. Law No. 40 of 2007 concerning Limited Liability Companies (PT Law) has stipulated that minority shareholders who are harmed due to members of the Board of directors making mistakes or negligence may file a lawsuit against the company (direct lawsuit) and file a lawsuit on behalf of the company (derivative lawsuit). This legal research used normative juridical approach. The data used were primary and secondary data which were analyzed using quantitative method. The results showed that the concept of derivative action provides a balance between effective recovery for shareholders on the one hand and on the other hand provides flexibility to the board of directors to make decisions that are free from shareholder interference. This concept is based on the principle that shareholders should not be involved in managerial matters within the company. In addition, the concept of derivative action plays a role in corporate governance, by providing a deterrent effect against members of the company's Board of directors or commissioners who commit irregularities or fraud. The court shall conduct a stage of testing or examination of errors that have been committed previously by the company concerned, if the company or the company is proven guilty then it can be summoned to a court which will thereafter be decided or tried, in court only accept and examine the derivative lawsuit, provided that the shareholders own at least 1/10 of the shares or 10% of the total number of shares with voting rights, if the commissioners and or directors make a mistake. Then it is considered effective if as long as the regulation is good and regulates certain existing or applicable laws. However, if as long as the court or shareholders see from the law does not match the existing regulations then it is said to be ineffective.

Keywords: *Legal Protection, Minority Shareholders, Derivative Lawsuit.*

ABSTRAK

Salah satu asas yang dikenal dalam ilmu hukum adalah asas "mayority rule Minority Protection", asas ini menekankan agar pemegang saham minoritas diperhatikan kepentingan dan haknya. Hal ini dikarenakan dengan posisi minoritas, mereka cenderung kurang terlindungi haknya dibandingkan dengan pemegang saham mayoritas. Perlindungan hukum terhadap pemegang saham mayoritas cukup terjamin, terutama melalui rapat umum pemegang saham (RUPS). Sedangkan perlindungan terhadap minoritas ini merupakan hal yang baru dan kurang mendapat perhatian. Permasalahan dalam penelitian ini adalah pengaturan peraturan perundang-undangan terhadap pemegang saham minoritas pada perusahaan tertutup di Indonesia dan bagaimana upaya hukum pemegang saham minoritas terkait pelanggaran haknya. Undang-Undang Nomor 40 Tahun 2007 tentang Perseroan Terbatas (UU PT) telah mengatur bahwa pemegang saham minoritas yang dirugikan karena kesalahan atau kelalaian anggota direksi dapat mengajukan gugatan terhadap perseroan (gugatan langsung) dan mengajukan gugatan kepada perseroan. atas nama perusahaan (gugatan turunan). Penelitian hukum ini menggunakan pendekatan yuridis normatif. Data yang digunakan adalah data primer dan data sekunder yang dianalisis menggunakan metode kuantitatif. Hasil penelitian menunjukkan bahwa konsep tindakan derivatif memberikan keseimbangan antara pemulihan yang efektif bagi pemegang saham di satu sisi dan di sisi lain memberikan keleluasaan kepada direksi untuk mengambil keputusan yang bebas dari campur tangan pemegang saham. Konsep ini didasarkan pada prinsip bahwa pemegang saham tidak boleh terlibat dalam urusan manajerial dalam perusahaan. Selain itu, konsep tindakan derivatif berperan dalam tata kelola perusahaan, dengan memberikan efek jera terhadap anggota direksi atau komisaris perusahaan yang melakukan penyimpangan atau kecurangan. Pengadilan melakukan suatu tahapan pengujian atau pemeriksaan atas kesalahan-kesalahan yang telah dilakukan sebelumnya oleh perusahaan yang bersangkutan, apabila perusahaan atau perusahaan tersebut terbukti bersalah maka dapat dipanggil ke pengadilan yang selanjutnya akan diputus atau diadili, hanya di pengadilan. menerima dan memeriksa gugatan turunan, dengan ketentuan pemegang saham memiliki paling sedikit 1/10 saham atau 10% dari jumlah seluruh saham dengan hak suara, jika komisaris dan atau direksi melakukan kesalahan. Maka dianggap efektif jika selama peraturan itu baik dan mengatur undang-undang tertentu yang ada atau berlaku. Namun jika selama pengadilan atau pemegang saham melihat dari undang-undang tidak sesuai dengan peraturan yang ada maka dikatakan tidak efektif.

Kata Kunci: *Perlindungan Hukum, Pemegang Saham Minoritas, Gugatan Derivatif.*

Introduction

Legal relations between the subjects of law have developed into complex relationships. Such legal relations occur not only between people, but also between legal entities and legal entities, and between legal entities and people[1]. The emergence of complex legal relations between the subjects of law occurs because today people tend to choose business entities in the form of legal entities, such as limited liability companies, as a means to achieve their goals in business[2].

In Article 1 Number 1 of Law No. 40 of 2007 concerning limited liability companies, it is stipulated that: "a limited liability company, hereinafter referred to as a company, is a legal entity that is a capital partnership, established by agreement, conducting business activities with authorized capital which is entirely divided into shares and meets the requirements stipulated in this law and its Implementing Regulations."

Because it is a legal entity, a Limited Liability Company is also included as a legal subject that has rights and obligations like humans. This is in line with the opinion of Chidir Ali who explained that humans are supporters of rights and obligations known as the subject of law (*subjectum juris*). But man is not the only subject of law, because there are still other subjects of law, that is, everything that according to the law can have rights and obligations, which is called a legal entity *(rechtpersoon)*[3].

A legal entity is a legal subject created by humans by fixing the legal entity as if it has functions and Wills like people[4]. From this opinion, it can be seen that although a Limited Liability Company is a legal entity, it is different from a human being, because a Limited Liability Company is an artificial person[5], it can only perform legal actions through human beings as its representatives. Because a Limited Liability Company is not a human being, in order for a Limited Liability Company to become a full legal subject, a management organ is needed, namely the Board of directors whose duty is to carry out the management of the limited liability company. The definition of what is meant by the Board of Directors can be found in Article 1 (5) of Law Number 40 of 2007 concerning Limited Liability Companies which stipulates that: "the Board of Directors is the authorized Organ of the company and is fully responsible for the management of the company for the benefit of the company, in accordance with the purposes and objectives of the company and represents the company, both inside and outside the court in accordance with the provisions of the articles of association".

Based on the definition of the Board of Directors as stipulated in Article 1 (5) of Law Number 40 of 2007 concerning limited liability companies, it can be seen that the authority and responsibility of the Board of Directors to manage a Limited Liability Company is an authority obtained based on the provisions of the law. In carrying out the management of this Limited Liability Company, the Board of Directors acts not for itself, but for the benefit of the

[1]Try Widiyono, *Direksi Perseroan Terbatas* (Jakarta: Ghalia Indonesia, 2008), ttps://lib.ui.ac.id/detail.jsp?id=101243.

[2] Widiyono.

[3]Chidir Ali, *Badan Hukum*, 1st ed. (Bandung: Alumni, 1991), https://opac.perpusnas.go.id/DetailOpac.aspx?id=79057.

[4] Widiyono, *Direksi Perseroan Terbatas*.

[5] Nike K. Rumokoy, "Pertanggungjawaban Perseroan Selaku Badan Hukum Dalam Kaitan Nya Dengam Gugatan Atas Perseroan," *Jurnal Hukum Unsrat* 17, no. 1 (2011): 14, https://ejournal.unsrat.ac.id/v3/index.php/jurnalhukumunsrat/issue/view/1234.

company so that the Board of Directors basically has a fiduciary duty.

During carrying out the duties of managing a Limited Liability Company, it is possible that the Board of Directors may make mistakes or omissions that may cause losses to the limited liability company. If the limited liability company suffers a loss, then the shareholders as the party investing in the Limited Liability Company will of course also suffer a loss. The possibility of shareholders experiencing losses due to errors or omissions made by members of the Board of Directors in the management of this limited liability company certainly needs to be balanced with adequate legal protection for shareholders.

Basically, the legal protection of the majority shareholder in a Limited Liability Company is guaranteed. This is because in Article 87 paragraph (1) jo. Article 87 paragraph (2) of Law No. 40 of 2007 concerning Limited Liability Companies has stipulated that the decision of the General Meeting of shareholders is taken based on deliberation to reach a consensus, but in the event that a decision based on deliberation to reach a consensus is not reached, a decision will be made based on a majority vote.

The provisions of the principle of majority vote in decision making at the General Meeting of shareholders cause the majority shareholder to be the party that has the dominant position. This is because in Article 84 (1) of Law No. 40 of 2007 concerning limited liability companies, it has been regulated that each share has one voting right. Based on this provision, the more shares owned by the majority shareholder, the more voting rights he has in the General Meeting of shareholders. On the other hand, legal protection for minority shareholders tends not to be fully guaranteed. This is because minority shareholders only own a small portion of the total number of shares in a limited liability company so often minority shareholders cannot fight for their interests in the General Meeting of shareholders due to insufficient votes. With the limited number of votes owned by minority shareholders, then looking for a way out through the mechanism of the General Meeting of shareholders may not necessarily be able to solve the existing problems if there is no support vote of the majority shareholders behind it.

In overcoming this situation, Law No. 40 of 2007 concerning limited liability companies gives the right to the aggrieved minority shareholders to be able to fight for their interests by making certain legal efforts, namely filing a lawsuit for and on behalf of the company (derivative lawsuit) filed by minority shareholders to members of the Board of directors who have made mistakes or omissions as stipulated in Article 97 (6) and Article 114 (6) of Law No. 40 of 2007 concerning limited liability companies.

The requirements that must be met by minority shareholders in filing a lawsuit on behalf of the company to members of the Board of directors who have made mistakes or omissions to cause losses to the Limited Liability Company can be found in Article 97 (6) of Law Number 40 of 2007 concerning Limited Liability Companies which stipulates that: "on behalf of the company, shareholders representing at least 1/10 (one tenth) of the total number of shares with voting rights may file a lawsuit through the District Court against members of the Board of directors who by mistake or negligence caused losses to the company". [6]

[6] Yatny Nur Afrianty and Wira Franciska, "Legal Protection Against Minority Shareholders for The Implementation of a General Meeting Of Shareholders (GMS) That Expused Time," *International Journal On Human Computing Studies* 3, no. 1 (2021): 12–

Article 114 (6) of Law No. 40 of 2007 concerning Limited Liability Companies stipulates that: "on behalf of the company, shareholders representing at least 1/10 (one tenth) of the total number of shares with voting rights may sue members of the Board of Commissioners who by mistake or negligence cause losses to the company".

Methodology

This used normative juridical method with primary, secondary, and tertiary library data. The data collected were analyzed systematically. For further analysis, descriptive analysis was performed from secondary data processes related to the research problem. The data were then compiled, described, and interpreted to draw a conclusion related to legal protection of minority shareholders through derivative lawsuits.

Discussion

1. The Characteristics of a Derivative Lawsuit

The term 'derivative action' means a lawsuit originating from something else. Something else in this case is the company itself, while those who carry out the lawsuit are its shareholders who are at the same time a task force for him. As a legal terminology, derivative suit means a lawsuit based on the primary right of the company, but carried out by shareholders on behalf of the company which is carried out because of a failure in the company. Or in other words, derivative action is a lawsuit made by shareholders for and on behalf of the company.

With the concept of derivative action, minority shareholders are given the right to take extraordinary actions through the courts with the aim that the company's rights can be restored and / or not harmed, especially by actions taken by the board of directors.

The concept of derivative action can be identified for the first time in the Company Law in Indonesia in Law Number 1 of 1995 concerning Limited Liability Companies, which then the concept is re-contained in Limited Liability Law Number 40 of 2007, although in both laws do not explicitly mention the term derivative action. Shareholders ' losses that trigger derivative actions, especially in the event of alleged irregularities committed by the board of directors, for example using the company's money for personal interests, paying more than market value, and so on to the detriment of shareholders.

For public companies, shareholders ' losses can be triggered by the decline in the value of shares caused by the actions of the board of directors that harm the company. When a claim is filed through a derivative lawsuit, recovery or compensation will be paid to the company, while shareholders only receive benefits in the form of increased share prices. Minority shareholders in acting on behalf of the company in court as a derivative action, is considered as a breakthrough.

The majority shareholder at a specially convened general meeting, free from the general rule of law on the subject under the provisions of the articles of association, has the power to bind all entities, and each corporation is deemed to have entered into a corporation after the entry into force of the provisions of the articles of association. How then can this Court Act in a case because it constitutes, if it is to be assumed, for the purposes of argument, that the powers of the owning body still exist, and may be

25, www.journalsresearchparks.org/index.php/IJHCS.

lawfully exercisable for such purposes as I have suggested.

Law No. 40 of 2007 concerning Limited Liability Companies provides the right for every shareholder to file a lawsuit against the company if it is harmed because of the company's actions that are considered unfair and without reasonable grounds as a result of the decision of the General Meeting of shareholders, directors, and/or board of Commissioners.

The concept of derivative lawsuit is different from the concept of direct action. A direct suit is an action taken by a shareholder on the basis of direct losses suffered by the shareholder concerned. In this case, the shareholders based on Article 61 of Law No. 40 of 2007 concerning Limited Liability Companies Act on behalf of their own interests, and not on behalf of or representing the company. Direct lawsuits are generally related to the legal or contractual rights of shareholders, related to the shares themselves, or related to ownership of shares and other matters related to the position as shareholders.

A direct suit basically contains a request for the company to stop adverse actions and take certain steps, both to overcome the consequences that have arisen and to prevent similar actions in the future.

In the case of a direct action for which there is no requirement of ownership of a minimum number of shares, damages will be paid to the plaintiff shareholder if the plaintiff shareholder wins the action. Whereas in a derivative lawsuit that in Indonesia requires ownership of at least 10% (ten percent), compensation will be paid to the company. The practical reasons for using derivative instruments for losses suffered by the company due to the fault of the board of directors are as follows:

1) Avoid lawsuits filed many times by various shareholders.
2) Derivative claims guarantee that all shareholders who suffer losses will benefit proportionately from the damages paid to the company.
3) Protect creditors and major shareholders against the transfer of company assets directly to plaintiff shareholders

In this regard, the American Law Institute's Corporate Governance Project stipulates a provision that allows courts to treat derivative works as direct actions involving a closed company, if they would not result in a double action, harm the interests of creditors, or interfere with the equitable distribution of damages to interested parties.[7]

In practice, it also happens that the majority shareholder is involved in conspiring with the wrong actions of members of the board of directors that result in losses for the company. In this case, to the minority shareholders who obtain unfair treatment, if the compensation demanded to the wrong members of the board of directors, will be paid to the company which will also be enjoyed by the majority shareholders. Therefore, in the event of such a condition, it is appropriate if the payment of damages is decided by the court to be paid directly to the plaintiff as a minority shareholder.

In the event that a shareholder is going to file a derivative lawsuit, the

[7] Sandra Dewi and Andrew Shandy Utama, "Responsibility of the Board of Directors to the Non-Performing Loans in Banking Company Based on Law Number 40 of 2007," in *PROCEEDING CelSciTech-UMRI* (Pekanbaru: Universitas Muhammadiyah Riau, 2019), 7–10, https://ejurnal.umri.ac.id/index.php/PCST/article/view/1737/1015.

shareholder must previously request the company to take action against the board of directors who have made mistakes that have resulted in losses for the company. If the request is rejected by the company, the shareholders may file a derivative lawsuit against the board of directors who made a mistake. The shareholders will act on behalf of the company because the board of Directors has failed to perform its duties for the benefit of the company.

A derivatives lawsuit basically involves two separate claims, namely the principal claim of the company against a third party (a member of the board of directors or commissioners) and the demand that the shareholders should be allowed to act on behalf of or on behalf of the company.

From another point of view, it can also be seen that derivative action is in principle a triangular litigation. In addition to involving the plaintiff's shareholders and the company as the plaintiff, litigation also involves parties who are suspected of making mistakes that harm the company or take personal benefits from the company in an unjustified way, who are domiciled as the defendant. The claim directed to the defendant is certainly the essence or essence of the derivative action, and the company's interest in this matter is directly contrary to the interests of the defendant. Therefore, it is common practice in common law countries that the defendants in a derivatives lawsuit case will be represented by their personal advocate and not by the advocate or legal consultant of the company.

The concept of derivative action provides a balance between effective recovery for shareholders on the one hand and on the other hand giving flexibility to the board of directors to make decisions that are free from shareholder interference. This concept is based on the principle that shareholders should not be involved in managerial matters within the company. In addition, the concept of derivative action plays a role in corporate governance, by providing a deterrent effect against members of the board of directors or commissioners of the company who commit irregularities or fraud.

2. The Effectivity of Derivative Lawsuits

Related to legal issues related to the protection of minority shareholders, we can refer to the provisions set forth in Law No. 40 of 2007 concerning Limited Liability Companies, in particular: the authority of shareholders in filing a lawsuit against the company if injured as a result of the decision of the General Meeting of shareholders, The board of directors and/or the Board of Commissioners in Article 61 (1) of Law No. 40 of 2007 concerning Limited Liability Companies "every shareholder without looking at what percentage of the minimum shares he has is entitled to file a lawsuit against the company to the court if the shareholder suffers losses due to unfair actions and without reasonable grounds, carried out by the board of Directors, Board of Commissioners or by the General Meeting of shareholders.

The authority of the shareholders in requesting the company that its shares can be repurchased due to the shareholders ' disapproval of the company's actions regarding amendments to the articles of association, transfer or guarantee of the company's assets whose value is more than 50% and merger, consolidation, takeover or separation (Article 62 of Law No. 40 of 2007 concerning Limited Liability Companies) "every shareholder has the right to request the company to purchase its shares at a reasonable price if the person concerned does not approve the company's actions that harm

shareholders or the company, in the form of: Amendment of the articles of association, transfer or guarantee of the company's assets that have a value of more than 50 % (fifty percent) of the company's net assets; or merger, consolidation, takeover, or separation".

Authority to hold shares for the holding of the General Meeting of shareholders, without the authority to decide on the holding of the General Meeting of shareholders (Article 79 (2) of Law No. 40 of 2007 concerning limited liability companies) "if we read the articles of aquo, we will get the impression that Law No. 40 of 2007 concerning limited liability companies requires the board of directors to call the GMS.

Article by article describes the order in which the General Meeting of shareholders can be held, starting from the request for the General Meeting of shareholders from the party or parties representing one tenth of all shares with voting rights or at the request of the Board of Commissioners and also if submitted by registered letter along with the reason, namely Article 79 (4) of Law Number 40 of 2007 concerning Limited Liability Companies."

The authority to represent the company to file a lawsuit against a member of the board of directors who caused the company's losses (Article 114 (6) of Law No. 40 of 2007 concerning Limited Liability Companies ". Determines that each member of the board The commissioner is personally responsible for the company's losses if the person concerned is guilty or negligent in carrying out their duties. In Article 114 (5) of Law No. 40 of 2007 concerning limited liability companies, it also determines that members of the board of commissioners cannot be held responsible for the above losses if they can prove:

1) Has conducted supervision in good faith and prudence for the benefit of the company and in accordance with the purposes and objectives of the company.
2) Not having a personal interest either directly or indirectly in the management of the board of directors resulting in losses.
3) Has provided advice to the board of directors to prevent the arising or continuation of such losses. If the errors or omissions of the members of the board of directors result in the company suffering losses, the shareholders have the right to file a derivative lawsuit.

The authority of the shareholders to conduct an audit of the company, on suspicion of adverse unlawful acts committed by the company, the Board of directors or commissioners. (Article 138 (3) of Law No. 40 of 2007 concerning Limited Liability Companies) "affirms that by requesting an examination of the company, in the event that there is an allegation that the company, members of the Board of directors or Commissioners of the company have committed unlawful acts to the detriment of the company or shareholders or third parties".

The authority of the shareholders to apply for the dissolution of the company (Article 144 (1) of Law No. 40 of 2007 concerning Limited Liability Companies) "the Board of Directors, Board of Commissioners or 1 (one) shareholder or more representing at least 1/10 (one tenth) of the total number of shares with voting rights, may submit a proposal for the dissolution of the company to the General Meeting of shareholders.

The plaintiff's claim to the board of Directors is a violation of fiduciary duty, and therefore derivative claim is the company's right. The court determined that the plaintiff had failed the maker of the request to the board of directors

(demand), and hence the derivative lawsuit could not be accepted. The thing that can make a lawsuit unacceptable is if the shares owned are less than 1/10.

The procedure for formal and material examination is based on steps written or contained in existing laws, and then decide when the relevant limited liability company is examined. Of the 1/10 shares owned is sufficient formal requirements which further complement the material requirements. Obstacles that occur in derivative lawsuits often come from formal defects, which are meant by a formal defect is an imperfection or incompleteness of the law, whether a regulation, agreement, policy, or something else.

This is because it is not in accordance with the law so it is not legally binding. Judgment declaring the lawsuit inadmissible (*niet ontvankelijke verklaard*). This decision is a decision that states that the lawsuit cannot be accepted, the responsibility for the decision of the lawsuit is borne by the company. In addition, the obstacles that are often faced in this case is a lawsuit that has been filed with the court, often the court in handling it is passive. Based on this, shareholders or plaintiffs who must be active in handling derivative lawsuit cases when associated with the duties of the court because the court here is passive when handling derivative lawsuit cases.

The activeness of the parties in handling this case is needed and the parties concerned must be prepared with the rules and evidence that will be carried out in court later. An error or omission and resulting loss in the company, as the basis for derivative claims, is unclear criteria.

This lack of clarity results in it is not easy to qualify that the actions of the Board of directors or commissioners have occurred in error or negligence, then the shareholders can also take part in dealing with these problems when the company it runs suffers losses caused by the Board of directors or Commissioners. To resolve these issues, you can use a lawsuit filed personally or through a lawyer, by taking legal or legal standing based on 1/10 of the share ownership.

The court must conduct a stage of testing or examination of errors that have been made previously by the company concerned, if it is proven that the company or the company is proven guilty, it can be summoned to a court which will then be decided or tried.

Therefore, the court only accepts and examines the derivative lawsuit, and sees from 1/10 of the shares owned by the shareholders, if the commissioners or directors make a mistake that they do in their ownership of 1/10 of the company's shares.

Then it is considered effective if as long as the regulation is good and regulates certain existing or applicable laws. However, if as long as the court or shareholders see from the law does not match the existing regulations then it is said to be ineffective.

Conclusion

The concept of derivative action provides a balance between effective recovery for shareholders on the one hand and on the other hand giving flexibility to the board of directors to make decisions that are free from shareholder interference. This concept is based on the principle that shareholders should not be involved in managerial matters within the company. In addition, the concept of derivative action plays a role in corporate governance, by providing a deterrent effect against members of the board of Directors of the company who commit irregularities or fraud.

One of the legal protections for minority shareholders in the Limited Liability Law is to give the right to the

shareholders of the company representing at least ten percent of the total number of shares with valid voting rights to file derivative claims for and on behalf of the company against the Board of Directors and or Commissioners of the company, which by mistake or negligence has caused losses to the company.

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JURNAL NURANI HUKUM : JURNAL ILMU HUKUM
Volume 5 Number 2, December 2022, pg 137-147
Fakultas Hukum, Universitas Sultan Ageng Tirtayasa, Serang-Banten, Indonesia
P-ISSN: 2655-7169 | e-ISSN: 2656-0801
https://jurnal.untirta.ac.id/index.php/nhk/index

Legal Review of Corporate Crime Against Sanctions as Substitute for Fines (District Court of Serang, Banten, Indonesia)

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Article Info:
|Submitted: 26 January 2022 **|Revised**: 2 August 2022 **|Accepted**: 5 August 2022

Recommended Citation: *Chicago Manual of Style 17th edition (full note)*
Reine Rofiana, "Legal Review of Corporate Crime Against Sanctions Substitute for Fines (At Serang District Court)", *Jurnal Nurani Hukum : Jurnal Ilmu Hukum*, Vol. 5 No. 2, (December, 2022)", P.137-147

ABSTRACT

This study aims to examine, analyze and understand the concept of corporate criminal responsibility and the reformulation of alternative criminal penalties against corporations for unpaid fines. Several criminal cases that have been resolved at the Serang District Court until 2020 have not found a single corporation that has been tried and convicted for committing a corporate crime. The judge is only passive, the judge's authority is only to examine, hear and decide cases based on the indictment made by the public prosecutor. Return of court case files to the prosecutor's office only if the indictment does not meet material requirements. PERMA Number 13 of 2016 does not regulate if the criminal fine cannot be paid by the corporation due to insufficient or non-existent corporate assets. This research was conducted in a normative juridical manner so that the disclosure was bound by a method based on the requirements of deductive logic, prioritizing literature studies with secondary data bases, namely primary, secondary and tertiary legal materials. In terms of evidence in court, if the fact is found that the corporation should also be a legal subject who can be held criminally responsible, the public prosecutor should have made a separate indictment for the legal subject of the corporation so that the corporation does not escape its responsibility. The provisions in PERMA No. 13 of the Year should regulate corporate assets if they do not pay the fines enough or even do not have the assets to pay the fines. Law enforcement officials should investigate the assets of the corporation first.

Keyword: *Corporate Liability, Indictment, Substitute Criminal*

ABSTRAK

Penelitian ini bertujuan untuk mengkaji, menganalisis dan memahami konsep pertanggungjawaban pidana korporasi dan perumusan kembali alternatif pidana denda terhadap korporasi atas denda yang belum dibayar. Beberapa perkara pidana yang telah diselesaikan di Pengadilan Negeri Serang belum ditemukan satu pun korporasi yang telah diadili dan dipidana karena melakukan tindak pidana korporasi. Hakim hanya bersifat pasif, kewenangan hakim hanya untuk memeriksa, mengadili dan memutus perkara berdasarkan surat dakwaan yang dibuat oleh penuntut umum. Pengembalian berkas perkara pengadilan ke kejaksaan hanya jika surat dakwaan tidak memenuhi syarat materiil. PERMA Nomor 13 Tahun 2016 tidak mengatur jika pidana denda tidak dapat dibayar oleh korporasi karena harta kekayaan korporasi tidak mencukupi atau tidak ada. Penelitian ini dilakukan secara yuridis normatif sehingga pengungkapannya terikat dengan metode yang didasarkan pada persyaratan logika deduktif, dengan mengutamakan studi kepustakaan dengan basis data sekunder yaitu bahan hukum primer, sekunder dan tersier. Hakim seharusnya diberikan kewenangan untuk mengembalikan berkas perkara ke kejaksaan, terutama mengenai siapa subjek hukum yang harus bertanggung jawab. Ketentuan dalam PERMA No. 13 Tahun 2016 seharusnya mengatur harta kekayaan perusahaan apabila tidak cukup membayar denda atau bahkan tidak memiliki harta kekayaan untuk membayar denda. Aparat penegak hukum harus menyelidiki aset korporasi terlebih dahulu..

Kata Kunci: *Tanggung Jawab Korporasi, Dakwaan, Pidana Pengganti.*

Introduction

Corporations play a major role in the interests of society and the interests of the state. The existence of corporations is inseparable for social life to meet the needs of mankind, while in the interests of the state it plays a role in the national economy in increasing the growth of the country's economy. In addition, corporations also generate income for the community and the state, such as state revenues in the form of taxes and foreign exchange, as well as creating employment opportunities, increasing technology transfer, and so on.

However, in addition to reaping profits that have a positive impact on society and the state, corporations can also cause negative consequences that lead to criminalization of corporations, this thing happens when corporations pollute water, air and land, exploit or drain natural resources that do not care about the environment, competition, and manipulation.

Taxes and fraud, exploitation of workers without payment for their rights, products or defects that are below standard can harm consumers. Criminalization of corporations can also be applied to corporations that commit criminal acts of excise, corruption or money laundering, which can harm individuals or society at large, which in the end will also harm the state.[1]

Initially, corporations or so-called civil companies were only known in civil law, so the principle of corporate liability in Indonesia is not regulated in the current general criminal law (KUHP). The subject of criminal law in the Criminal Code which can be seen in prisoner could be punished.

The formulation of criminal liability in the article does not adhere to the principle of corporate liability, which means that corporations are not considered as subjects of criminal law, therefore there is no punishment for corporate crimes, but this understanding is developing because in criminal law, corporations can be legal entities or not legal entity. As a collection of people and/or assets that are organized whether they are legal entities or not, corporations certainly have differences with individuals.

Subekti and Tjitrosidibio stated that what is meant with *corporatie* or corporation is a company which is legal entity. While Rudi Prasetyo stated: "The word corporation terms commonly used in criminal law experts to mention what is common in law others, particularly in the field of civil law, as a legal entity, or in Dutch is known as *rechtspersoon*, or the one in English called legal entities or corporations.[2]

In Indonesia, corporations are known as criminal law subjects. However, currently there is uncertainty regarding the concept of the corporation as a subject of criminal law and what entities can be accounted for in criminal law. In addition, the regulation regarding the imposition of criminal liability for corporations is still very minimal, especially regarding the separation of corporate criminal responsibility and management (human subjects) when a crime occurs within the corporation.[3]

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[1] Parangan Stevy Nathaniel Isser, Konoras Abdurrahman, and Kumendong Wempie Jh., "Pertanggungjawaban Pidana Korporasi Dalam Tindak Pidana Cukai," *Lex Privatum* 9, no. 7 (2021): 98, https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/34709/32557.

[2] Misbahul Huda, "Politik Hukum Tindak Pidana Korporasi Di Indonesia," *IBLAM Law Review* 1, no. 2 (June 30, 2021): 45–62, https://doi.org/10.52249/ilr.v1i2.23.

[3] Abdurrakhman Alhakim and Eko Soponyono, "Kebijakan Pertanggungjawaban Korporasi Terhadap Pemberantasan Tindak Pidana Korupsi," *Jurnal Pembangunan Hukum*

In the Court, the Judge is only passive, the Judge's authority is only to examine, hear and decide cases based on the indictment made by the Public Prosecutor. The return of the case file from the court to the prosecutor's office is only if the indictment does not meet material requirements. Article 143 paragraph 2 of the Criminal Procedure Code states that the indictment must contain the full name, place of birth, age or date of birth, gender, nationality, place of residence, religion and occupation of the suspect. Because it could happen in court based on existing legal facts that corporations are considered legal subjects who can be held criminally accountable. An important part of the criminal system is to establish a sanction. Sentencing can be interpreted as the stage of determining sanctions and also the stage of imposing sanctions in criminal law.

What is the purpose of punishment cannot be separated from the purpose of law in general, namely the achievement of material and spiritual community welfare and unwanted actions, namely unwanted actions, namely actions that bring harm to society. Determining the purpose of sentencing is quite a problem, because punishment has several purposes which can be classified based on theories about sentencing.[4]

The main criminal sanctions in various laws for corporate crimes that commit criminal acts are only fines. The Supreme Court Regulation (PERMA) Number 13 of 2016 concerning Procedures for Handling Criminal Cases by Corporations only stipulates that if the corporation does not pay the fine, the corporate property can be confiscated by the prosecutor and auctioned off to pay the fine, but does not regulate if the fine cannot be paid. Paid by the corporation because the corporation's assets are not sufficient to pay the fine or even have no more property to pay the fine.

Regulations regarding corporate sanctions still have to be regulated more fully and clearly so that later it will not become a problem in its implementation.

Methodology

This research is a legal research. Legal research is a scientific activity, which is based on certain methods, systematics and thoughts that aim to study one or several certain legal phenomena, by analyzing them. This legal research is included in the category of legal science regarding basic understanding (*Begriffen wissenschaft*) which tends to limit itself to legal rules from a legal perspective that is aspired to and examines legal subjects, rights and obligations, legal events including their elements, legal relations as well as legal objects.

As an example, the *Begriffen Wissenschaft* study examines the scope of legal subjects (namely supporters of rights and obligations), types of legal subjects (natural persons, legal persons and officials or figures). in law is based on legal dogmatic or normative juridical.

Normative juridical is theoretically rational so that its disclosure is bound to a method based on the requirements of deductive logic. In addition, normative juridical discusses doctrines or principles in the science of law.

This study uses a normative juridical approach, namely how corporate responsibility and alternative reformulation of fines against corporations are made for unpaid fines.

Indonesia, 2019, https://doi.org/10.14710/jphi.v1i3.322-336.

[4] Hidayat Chusnul Chotimah, Muhammad Ridha Iswardhana, and Tiffany Setyo Pratiwi, "Penerapan Military Confi Dence Building Measures Dalam Menjaga Ketahanan Nasional Indonesia Di Ruang Siber," *Jurnal Ketahanan Nasional* 25, no. 3 (December 30, 2019): 331, https://doi.org/10.22146/jkn.50344.

Discussion

Criminal liability is to impose penalties on the maker of because of an act that violates the prohibition or creates a situation that forbidden. Criminal liability therefore concerns the transition process punishment for the crime against the maker. Accountability punishment is determined based on the fault of the maker and not just by the fulfillment of all elements of the crime. Thus the error is placed as a determining factor for criminal liability and not only seen just a mental element in a crime.[5]

To determine that a Corporation or a proven corporation committing an act that prohibited has a fault, it must be confirmed First, the corporate crime used as the theoretical basis to determine whether or not a corporation or corporation is the actor's theory functional or identification theory. It is important to note is Based on the traditional view of the Criminal Code, which is still dominant today, influenced by the principle of "*societas delinquere non-potest*", as a result it is impossible for corporations to there is a fault in him because he has no heart.

After that, a criminal act committed by a corporation must be an act that is against the law and without any reason that removes the unlawful nature of an act. In the corporation there must also be things that come to a conclusion that he is a perpetrator who has the ability to be criminally responsible for crime committed. [6]

Criminal or *straf* can be interpreted as suffering a mere tool to achieve sentencing purposes. Punishment or punishment in essence is setting the law for an event. Criminal law is a law that is included in the realm of law public. For this reason, the criminal law contains rules that determine actions that should not be carried out accompanied by threats in the form of criminal (misery) and determine the terms of the criminal can be imposed. As rules accompanied by a threat, criminal law cannot be separated from human values, so that criminal law is often described as a sword which is double-edged, on the one hand, criminal law aims to uphold values humanity, but on the other hand, the enforcement of criminal law actually imposes sanctions It's a shame for humans who violate it.[7] In criminal law there are elements or characteristics of criminal, namely:

1) The crime is essentially an imposition of suffering or distress or other unpleasant consequences;
2) The punishment was given intentionally by a person or entity who have power; and
3) The punishment is imposed on someone who has committed an act criminal law according to law.

Of these three elements, experts have formulated several theories regarding punishment, which is the legal basis and purpose of sentencing (*Strafrecht* Theory), namely:

1) *De Vergelding Theori* (Theory of absolute or vengeance);
2) *De Relative Theori* (Relative theory or goals);
3) *De Verenigings Theori* (Combined Theory); and
4) Integrated Theory of Criminal Punishment integrated)

[5] Aryo Fadlian, "Pertanggungjawaban Pidana Dalam Suatu Kerangka Teoritis," *Jurnal Hukum Positum* 5, no. 2 (2021): 13, https://journal.unsika.ac.id/index.php/positum/article/view/5556.

[6] Herlina dan Riki Yanto Pasaribu Manullang, *Pertanggungjawaban Pidana Korporasi*, *LPPM UHN Press*, 2020.

[7] Yuyuk Ucuk Suyono, *Teori Hukum Pidana Dalam Penerapan Pasal Di KUHP* (Surabaya: Unitomo Press, 2019).

Hart, whose opinion was quoted by Packer, stated: five characteristics that must exist from a "punishment", namely: According to Hart's view that a crime must contain suffering or normal unpleasant consequences. The punishment must be aimed at a violation of the rules law. Criminals must be imposed to prove to the violator about the offense he has committed, and the punishment must be imposed by a competent body in a legal system due to a criminal act.[8]

Regulations regarding the punishment of corporations are regulated separately, namely in the Supreme Court Regulation No. 13 of 2016 concerning procedures for handling criminal cases by corporations. The contents of Article 4 of the PERMA are:

1) Corporations can be held criminally responsible in accordance with the provisions on Corporate crimes in the law governing Corporations.
2) In imposing a crime against a Corporation, the Judge may assess the Corporation's faults as referred to in paragraph (1), among others:

The corporation may obtain profits or benefits from the crime or the crime is committed for the benefit of the corporation;

1) Corporations allow criminal acts to occur; or
2) The corporation does not take the necessary steps to prevent, prevent a bigger impact and ensure compliance with applicable legal provisions in order to avoid the occurrence of criminal acts.

Although it has been affirmed normatively that corporations are a legal subject and can be accounted for, not many corporations have been criminalized. The reality is that many criminal processes stop at the management and not many follow up to ensnare and carry out criminal proceedings against their corporations.

Until 2020, no corporation has been tried and tried in a criminal case at the Serang District Court. A member judge at the Serang District Court, Guse Prayudi, explained that the court only examines and hears cases, which means that the court's authority if the case is transferred to the court, the court has the authority to examine, meaning that the court cannot look for cases and cannot determine a person or a legal entity that is proposed as a defendant so that the court is passive, only accepting case files submitted from the prosecutor's office.

To determine a person or corporation as the defendant in a criminal case, it is the police and the prosecutor's office. Therefore, until now the court has only criminalized the directors or management. Judges in examining and deciding cases are still guided by the indictment.

The application of criminal sanctions to corporations so far has never been imposed by judges, because no corporations have been prosecuted by the prosecutor's office for trial. As a result, corporations which, if indicated to have committed a crime, can still move freely. Corporations use natural persons as tools of crime with the intention of benefiting the corporation, but those who are convicted are only criminals only corporate managers.

Article 143 paragraph (2) of the Criminal Procedure Code states that the indictment must contain the full name,

[8] Joko Sriwidodo, *Kajian Hukum Pidana Indonesia Teori Dan Praktek* (Kepel Press, 2019).

place of birth, age or date of birth, gender, nationality, place of residence, religion and occupation of the suspect. The public prosecutor must also describe carefully, clearly and completely regarding the criminal act that is being charged. Some of these identities are not appropriate if they are addressed to corporations or companies. For example, gender and religion, because corporations don't have it all.

Thus, the Criminal Procedure Code does not regulate corporate identity as a human legal subject in Article 143 paragraph (2) of the Criminal Procedure Code, but it can be addressed by looking at the corporate identity of the AD/ART.

The indictment is the basis criminal case investigation law the judge. Therefore, the defendant can only be convicted if proven to have committed a crime that mentioned in the indictment. If defendant in the judge's opinion proven to have committed a crime but not mentioned in the letter charges, then he can be sentenced criminal.[9]

In terms of evidence in court, if the fact is found that the corporation should also be a legal subject who can be held criminally responsible, the public prosecutor should have made a separate indictment for the legal subject of the corporation so that the corporation does not escape its responsibility. This is something that must be understood further by law enforcement so that corporations as perpetrators of criminal acts can be made defendants and prosecuted in court.

The regulation of corporate crime, must include options for criminal sanctions and or disciplinary actions as additional penalties which alternatively and or cumulatively can be imposed on the corporation and this includes fines, forfeiture of profits, expropriation, temporary closing of buildings, temporary or permanent closure of corporations, revocation of license, announcement of judge's decision, temporarily or permanently prohibiting certain actions.

The purpose of the application of these sanctions is broad, namely general prevention, special prevention, conflict prevention, rehabilitation, rendering incapacity and can be regarded as retaliation. Apart from looking at the various provisions in the law regarding corporate responsibility, on the other hand, human resources (HR) must be improved so that they are reliable, especially HR at the prosecutor's office as public prosecutors and the judiciary who hears and decides cases. All of this is very necessary in eradicating crime, especially regarding corporate liability, while corporations have been known to be difficult to hold accountable for when an act can be charged to a corporation, and when an act cannot be charged to a corporation.

The paradigm shift that corporations can be held criminally accountable has consequences regarding the types of crimes that are appropriate to be applied to corporations because not all types of existing crimes can be given to corporations. In the special criminal law, the criminal sanction of a fine is the only principal crime that can be imposed on a corporation that commits a crime or violation, so that the imposition of a criminal fine on a corporation is a must (imperative).

High fines plus the existence of a criminal fine for corporations will be meaningless if it is not accompanied by rules for implementing criminal penalties or substitute penalties. The penalty

[9] Hasanal Mulkan, "Status Terdakwa Setelah Surat Dakwaan Dinyatakan Batal Demi Hukum Dalam Perkara Pidana," *Jurnal Hukum Doctrinal* 5, no. 1 (2020): 47–61, https://jurnal.um-palembang.ac.id/doktrinal/article/view/2516.

substitute for the fine serves so that the corporation cannot be separated from criminal responsibility as a subject of criminal law.

The Supreme Court Regulation (PERMA) Number 13 of 2016 concerning Procedures for Handling Criminal Cases by Corporations was issued with the consideration that many laws in Indonesia regulate corporations as subjects of criminal acts that can be held accountable, but cases with corporate legal subjects are filed in criminal proceedings are still very limited. PERMA Number 13 of 2016, article 25, namely:

1) The judge imposes a sentence on the Corporation in the form of a principal and/or additional penalty;
2) The principal penalty that can be imposed on the Corporation as referred to in paragraph (1) is a fine;
3) Additional penalties are imposed on the Corporation in accordance with the provisions of the laws and regulations of PERMA Number 13 of 2016, article 28 paragraph 3, namely: If the convict of the Corporation does not pay the fine as referred to in paragraphs (1) and (2), the property of the Corporation may be confiscated by the prosecutor and auctioned off to pay the fine.

The main criminal sanctions against corporations can only be subject to fines. Corporations are not people who can be sentenced to death, imprisonment or imprisonment. The PERMA rule only stipulates that if the corporation does not pay the fine, the corporation's assets can be confiscated by the prosecutor and auctioned off to pay the fine, but does not regulate if the criminal fine cannot be paid by the corporation because the corporation's assets do not pay the fine or even have no money. property again to pay the fine. So far, the handling of criminal acts by corporations has not been fully regulated in the special criminal law but is still regulated in the Attorney General's Regulations and the Supreme Court Regulations. PERMA should have comprehensively regulated criminal sanctions for corporations, especially regarding fines that are not paid enough or cannot be paid because the corporation no longer has the property to pay the criminal fine.

Law enforcement officers should investigate corporate assets when it is indicated that the corporation is involved in committing a crime. Investigators can freeze or confiscate corporate assets so that there is no longer any reason that the corporation no longer owns the assets. So that when the corporation is sentenced to a fine and the corporation cannot pay, the Prosecutor can immediately execute the criminal sanction of the fine by auctioning it off corporate property to pay a criminal fine.

However, if the corporation from the beginning of the investigation does not have property and if the corporation is imposed with a fine, it can be alternatively punished with a punishment in the form of dissolution or closure of the company.

Thus, the issuance of PERMA is a challenge for law enforcement officers in ensnaring corporations as perpetrators of criminal acts, which so far are still a debate about the procedures for implementing them. Regulations regarding corporations still have to be regulated more clearly in the draft KUHP which is being discussed in the DPR because PERMA was a transitional product before the RKUHP was enacted.

So far, the handling of criminal acts by corporations has not been fully regulated in the special criminal law but is still regulated in a Supreme Court Regulation. PERMA should have comprehensively regulated criminal sanctions for corporations, especially

regarding fines that are not paid enough or cannot be paid because the corporation no longer has the property to pay the criminal fine. Law enforcement officers should investigate corporate assets when it is indicated that the corporation is involved in committing a crime. Investigators can freeze or confiscate corporate assets so that there is no longer any reason that the corporation no longer owns the assets.

So that when the corporation is sentenced to a fine and the corporation cannot pay, the Prosecutor can immediately execute the criminal sanction of the fine by auctioning the corporate property to pay the criminal fine.

However, if the corporation has been investigated from the start and if the corporation has been sentenced to a fine, it can be alternatively punished with a punishment in the form of disbanding or closing the company. Thus, the issuance of PERMA is a challenge for law enforcement officers in ensnaring corporations as perpetrators of criminal acts, which so far are still a debate about the procedures for implementing them. Regulations regarding corporations still have to be regulated more clearly in the draft KUHP which is being discussed in the DPR because PERMA was a transitional product before the RKUHP was enacted.

Conclusion

Several special criminal laws outside the Criminal Code do not provide a complete explanation of who is responsible when there is a crime involving corporations so that law enforcement officers find it difficult to determine who should be responsible. The reality is that many criminal processes stop at the management and not many follow up to ensnare and carry out criminal proceedings against their corporations. Several criminal cases that have been resolved in the Serang District Court have not yet been found by a single corporation that has been prosecuted and tried and sentenced for corporate crimes. Judges are only passive, the judge's authority only examines, hears and decides cases based on indictment made by the Public Prosecutor.

The return of the case file from the court to the prosecutor's office is only if the indictment does not meet material requirements. Article 143 paragraph 2 of the Criminal Procedure Code states that the indictment must contain the full name, place of birth, age or date of birth, gender, nationality, place of residence, religion and occupation of the suspect. Judges should be given the authority to be able to return case files to the prosecutor's office, especially regarding who the legal subject should be responsible for.

The legal subject, whether in the form of a person or a corporation, is indicated to be involved in a criminal act, so that the sanctions imposed are right on those who should be responsible so that there is conformity between the legal subjects in the indictment and the legal subjects who were sentenced to crime. In terms of evidence in court, if the fact is found that the corporation should also be a legal subject who can be held criminally responsible, the public prosecutor should have made a separate indictment for the legal subject of the corporation so that the corporation does not escape its responsibility.

The Criminal Procedure Code does not regulate corporate identity as a human legal subject in Article 143 paragraph (2) of the Criminal Procedure Code, but it can be addressed by looking at the corporate identity from the Articles of Association or Bylaws. This is something that must be understood further by law enforcement so that corporations as perpetrators of criminal acts can be made defendants and prosecuted in court.

The paradigm shift that corporations can be held criminally

accountable has consequences regarding the types of crimes that are appropriate for applied to corporations because not all types of existing crimes can be given to corporations.

The position of criminal fines which is the main crime for corporations causes criminal sanctions to be able to prevent corporations from committing criminal acts again or prevent other corporations from committing criminal acts, so there needs to be a distinction between sanctions for corporations and criminal sanctions for people (humans). High fines plus an increase in criminal fines for corporations will be meaningless if they are not accompanied by rules for implementing fines or criminal penalties his replacement. The penalty in lieu of the fine serves so that the corporation cannot be separated from criminal responsibility as a subject of criminal law.

The Supreme Court Regulation (PERMA) Number 13 of 2016 concerning Procedures for Handling Criminal Cases by Corporations only stipulates that if the corporation does not pay the fine, the corporate property can be confiscated by the prosecutor and auctioned off to pay the fine, but does not regulate if the fine cannot be paid. paid by the corporation because the corporation's assets are not sufficient to pay the fine or even have no more property to pay the fine.

The issue of corporate property should also be regulated if it is not enough to pay the fine or even does not have the property to pay the fine. Law enforcement officers should first investigate whether the property or assets of the corporation still exist or no longer exist. After arriving at the investigation stage, the investigator must immediately freeze or confiscate the corporate assets so that the corporation does not escape its responsibility by transferring assets to hard-to-reach places or the corporation pretends not to have property or wealth anymore. If the corporation is guilty and is found to still have property, the frozen or confiscated property can be immediately confiscated for the state if the corporation is sentenced to a fine.

However, if the corporation is found guilty and is found to have no more assets, the appropriate sanction is in the form of dissolution or closure of the company. The problem of determining sanctions in criminal law, regardless of the type and form of sanctions, must be based on and oriented to the purpose of punishment. After the purpose of punishment is determined, then the type and form of sanctions that are most appropriate for the perpetrators of the crime are determined. Regulations regarding corporate sanctions still have to be regulated more fully and clearly so that later it will not become a problem in its implementation.

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JURNAL NURANI HUKUM : JURNAL ILMU HUKUM
Volume 5 Number 2, December 2022, pg 148-160
Fakultas Hukum, Universitas Sultan Ageng Tirtayasa, Serang-Banten, Indonesia
P-ISSN: 2655-7169 | e-ISSN: 2656-0801
https://jurnal.untirta.ac.id/index.php/nhk/index

Philosophy Concept of Restorative Justice in Handling Juvenile Delinquent

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Article Info:
|Submitted: 19 September 2022 **|Revised**: 30 November 2022 **|Accepted**: 26 December 2022
Recommended Citation: *Chicago Manual of Style 17th edition (full note)*
Reine Rofiana, "Philosophy Concept of Restorative Justice in Handling Juvenile Delinquent", *Jurnal Nurani Hukum : Jurnal Ilmu Hukum*, Vol. 5 No. 2, (December, 2022)", P.148-160

ABSTRACT

Restorative justice in handling juvenile delinquent occurs because of the juvenile justice system growth. The increasing number of institutions that guarantee the rights of children in juvenile delinquent at the courts has led more implementation of the criminal justice system that applies restorative justice. Alignment between the 2000 UN declaration as the main principles regarding the use of restorative justice programs in criminal matters, the Vienna Declaration on crime and justice, the XI UN congress in 2005 on crime and criminal justice as a basis for researchers who passionate to examine how philosophical concept of restorative justice in juvenile delinquent and how the mechanism for applying restorative justice in juvenile delinquent uses normative juridical research. After conducting research, the philosophical concept of restorative justice in handling juvenile delinquent can be seen from before the rise of Law Number 3 of 1997 concerning Juvenile Court which refers to the provisions of the Criminal Code Articles 45, 46, and 47 which contain the authority of judges in making decisions regarding types of crimes, types of punishment and the length of punishment for children, Law Number 3 of 1997 concerning Juvenile Court and Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. In line with the philosophy of the mechanism for the application of restorative justice in handling juvenile delinquent, there are several regulations in Indonesia such as the Supreme Court Regulation Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System, Government Regulation Number 65 of 2015 concerning Guidelines for Implementing Diversion and Handling of Children who have not 12 years old and a certificate from the Director General of Badilum Number 1691/DJU/SK/PS.00/12/2020 dated 22 December 2020 concerning Guidelines for the Implementation of Restorative Justice in the General Courts.

Keyword: *Philosophical, Restorative Justice, Juvenile Delinquent*

ABSTRAK

Keadilan restoratif dalam menyelesaikan perkara tindak pidana perkara anak terjadi karena perkembangan sistem peradilan anak. Bertambahnya lembaga-lembaga yang menjamin hak anak berhadapan dengan hukum di peradilan membuat semakin banyak pelaksanaan sistem pemidanaan yang menerapkan keadilan restoratif. Keselarasan antara deklarasi PBB Tahun 2000 tentang prinsip-prinsip pokok tentang penggunaan program-program keadilan restoratif dalam permasalahan pidana, Deklarasi Wina tentang tindak pidana dan keadilan, kongres PBB ke XI Tahun 2005 tentang kejahatan dan peradilan pidana sebagai dasar peneliti ingin meneliti bagaimana filosofis konsep keadilan restoratif dalam menangani perkara anak serta bagaimana mekanisme penerapan keadilan restoratif terhadap menangani perkara anak menggunakan penelitian yuridis normatif. Setelah melakukan penelitian, filosofis konsep keadilan restoratif dalam menangani perkara anak dilihat dari sebelum lahirnya Undang-Undang Nomor 3 Tahun 1997 tentang Pengadilan Anak yang merujuk pada ketentuan KUHP Pasal 45, 46, dan Pasal 47 yang memuat tentang kewenangan hakim dalam menjatuhkan putusan tentang jenis-jenis pemidanaan dan lamanya pidana untuk anak, Undang-Undang Nomor 3 Tahun 1997 tentang Pengadilan Anak dan Undang-Undang Nomor 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak. Sejalan dengan filosofisnya mekanisme penerapan keadilan restoratif terhadap menangani perkara anak terdapat di beberapa peraturan di Indonesia seperti Peraturan Mahkamah Agung Nomor 4 Tahun 2014 tentang Pedoman Pelaksanaan Diversi Dalam Sistem Peradilan Pidana Anak, Peraturan Pemerintah Nomor 65 Tahun 2015 tentang Pedoman Pelaksanaan Diversi dan Penanganan Anak yang Belum Berumur 12 Tahun dan Surat Keterangan Dirjen Badilum Nomor 1691/DJU/SK/PS.00/12/2020 tanggal 22 Desember 2020 tentang Pedoman Penerapan Restorative Justice di Lingkungan Peradilan Umum.

Kata Kunci: *Filosofis, Restorative Justice, Perkara Anak*

Introduction

Indonesia in the criminal system still treats children which involved in juvenile delinquent as perpetrators of criminal acts like adults as criminals, with the condition of a criminal who deserves to be punished like an adult. Sentencing that leads to the individual perpetrator or individual responsibility with the view that the person is able to take full responsibility for his actions.[1]

The problem of juvenile justice in protecting children from the law in government policies is in special protection, namely legal protection in the judicial system and laws that specifically regulate justice and Law Number 3 of 1997 concerning Juvenile Courts[2] which has been replaced by Law Number 11 of 2012 concerning the Juvenile Criminal Justice System[3]. These changes are for developments in protecting children for the better with the hope that juvenile justice will be more effective in protecting children who are caught in the law by realizing an "Integrated Criminal System".[4]

The development of the juvenile justice system starts from this definition which becomes more external and leads to the criminal justice system. It is making more and more institutions that can guarantee children's rights in undergoing the justice system and based on the law principle clearly explain the upheld of children's rights. Thus, the settlement in the implementation of the criminal system in Indonesia for children can be done by applying restorative justice. Police, prosecutors and courts as well as community advisors or correctional centers, advocates or legal aid, special child development agencies (LPKA), temporary child placement institutions (LPAS) and social welfare administration institutions (LPKS) as determinants of whether children will be released or processed in juvenile court to the stage when the child is placed in choices, ranging from being released to being included in a sentencing institution in the corridor of restorative justice.[5]

Restorative justice is a philosophy, process of justice, theory, and intervention that emphasizes repairing losses caused by criminal acts, which in fourth Pancasila, namely deliberation, is a priority in making decisions as a benchmark for restorative justice. As with the application of criminal sanctions for children, it often creates dilemmatic problems, both juridically, sociologically and philosophically.[6]

The application of the characteristics concept of customary law in Indonesia can be described as the root of restorative justice, views on customary violations/customary offenses in a model

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[1] Bambang Hartono, "Analisis Keadilan Restoratif (Restorative Justice) Dalam Konteks Ultimum Remedium Sebagai Penyelesaian Permasalahan Tindak Pidana Anak," *Pranata Hukum* 10, no. 2 (July 2015), https://doi.org/10.36448/PRANATAHUKUM.V10I2.197.

[2] "Indonesia, Juvenile Court Act, Law No. 3 of 1997, State Gazette No. 3 of 1997, Supplement to the State Gazette No. 3668." (n.d.).

[3] Indonesia, Juvenile Court Act, Law No. 3 of 1997, State Gazette No. 3 of 1997, Supplement to the State Gazette No. 3668.

[4] Susana Andi Meyrina, "Restorative Justice Dalam Peradilan Anak Berdasarkan Undang-Undang No.11 Tahun 2012," *Jurnal Penelitian Hukum De Jure* 17, no. 1 (March 2017): 92–107, https://doi.org/10.30641/DEJURE.2017.V17.92-107.

[5] "Mahkamah Agung Republik Indonesia," n.d.

[6] Ardini, "Restoratif Justice Sebagai Pertimbangan Hakim Menjatuhkan Putusan Pidana Terhadap Anak Yang Melakukan Penganiayaan (Analisis Putusan Nomor 4/Pid.Sus-Anak/2018/Pn.Skw)," *Jurnal Ilmiah Maahasiswa Hukum (JIMHUM)* 1, no. 4 (2021): 1–15.

and way of settlement offered. A simple model of restorative justice that already exists in Indonesia that resolves conflicts by way of deliberation, where the practice of non-adversary dispute resolution or outside the criminal justice process is a reflection of the consensus deliberation institution which is part of the Indonesian philosophy.[7]

Based on the description above, the author wants to discuss how the philosophical concept of restorative justice in handling juvenile delinquent and how the mechanism for applying restorative justice in handling juvenile delinquent.

Methodology

The author uses a normative juridical method, referring to the legal norms contained in the legislation and the legal norms that exist in society.[8] Sources of legal materials obtained from official documents, books related to the research object of research results and statutory regulations. Literature research methods obtained through library research sourced from laws and regulations, official documents, publications and research results. Legal materials are analyzed qualitatively, referring to the legal norms that exist in the laws and regulations as well as the norms that live and develop in society.

So that the results of the analysis are descriptive analysis, the activity of determining the content or meaning of the rule of law is used as a reference in solving legal problems that are the object of study.

Discussion

1. Philosophy Concept of Restorative Justice in Handling Juvenile Delinquent

The philosophical basis for the concept of restorative justice when viewed from Pancasila has been explained in the introduction. In addition, the philosophical basis can also be found in the fourth paragraph of the Preamble to the 1945 Constitution of the Republic of Indonesia, namely that the state has the right to protect all Indonesian citizens, including children.[9]

Indonesian regulations that have been based on children's rights as contained in the Convention on the Rights of the Child by Presidential Decree Number 36 of 1990[10], Law Number 23 of 2002 concerning Child Protection.[11] Responding the need of children protection in criminal proceedings, the Juvenile Criminal Justice System Act was formed, due to the lack of a Juvenile Court Law providing justice to children and adjudicating children's rights.[12]

The Juvenile Criminal Justice System Act contains several important changes originating from the paradigm of the Criminal Code, the change in child punishment from retributive to restorative using diversion in the judicial process. In addition, the perspective of

[7] Susana Andi Meyrina, "Restorative Justice Dalam Peradilan Anak Berdasarkan Undang-Undang No.11 Tahun 2012."

[8] Zainuddin Ali, *Metode Penelitian Hukum,* (Jakarta: Sinar Grafika, 2009).

[9] Dwi Ratna and Kamala Sari, "Konsep Restorative Justice Dalam Undang-Undang Ri Number 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak Concept of Restorative Justice in the Law of the Republic of Indonesia Number 11 of 2012 Concerning Children ' S Criminal Court System," *Jurnal IUS* 6, no. 2 (2014): 588–600.

[10] "Indonesia, Presidential Decree on the Ratification of Convention on The Rights of the Child (Konvensi Hak-Hak Anak), KEPPRES No. 36 on 1990." (n.d.).

[11] "Indonesia, Child Protection Law, Law No. 23 of 2002, State Gazette No. 109 of 2002, Supplementary State Gazette No. 4235." (n.d.).

[12] Erasmus Napitupulu, *Pemidanaan Anak Dalam Rancangan KUHP* (Jakarta Selatan: Institute for Criminal Justice Reform, 2015).

imposing child punishment has changed with imprisonment as a last resort in accordance with the different dimensions of children. The current restorative justice process requires the community to play an active role in tackling crime. Even though law enforcement has a secondary role, society must take responsibility for healing the pain caused by crime.[13]

Juvenile Delinquent law enforcement not only looks at the concept of restorative justice from one angle to bring together victims and perpetrators to solve problems, but also recognizes that the interests of children are the main thing. In United Nations Standard Minimum Rules for the Administration of Juvenile Justice or The Beijing Rules declare that all competent authorities have the power to terminate the judicial process at any stage and at any opportunity in the best interests of the child.[14] To find out more about the development of sentencing can be seen from:

A. Before the Enactment of Law Number 3 of 1997 concerning Juvenile Court

Handling juvenile delinquent contained in the Criminal Code Article 45, Article 46, and Article 47 including the power of judges to make decisions about the type and duration of punishment for children who commit crimes. The Criminal Code does not provide a definition of children, but refers to the provisions of Article 45 is meant by children are every person who has not reached adulthood or has not reached 16 years. The types of crimes that cannot be imposed on children are dead punishment, life imprisonment, deprivation of certain rights and notification of judge's decision. However, there are alternatives for imposing sanctions on juvenile delinquent, both in the form of criminal behavior and actions, namely:[15]

1) Return to parent, guardian or caregiver.
2) Submitted to the State to receive education from the State.
3) Sentenced to a maximum sentence of less than a third of the maximum adult sentence.
4) If juvenile delinquent is punished by death or life imprisonment, it can only be sentenced to a maximum imprisonment of 15 years.

B. Law Number 3 of 1997 concerning Juvenile Court

The enactment of this law revokes the provisions of Article 45, Article 46 and Article 47 of the Criminal Code which regulates juvenile delinquent. This law states that juvenile delinquent is a naughty child, and sets a new standard for determining the age limit for children aged 8 years who are under 18 and unmarried. The form of punishment for children is lighter than previously regulated in the Criminal Code, namely:[16]

1) Imprisonment up to half of the principal punishment for adults.
2) The death penalty or life imprisonment is reduced to a maximum of 10 years in prison.
3) The threat of death penalty or life imprisonment for children under the age of 12 is reduced to surrender of the child to the state
4) If the fine is not paid and replaced with mandatory work training of up

[13] Napitupulu.

[14] Napitupulu.

[15] Bilher Hutahaean, "Penerapan Sanksi Pidana Bagi Pelaku Tindak Pidana Anak," *Jurnal Yudisial* 6, no. 1 (March 2013): 64–79, https://doi.org/10.29123/JY.V6I1.119.

[16] Meril Tiameledau, "Percobaan Sebagai Alasan Diperingankannya Pidana Bagi Pelaku Tindak Pidana Menurut KUHP," *Lex Administratum* 4, no. 3 (March 2016).

to 90 days, the training time does not exceed four hours a day and it is not carried out at night, the maximum penalty is half of the adult law
5) Supervision sentence is a minimum of three months and a maximum of two years, which the child is supervised by a prosecutor and supervised by a local supervisor.
6) Additional sanctions in the form of confiscation of certain goods and/or payment of compensation.

The category of actions imposed on naughty children can be accompanied by a warning and conditions set by the judge. Such as:[17]

1) Return to parent/guardian/foster parent.
2) State submissions to take part in coaching and job training.
3) Submission to the social department or social organization that handles education, coaching or job training.

Based on the explanation above, the punishment in this law is a paradigm shift which was originally in the Criminal Code which was retaliatory, but the law is generally preventive in nature. Meanwhile, the purpose of punishment is not only to deter children who are the perpetrators but also to prevent the wider community from committing such acts.

C. Law Number 11 of 2012 concerning the Juvenile Criminal Justice System

This law was formed because the Juvenile Court Law no longer meets the legal needs of the community and fails to provide special protection for children in conflict with the law as a whole. Society, government and other national institutions have duties and responsibilities to improve children's welfare and provide special protection for children in situations of legal conflict. Such as:[18]

1) Restorative justice, together with diversion, is an effort to find solutions outside the judiciary and must be implemented first by law enforcement, families and communities. With the intention of:[19]
   a) Seeking peace between victims and children.
   b) Prioritizing out-of-court negotiations.
   c) Keep children away from the bad effects of litigation.
   d) Instilling responsibility in children.
   e) Fulfills the best interests of the child.
   f) Protection of children from deprivation of liberty.
   g) Encourage people to participate.
   h) Improve children's life skills.
2) Diversion, an effort to avoid resolving cases through formal channels or court decisions with the aim of diverting attention, avoiding negative views of children, or preventing problems with the law.
3) Certain minimum penalties and fines for sentencing have been abolished, and criminal offenses under this law are limited to imprisonment under conditions outside of community service or supervision institutions, job

[17] T. W. (Tri) Widiastuti, "Penegakan Hukum Terhadap Kenakalan Anak," *Jurnal Wacana Hukum* 11, no. 1 (2012): 23573, https://doi.org/10.33061/1.JWH.2012.11.1.730.

[18] Suyanto Edi Wibowo et al., "Implikasi Berlakunya Undang-Undang Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak Terhadap Kelembagaan Dan Regulasi Pelaksana," *Jurnal Legislasi Indonesia* 13, no. 2 (May 2018): 121–33, https://doi.org/10.54629/JLI.V13I2.107.

[19] Reyner Timothy Danielt, "Penerapan Restorative Justice Terhadap Tindak Pidana Anak Pencurian Oleh Anak Di Bawah Umur," *LEX ET SOCIETATIS* 2, no. 6 (August 2014), https://doi.org/10.35796/LES.V2I6.5364.

training, coaching within institutions and imprisonment as a last resort when a crime commits a serious crime or involve violence or conditions that endanger society. There are also additional penalties such as deprivation of profits from criminal acts and compliance with customary obligations.

The punishments that can be given to juvenile delinquent children who are not yet 14 years old are as follows:[20]

1) Return to parent or guardian.
2) Leave it to someone.
3) Treatment in a mental hospital.
4) Treatment in a social welfare facility.
5) Must attend formal education and/or training organized by government agencies or private bodies.
6) Revocation of driver's license.
7) Repairs due to criminal acts.

2. The Mechanism of Applying Restorative Justice in Handling Juvenile Delinquent

In the previous discussion, restorative justice in handling juvenile delinquent is recovery counseling involving victims, perpetrators, and their respective families in coordination with law enforcement and community leaders, aiming to realize children's rights and protect children in conflict with the law. The conditions for applying restorative justice are:[21]

1) Conditions for the perpetrator such as the age of the child, the threat of punishment (maximum 7 years), confession of guilt and remorse, consent of the victim and family, frequency of the perpetrator's crime.
2) If the child has previously violated the law, the nature and number of previous offenses must still be considered for restorative justice. When finding records that the child frequently violates the law, it becomes difficult to provide restorative justice.
3) Whether the child admits the crime and regrets it will be a positive consideration in resolving the case through a restorative justice approach if the child does so.
4) The impact of the act on the victim, the behavior of the child apologizing to the victim can be the basis for a settlement using restorative justice. If the violation has a serious impact on the victim, and the victim does not forgive the perpetrator, then they cannot use restorative justice as a solution
5) The attitude of the family of the child offender, if the family covers up the child's mistakes in the implementation of restorative justice, it will be difficult because support from parents and family becomes important in the implementation of restorative justice

There are several uses of the program in implementing restorative justice, namely:[22]

1) Restorative justice programs can be used at any stage of the criminal justice system.
2) A restorative justice process, which only sufficient evidence to prosecute the perpetrator with the freedom and

[20] Napitupulu, *Pemidanaan Anak Dalam Rancangan KUHP*.

[21] Lilik and Purwastuti Yudaningsih, "Penanganan Perkara Anak Melalui Restorative Justice," *Jurnal Ilmu Hukum Jambi* 5, no. 2 (2014): 43277, https://www.neliti.com/id/publications/43277/.

[22]Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM Republik Indonesia, *Pengkajian Hukum Tentang Penerapan Restorative Justice Dalam Penyelesaian Tindak Pidana Yang Dilakukan Oleh Anak-Anak* (Jakarta: Kementerian Hukum dan HAM, 2013).

voluntarism of the victim and perpetrator, as well as the freedom of the perpetrator and victim to withdraw their consent at any time during the process. Contracts made voluntarily are also made and contain appropriate and proportionate obligations.

3) The settlement is based on basic facts that are relevant to the case, and the order of the perpetrators cannot be used as incriminating evidence in subsequent trials.
4) Disparities due to power imbalances and cultural disparities are taken into account when applying restorative justice.
5) The safety of the parties, this must also be considered in the restorative justice process.
6) If restorative justice is inappropriate or impossible, the case will be referred to a criminal justice officer for determination to avoid delays. Authorities encourage perpetrators to hold victims and affected communities accountable.

There are several types of treatments with a restorative justice approach, namely:[23]

1) Victim-perpetrator mediation, aims to resolve the dispute through negotiations to reach an agreement between the parties, with the help of a mediator

2) Family counseling, the facilitator facilitates the resolution of children's cases through family counseling, paying attention to the involvement of parties such as victims, perpetrators, families and people closest to the child, as well as providing information on the place, time and mechanism of the meeting offered.

3) Community deliberation, resolving juvenile delinquent through community consultations involving the perpetrator's family, victim's family and community/religious leaders by taking into account the involvement of parties who were harmed by the perpetrator's actions, supporting parties of the perpetrator and victim, as well as information related to the place, time and mechanism of the meeting.

The handling mechanism with a restorative justice approach is as follows:[24]

1) Investigators, public prosecutors, and judges must consider the type of violation, the age of the child, the results of the community survey of the correctional institution, and support from the family and the community

2) Stages in the deliberation, such as digging up information on the perpetrator regarding the actions and responsibilities of the perpetrator, information on the victim regarding the loss of the victim and things that can compensate for the perpetrator's mistakes. Family considerations related to bearing the blame and ways to prevent repetition of actions. Negotiations and agreements related to the needs of victims and the community, realistic and timely plans, protection of children's rights and child development as well as anticipation if plans are successful and not successful.

3) If the settlement results in a peace agreement, with or without compensation, surrender to parents, participation in community education or training and community service. Agreements are determined in the delegated delegation and considered

[23] Indonesia.

[24] Indonesia.

by the public prosecutor and judge as decision making at the time of prosecution.

The mechanism for applying restorative justice can be seen more deeply as contained in several regulations in Indonesia such as the Supreme Court Regulation Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System[25], Government Regulation Number 65 of 2015 concerning Guidelines for the Implementation of Diversion and Handling of Children Under 12 Years of Age[26] and Certificate of Director General of Badilum Number 1691/DJU/SK/PS.00/12/2020 dated 22 December 2020 concerning Guidelines for the Implementation of Restorative Justice in the General Courts.

A. Supreme Court Regulation Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System

The definition of diversion deliberation in Supreme Court Regulation Number 4 of 2014 is deliberation between parties involving children and their parents/guardians, victims and/or parents/guardians, community guidance, professional social workers, representatives and other parties to reach diversion agreements through restorative justice. The judge as a facilitator appointed by the head of the court in handling the case of the child concerned. Diversion means transferring the process to a long and very rigid child case settlement system where mediation or deliberation is an integral part of diversion to achieve restorative justice.

Based on Article 2, diversion applies to children who are 12 years old but not yet 18 years old or 12 years old even though they have been married but are not yet 18 years old. The mediator appointed by the Chairperson of the Court must provide an opportunity for the child to be heard about the accusation, and the parent/guardian must refer to matters relating to the child's behavior and the expected form of settlement, and the child's victim.

The stages of implementing diversion in court are carried out after receiving a decision from the Court Chairman regarding the disposition of any diversion attempt and the determination of the diversion consultation date. After the case submitted, the public prosecutor signs the child and parent/guardian or assistance, victim and/or parent/guardian, community counselor, professional social worker, community official in diversion. The stages of the diversion deliberation consist of:

1) Opening with the facilitator outlining the charges, guiding the community as a provider of information on child behavior and social justice, and offering proposed solutions.
2) The facilitator provides an opportunity for the child to hear the accusation, the parents/guardian will handle problems related to the child's behavior and the expected resolution, and the child victim/victim/parent/guardian will provide the response to the expected settlement.

[25]"Indonesia, Regulation of the Supreme Court Guidelines for the Implementation of Diversion in the Juvenile Criminal Justice System Number 4 of 2014, State Gazette Number 1052 of 2014." (n.d.)..

[26] "Indonesia, Government Regulation Guidelines for the Implementation of Diversion and Handling of Children Under the Age of 12 (Twelve) Years Number 65 of 2015, State Gazette Number 194 of 2015, Supplement to the State Gazette Number 5732.," n.d.

3) Professional social workers provide information about the social situation of child victims and suggest solutions.
4) After obtaining the results of deliberation regarding the avoidance agreement made with the consideration that the agreement does not violate the law, religion, public order and public decency, decency or cannot be carried out by the child, or does not contain anything that is not good.
5) Diversion deliberations are recorded in the Minutes of Diversion signed by the diversion facilitator and the substitute clerk/registrar and reported to the Chairperson of the Court.
6) The decision on the diversion agreement is made by the Chairperson of the Court and if it does not meet the requirements, so it is amended with diversion guidelines and a decision is made to terminate the examination.

B. Government Regulation Number 65 of 2015 concerning Guidelines for the Implementation of Diversion and Handling of Children Under 12 (Twelve) Years Old

Based on government regulations regarding guidelines for the implementation of diversion and the handling of children who are not yet 12 years old. Diversion aims to achieve peace between victims and children, resolve child cases outside the judicial process, prevent children from deprivation of independence, encourage the community to participate, and instill a sense of responsibility in children.

The diversion agreement is carried out by investigators, public prosecutors and judges. The diversion process carried out must consider the category of crime, the age of the child, the results of community research and support from the family and community environment in conducting diversion. The results of the diversion agreement are in the form of peace with or without compensation, handover to parents/guardians, participation in education or training in educational institutions or LPKS for a maximum of three months and community services.

A diversion agreement without the consent of the victim and/or the family of the victim's child can be carried out by the investigator together with the child and/or his family, and the community advisor by fulfilling the conditions if the crime in the form of a violation, a minor crime, a crime without a victim or the value of the loss of the victim is not more than the value of the local provincial minimum wage. With the results of the agreement such as the return of losses in the event of a victim, rehabilitation is returned. The diversion procedure is carried out as follows:

1) Investigators are required to report to the public prosecutor about the start of the diversion effort and the implementation of the diversion effort within a maximum of 1x24 hours.
2) Investigators inform and offer settlement of cases through diversion to children and/or parents/guardians, as well as victims or child victims and/or parents/guardians.
3) If an agreement is not reached, the investigator will continue the investigation and submit an official report regarding the diversion effort to the public prosecutor.
4) Diversion is completed within 30 days from the start of diversion, discussion of diversion is led by investigators, community counselors act as deputy facilitators. Attended by children and/or parents/guardians, victims or child victims and/or parents/guardians and professional social workers

5) The investigator issues a decision to stop the investigation if an agreement is not reached no later than three days after receiving the court's decision for a criminal examination with a copy to the Head of the local District Court.

C. Certificate of the Director General of Badilum Number 1691/DJU/SK/PS.00/12/2020 dated 22 December 2020 concerning Guidelines for the Implementation of Restorative Justice in the General Courts

A restorative justice approach can be applied to criminal acts, including:

1) Minor crimes with criminal threats regulated in Articles 364, 373, 379, 384, 407 and 482 of the Criminal Code with a loss value of not more than Rp. 2,500,000, a peace mechanism between the perpetrator and the victim as well as the victim's family and community leaders. Judges make peace efforts and prioritize restorative justice in their decisions. If restorative justice is achieved, it will be included in the consideration of the decision.
2) Child cases, a restorative approach with the stipulation of diversion is regulated in Law Number 11 of 2012 concerning the Juvenile Justice System.
3) Cases of women in conflict with the law, restorative justice based on the Regulation of the Supreme Court of the Republic of Indonesia Number 3 of 2017 concerning Guidelines for Adjudicating Cases of Women Facing the Law.
4) Narcotics cases, the application of restorative justice can be applied only to addicts, abusers, victims of abuse, narcotics dependence, and narcotics used for one day. The panel of judges may order narcotics addicts and narcotics abuse newspapers to receive treatment, care, and recovery at medical rehabilitation institutions and/or social rehabilitation institutions.

Conclusions

The philosophical concept of restorative justice in juvenile delinquent can be seen from the second principle of Pancasila and the preamble to the 1945 Constitution, followed by Indonesian regulations that have been based on children's rights as contained in the Convention on the Rights of the Child by Presidential Decree No. 36/1990, Law No. Law Number 23 of 2002 concerning Child Protection, Law Number 11 of 2012 concerning the Criminal Justice System for Children, because of the lack of Law Number 3 of 1997 concerning Juvenile Court in providing justice for children.

The mechanism for applying restorative justice to dealing with children's cases can be seen through the use of programs and other types of social justice approaches, and supported by Supreme Court Regulation Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System, Government Regulation Number 65 of 2015 concerning Guidelines for Implementing Diversion and Handling of Children Under 12 Years of Age and Certificate of Director General of Badilum Number 1691/DJU/SK/ PS.00/12/2020 dated December 22, 2020 regarding Guidelines for the Implementation of Restorative Justice in the General Courts Environment.

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JURNAL NURANI HUKUM : JURNAL ILMU HUKUM
Volume 5 Number 2, December 2022, pg 161-171
Fakultas Hukum, Universitas Sultan Ageng Tirtayasa, Serang-Banten, Indonesia
P-ISSN: 2655-7169 | e-ISSN: 2656-0801
https://jurnal.untirta.ac.id/index.php/nhk/index

The Legal Standing of PPKM in Banten Province (Constitutional Law Perspective)

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Article Info:
|**Submitted**: 30 September 2022 |**Revised**: 30 November 2022 |**Accepted**: 26 December 2022

Recommended Citation: *Chicago Manual of Style 17th edition (full note)*
Eki Furqon and Qotrun Nida, "The Legal Standing of PPKM in Banten Province (Constitutional Law Perspective)", *Jurnal Nurani Hukum : Jurnal Ilmu Hukum*, Vol. 5 No. 2, (December, 2022)", P.161-171

ABSTRACT

The establishment of the policy for the Implementation of Restrictions on Community Activities (PPKM) is one of the efforts to overcome the pandemic carried out by the Indonesian government. The legal basis for the PPKM policy is contained in the Instruction of the Minister of Home Affairs, which is a problem because of the pandemic situation which is a national disaster but the policies used are only regulated in the minister's instructions. Banten Province, which is included in the Java-Bali PPKM area imposed by the central government, has issued a policy containing the implementation of PPKM as stipulated in the Banten Governor's Instruction Number 1 of 2021. These problems then have an impact on the extent of the binding power of the PPKM when viewed from the legal basis, its formation is related to the hierarchical system of legislation in Indonesia. The research method used is a normative juridical research method with the aim of seeing how the normative arrangements regarding the legal position of PPKM in Banten Province are in the Indonesian constitutional system. Using secondary data such as literature and literature but also using primary data or field data as supporting data. The policy in the form of a ministry instruction in this case the Instruction of the Minister of Home Affairs regarding PPKM cannot be used to regulate matters that are comprehensive or external to the ministry itself. Therefore, the use of a Ministerial Instruction in handling Covid-19 is not appropriate because it is not a legal product in the form of a regulation that can bind all parties and have clear legal consequences.

Keyword: *Covid-19, Enforcement of Restrictions on Community Activities, Ministerial Instructions.*

ABSTRAK

Pembentukan kebijakan Pemberlakuan Pembatasan Kegiatan Masyarakat (PPKM) merupakan salah satu upaya penanggulangan pandemi yang dilakukan oleh pemerintah Indonesia. Dasar hukum kebijakan PPKM terdapat dalam Instruksi Menteri Dalam Negeri, yang mana menjadi persoalan karena situasi pandemi yang merupakan bencana nasional akan tetapi kebijakan yang digunakan hanya diatur dalam instruksi menteri. Provinsi Banten yang termasuk ke dalam wilayah PPKM Jawa-Bali yang diberlakukan oleh pemerintah pusat, telah mengeluarkan kebijakan yang memuat tentang penerapan PPKM yang diatur dalam Instruksi Gubernur Banten Nomor 1 Tahun 2021. Permasalahan tersebut kemudian berdampak pada sejauh mana kekuatan mengikat dari PPKM tersebut jika dilihat dari dasar hukum pembentukannya dihubungkan dengan sistem hirarki perundang-undangan di Indonesia. Metode penelitian yang digunakan adalah metode peneitian yuridis normatif dengan tujuan untuk melihat bagaimana pengaturan normatif mengenai kedudukan hukum PPKM di Provinsi Banten dalam sistem ketatanegaraan Indonesia. Menggunakan data sekunder seperti literatur dan kepustakaan tapi juga menggunakan data primer atau data lapangan sebagai data penunjang. Kebijakan berupa instruksi kementerian dalam hal ini Instruksi Menteri Dalam Negeri mengenai PPKM tidak dapat digunakan untuk mengatur hal yang sifatnya menyeluruh atau eksternal dari kementerian itu sendiri Maka dari itu penggunaan Instruksi Menteri dalam penanganan Covid-19 tidaklah tepat karena bukan merupakan produk hukum yang berbentuk peraturan yang dapat mengikat semua pihak dan memiliki akibat hukum yang jelas.

Kata Kunci: *Covid-19, Pemberlakuan Pembatasan Kegiatan Masyarakat, Instruksi Menteri.*

Introduction

Indonesia is a country based on law as stated in Article 1 paragraph 3 of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia). The elaboration of the notion as a state of law has the meaning that every aspect of people's lives, both in the social and government fields, must be carried out in accordance with the legal rules that apply in the law of the country. According to Hans Kelsen's teachings, the state is essentially a *Zwangsordnung*, a legal order or social order that has a coercive nature, which gives rise to the right to govern and the obligation to submit.

Because the rule of law is incarnated in the form of regulations that contain sanctions if violated, thus limiting the freedom of citizens which is a fundamental value in a country. In addition, Indonesia is a country that adheres to the teachings of a welfare state (*verzoging* state, welfare state) and can be categorized as a democratic legal state. Where in every administration of government affairs must be based on applicable law (*wetmatigheid van bestuur*).

The Covid-19 pandemic that has hit Indonesia since the beginning of 2020 is a national disaster which until now is still something that has not been fully resolved. Nevertheless, various efforts have been made by the Indonesian government with the aim of accelerating the handling of the Covid-19 pandemic. Efforts to handle the Covid-19 pandemic carried out by the Indonesian government continue to experience developments in terms of choosing the policy model to be used, which of course will be adjusted to the level of urgency in the field.

At the beginning of the spread of Covid-19 in Indonesia in 2020, the Indonesian government chose to use the Large-Scale Social Restriction policy (hereinafter referred to as PSBB) as an effort to deal with the pandemic..[1] The selection of PSBB was the result of a central government decision based on current conditions and state law in dealing with a health emergency or disease outbreak as in the case of Covid-19, namely Law Number 6 of 2018 concerning Health Quarantine (hereinafter referred to as the Health Quarantine Law).[2]

Over time, the implementation of the PSBB policy which has been implemented since the beginning of 2020 has continued to change into Local-Scale Social Restrictions (PSBL) and Transitional PSBB before the government finally switched to using a new policy, namely the Enforcement of Community Activity Restrictions (PPKM).

PPKM came into force in Indonesia on January 11, 2021 with the legal basis being the Instruction of the Minister of Home Affairs Number 1 of 2021 concerning the Enforcement of Restrictions on Community Activities to Control the Spread of Covid-19. The *Inmendagri* which is the legal basis for PPKM has a time limit of validity, which is from January 11, 2021 to January 25, 2021. After the expiration of the *Inmendagri* validity period, a new *Inmendagri* is then issued regarding the extension of PPKM for a period of validity

[1]Goverment of Indonesia, "Government Regulation Number 21 of 2020 Concerning Large-Scale Social Restrictions in the Context of Accelerating the Handling of Corona Virus Disease 2019 (Covid-19)" (2020).

[2]Eki Furqon and Edi Mulyadi, "The Harmonization of the Central and Local Governments Authority: Handling Public Health Emergencies on Coronavirus Disease 2019," *UNIFIKASI : Jurnal Ilmu Hukum* 7, no. 2 (December 26, 2020): 205–14, https://doi.org/10.25134/UNIFIKASI.V7I2.3569.

that is adjusted to the wishes of the government.

PPKM in its development has similarities, such as the previous policy, namely PSBB, experiencing changes in terms ranging from PPKM, Micro-Based PPKM and Emergency PPKM. In general, Micro-Based PPKM is the same as regular PPKM, the difference is Emergency PPKM. Emergency PPKM is an implication of the establishment of *Inmendagri* Number 15 of 2021 concerning the Implementation of Restrictions on Emergency Community Activities for Corona Virus Disease in 2019 in the Java and Bali Regions, in which the implementation of Emergency PPKM can lead to curfew rules, crowd control and other more repressive actions.

The basic difference between the implementation of PSBB and PPKM is in terms of the legal basis. PSBB is regulated in a government regulation, while PPKM is regulated in the Instruction of the Minister of Home Affairs. In addition, the PPKM policy is not found in the Health Quarantine Law, in contrast to the PSBB which is clearly written in it. It can be explained that, PPKM is a government policy that is only based on ministerial instructions, because there are no clear references in the relevant laws.

Indonesia's positive legal system in which there is a vertical classification of laws and regulations which in other terms is called the hierarchy of laws and regulations in Indonesia.[3] Therefore, every existing statutory regulation must be in accordance with the principle of statutory regulations, namely *lex superiori derogat lex inferiroi*, namely a lower statutory regulation must not conflict with higher regulations. In addition to determining the level of the hierarchy formally, the hierarchy of laws and regulations can also see the binding strength and limitations of the validity of a regulation itself.

The Banten Provincial Government, whose territory is included in the area that must implement PPKM, has issued Banten Governor Instruction Number 15 of 2021 concerning Covid-19 Emergency PPKM in the Banten Province. In his consideration, it was explained that this governor's instruction was following up on the Instruction of the Minister of Home Affairs Number 15 of 2021 concerning PPKM.

The issue regarding PPKM can then be seen from its legal basis and the extent to which it applies, which in this case is a Ministerial Instruction and specifically assesses the Instruction of the Minister of Home Affairs regarding the handling of the Covid-19 pandemic. This is a consequence of every policy within the scope of the rule of law. PPKM cannot only be seen in terms of effectiveness and efficiency, but the policy must be based on applicable laws and regulations.

Based on Article 7 of Law Number 12 of 2011 concerning the Establishment of Legislation which explains the hierarchy of existing laws and regulations in Indonesia, it is important to conduct a study on the legal position of PPKM in Banten Province in the Indonesian Constitutional System and its relation to its binding power and the extent of the impact that can be caused by ministerial instructions, especially the Minister of Home Affairs Instruction regarding the handling of the Covid-19 pandemic.

Based on the explanation of the background above, the researcher obtained the formulation of the problem, namely how the legal position of the Enforcement of Restrictions on Community Activities in Banten Province in the Indonesian constitutional system?

[3] *See* Article 7 of "Law Number 12 of 2011 Concerning the Establishment of Legislations" (n.d.).

Methodology

The research method used in this study is a normative juridical legal research method. Normative legal research puts law as a building system of norms. The system of norms in question is about principles, norms, rules of laws and regulations, court decisions, agreements and doctrines (teachings).[4]

In this study, the author uses normative legal research, which is a scientific research procedure to find the truth based on the logic of legal scholarship from the normative side. Normative juridical research uses secondary data as primary data and primary data as supporting or supporting data.

Data collection techniques used in this research are field studies and literature studies. Types of data collection through field studies conducted by researchers include field observations, interviews and questionnaires.

Literature study, is a secondary data collection technique, namely the source of data is not directly from people but data or from primary legal materials such as laws and regulations, books, documents and library materials or other written materials related to an event. or certain activities related to the formulation of the problem in the research to be answered. The data analysis used is descriptive analytical, in which the researcher will analyze the data and then process the data into a qualitative explanation.

Discussion

As a form of government effort in dealing with the ongoing COVID-19 pandemic in Indonesia, many policies have been made and implemented since the outbreak began to enter the country. Various policies, especially in the form of restrictions on the movement of people from one place to another, continue to be intensified. This is of course to reduce the transmission rate of the COVID-19 virus, which is very easy to mutate between humans. The policy of restricting movement or restrictions on community activities began with the enactment of Large-Scale Social Restrictions (PSBB) in 2020 which were implemented in big cities and some of their buffer cities.

The policy is then given relaxation until it enters a transition period, where all activities in various sectors can begin to be carried out in stages. Seeing the national economy which must be immediately restored for the welfare of the community, also with the development of the spread of COVID-19 at that time it was starting to be controlled.

People are getting used to living a new life or what is called "New Normal", where all activities are still carried out in conjunction with the implementation of health protocols that must be obeyed by the whole community.

The various efforts of the central government to cope with the pandemic condition have actually been able to refer to the provisions of the applicable laws, one of which can be seen in Law Number 6 of 2018 concerning Health Quarantine. The following is a table of methods for handling public health emergencies contained in Law Number 6 of 2018:

Table 1

No	Types of Health Quarantine in the Region	Authority to Determine	Person responsible
1.	Home Quarantine	Health Quarantine Officer	Central Government by involving local government and related parties
2.	Regional Quarantine	Minister of Health	Central Government by involving local

[4] Mukti Fajar and Ahmad Yulianto, *Dualisme Penelitian Hukum Normatif Dan Empris*, 3rd ed. (Yogyakarta: Pustaka Pelajar, 2010).

			government and related parties
3.	Hospital Quarantine	Health Quarantine Officer	Central Government and/or Local Government
4.	Large-Scale Social Restrictions	Minister of Health	Local government

Based on the table above, it can be seen that in the laws and regulations governing the management of public health emergencies, there are various types and classifications, the selection of which can be adjusted according to their respective needs. This has also been done by the government by implementing PSBB in 2020.

After almost a year of the new normal, until efforts to prevent the spread of the COVID-19 virus through mass vaccinations for the people of Indonesia showed that the development of the spread of COVID-19 continued to improve day by day, it turned out that there was a second wave of the spread of this virus that could not be controlled in the middle of the year. In 2021, the number of new positive case confirmations of people infected with the COVID-19 virus penetrated the tens of thousands plus the entry of this new variant of COVID-19.

Quick steps taken by the government to deal with this phenomenon, the government decided to implement the Implementation of Emergency Community Activity Restrictions (PPKM). The implementation of the policy is carried out in a limited manner in several cities / districts, especially in the islands of Java and Bali where the number of cases is very high to suppress the spread of the COVID-19 virus.

Indonesia as a legal state based on Article 1 paragraph (3) of the 1945 Constitution has an absolute consequence that every government action and policy must be realized in the form of or through clear legal products. In the Implementation of Restrictions on Community Activities (PPKM), this policy is based on the issuance of Minister of Home Affairs Number 1 of 2021 concerning the Enforcement of Activity Restrictions to Control the Spread of Covid-19.

According to I Gede Pantja Astawa, what can be said as state regulations (*staatsregelings*) or decisions in a broad sense (besluiten). Decisions in a broad sense (besluiten) can be divided into 3 (three) groups, namely:[5]

1) *Wettelijk regeling (*statutory regulations*),* such as the Constitution, laws, government regulations in lieu of government regulations, presidential regulations, ministerial regulations, regional regulations, and others;
2) *Beleidsregels (*policy regulations*),* such as instructions, circulars, announcements and others;
3) *Beschikking* (determination), such as decrees and others.

In its classification as policy regulations, instructions can be further broken down into two types. First, these instructions are made and apply to policy regulators themselves. And the second is the type of instruction or policy regulation that is made and applies to administrative bodies or officials who are subordinate to the policy maker. While the substance of each policy is basically

[5] Ahmad Gelora Mahardika and Rizky Saputra, "Kedudukan Hukum Pemberlakuan Pembatasan Kegiatan Masyarakat Dalam Sistem Ketatanegaraan Indonesia," *Legacy: Jurnal Hukum Dan Perundang-Undangan* 1, no. 1 (March 4, 2021): 1–23, https://doi.org/10.21274/LEGACY.2021.1.1.1-23.

the same. That is, it contains implementation guidelines to technical instructions in the form of other general rules.[6]

Based on the classification regarding the hierarchy of laws and regulations as stated in Article 7 Paragraph (1) as follows:

Table 2

No	Regulations
1	1945 Constitution of the Republic of Indonesia
2	Decree of the People's Consultative Assembly
3	Laws/Government Regulations in Lieu of Laws (*Perppu*)
4	Government regulations
5	Presidential decree
6	Provincial Regulations
7	Regency/City Regional Regulation

Looking at the table above, it is not a type of legislation that has binding legal force and can be accounted for. If seen from the table above, it is not found regarding the legal position of the Ministerial Instruction because it is not a regulation that is included in Article 7 paragraph (1).

Concretely stated in Article 8 paragraph (1) of Law no. 12/2011 states that what can be categorized as statutory regulations are only any regulations issued by various state institutions and one of them is the minister. Thus, it can be ascertained that the Ministerial Instruction does not have a position as a statutory regulation in the Indonesian constitutional system. Referring to the provisions contained in Article 8 of Law Number 12 of 2011, only a Ministerial Regulation has this position.

Meanwhile, the Ministerial Instruction only applies as a policy regulation. In its implementation, policy regulations such as Ministerial Instructions cannot be directly legally binding but still contain legal relevance. This was agreed by Maria Farida, according to Maria Farida Instructions do not include laws and regulations, this is because an instruction is always individual and concrete and there must be an organizational relationship between superiors and subordinates, while the nature of the legal norms in the legislation is general, abstract, and persistent.[7]

Looking at the legal basis for dealing with the pandemic outbreak in Indonesia. So, it can refer to Law no. 6 of 2018 concerning Health Quarantine. This is the basis for the issuance of various derivative rules such as the application of PSBB, and so on. Meanwhile, formally, the formation of every statutory regulation which is one of the steps in preventing the spread of Covid-19 must be based on Law Number 12 of 2011 concerning the Establishment of Legislation. This is important, so that in the design process until the ratification of each regulation does not conflict or conflict with other laws and regulations.

Banten Province translates the derivative of the Ministry of Home Affairs by issuing Banten Governor Instruction Number 1 of 2021. Regarding central regulations, guidelines and instructions on PPKM are contained in *Inmendagri* Number 1 of 2021. This instruction is a step that was initiated directly by the Central Government and addressed to all Regional Heads in Java-Bali. The Instruction states that its implementation is based on the massive development of the Covid-19 pandemic on the islands of Java and Bali, and with the new variant of the Covid-19 virus, efforts to control the Covid-19 pandemic are needed.[8]

The implementation of Community Activity Restrictions (PPKM) is regulated in the Ministry of Home Affairs. Ministers

[6] Mahardika and Saputra.
[7] Mahardika and Saputra.
[8] Mahardika and Saputra. pg.7.

can issue policy regulations if they have received orders from the president. The system of laws and regulations in Indonesia itself is admittedly still contains a number of problems, including not all types of legislation clearly located in the hierarchy of laws and regulations and too broad material content and similarities. content material between laws and regulations.[9]

1. Formal Aspect
   In an effort to prevent COVID-19, which has not been implemented optimally with the implementation of PSBB, the president has made more progressive prevention efforts, namely by ordering his ministers to be more responsive in dealing with COVID-19, which was then followed up with the establishment of a PPKM policy based on the Instruction of the Minister of Home Affairs No. 1 of 2021 concerning the Enforcement of Restrictions on Community Activities.
   The issuance of the President's decision as a form of a health emergency that occurred in the territory of Indonesia due to the COVID-19 pandemic, which has not been able to control its spread, requires quick, focused, precise and integrated steps between the central government and regional governments to be instructed.
2. Material Aspect
   The material aspect of the formation of this ministerial instruction is seen as a form of controversial legal product because there is no firm legal basis to regulate it. As a result, the content of the implementing regulations is independently prepared by the makers as a form of free authority (*vrije bevoegheid*).[10] In reality, it is not clear what material must be regulated by a ministerial decision, which is definitely an implementing regulation of a higher-level statutory regulation.

The establishment of regulations at the ministerial level is in order to exercise government power, so that ministry regulations are strong enough to operate. Concretely stated in Article 8 Paragraph (1) of Law no. 12 of 2011 states that what can be categorized as statutory regulations are only any regulations issued by various state institutions and one of them is the minister.

It is called '*beleids*', 'policy' or policies, because formally it cannot be called or it is not in the form of an official regulation but its contents are regulatory (*regeling*). Policy rules are considered something that cannot be avoided, because they are needed in practice. Such as "subordinate legislation" which is needed to implement laws, policy rules. Although the official regulations are not laws, it is also necessary to carry out official regulations.[11]

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[9] Bayu Dwi Anggono, "Tertib Jenis, Hierarki, Dan Materi Muatan Peraturan Perundang-Undangan: Permasalahan Dan Solusinya," *Masalah-Masalah Hukum* 47, no. 1 (January 30, 2018): 1, https://doi.org/10.14710/mmh.47.1.2018.1-9.

[10] Cholida Hanum, "Analisis Yuridis Kedudukan Surat Edaran Dalam Sistem Hukum Indonesia," *Humani (Hukum Dan Masyarakat Madani)* 10, no. 2 (November 26, 2020): 138–53, https://journals.usm.ac.id/index.php/humani/article/view/2401.

[11] Iqozul Himam, Kafrawi Kafrawi, and AD Basniwati, "Aspek Hukum PSBB Dan PPKM Dalam Penerapan Undang-Undang Kekarantinaan Kesehatan," *Jurnal Diskresi* 1, no. 1 (June 21, 2022): 77, https://journal.unram.ac.id/index.php/diskresi/article/view/1314.

According to the doctrine of policy is a standard that determines a goal to be achieved. Policy is also known as public policy or public policy. Rian Nugroho Dwidjowijoto's opinion by dividing the policy into 3 stages, namely:[12]

1) Policies that are macro in nature in the form of laws and regulations that are regulated in the laws and regulations.
2) An intermediate policy or explanation of this implementation in this sense may take the form of a Ministerial Regulation, Governor Regulation, Regent Regulation and Mayor Regulation. The policy can also be in the form of a Joint Letter between the Minister, governor and regent and mayor.
3) Public policies of a micro nature, namely policies that regulate the implementation of the policies above. The form of policy is regulations issued by public officials under the Minister, namely governors, regents and mayors.

From the description above, the policy concepts referred to in this study include laws, Ministerial Instructions, and Governor's Circulars containing standards for determining goals to be realized by the state through Emergency PKKM in Handling the Eradication of Covid 19.

To find out whether this policy is categorized as Freies Ermessen or Discretion in Article 23 of Law Number 30 of 2014 concerning Government Administration, it is stated that the limits of the scope of the use of discretion by Government Officials include:

1) Making decisions or actions based on the provisions of laws and regulations that provide a choice of decisions or actions;
2) Decision making or action because the laws and regulations do not regulate;
3) Making decisions or actions because the laws and regulations are incomplete or unclear; and
4) Decision-making or action due to government stagnation for the wider interest.

In Article 24 of the Government Administration Law, there are conditions that must be met and heeded in issuing a discretion, including:

1) In accordance with the discretionary objectives as referred to in Article 22 paragraph 2;
2) Does not conflict with statutory regulations;
3) In accordance with the General Principles of Good Governance (AAUPB);
4) Based on objective reasons;
5) Does not cause conflicts and interests; and
6) Done in good faith.

As a legal order, all applicable laws and regulations in Indonesia must be interrelated as a system that is built in a comprehensive, consistent and hierarchical manner based on the 1945 Constitution of the Republic of Indonesia as the basic law and final legitimacy of regulatory validation. legislation and the entire legal system. That there is no conflict between one norm and another, solely for the sake of guaranteeing legal certainty to the community.

[12] Kadek Julia Mahadewi, "Kebijakan Pelaksanaan PPKM Darurat Untuk Penanganan Covid-19 Dalam Tatanan Kehidupan Era Baru Di Provinsi Bali," *Kertha Semaya : Journal Ilmu Hukum* 9, no. 10 (August 22, 2021): 1879–95, https://doi.org/10.24843/KS.2021.V09.I10.P13.

PPKM implemented by the central government and then determined by local governments through a derivative regulation from the Instruction of the Minister of Home Affairs which regulates PPKM during the Covid-19 pandemic presents something that needs to be studied in the constitutional aspect in Indonesia. The selection of the Ministry of Home Affairs as the legal basis for PPKM is something that the central government needs to improve in the future when facing a pandemic situation such as Covid-19. Administratively, the ministry's instruction is not a regulation that can be applied by mobilizing many parties in the maximum sense, like other statutory regulations that exist above it. This is because its internal nature is not even higher than the Ministerial Regulation itself, which in this case means that it is inappropriate for a rule to be used comprehensively and massively based on an internal legal basis.

Conclusions

The Instruction of the Minister of Home Affairs regarding PPKM made by the government during the Covid-19 pandemic is one of the government's efforts to reduce the impact of the Covid-19 pandemic, but in legal standing, policies in the form of ministry instructions cannot be used to regulate matters that are overall or external to the ministry itself. Therefore, the use of the Ministerial Instruction in handling Covid-19 is not appropriate because it is not a legal product in the form of a regulation that can bind all parties and has clear legal consequences.

Referring to the Indonesian state administration system, in an emergency the state administration system will turn into an emergency constitutional law by keeping an eye on adjusting to the conditions that occur. The formation of regulations whose level is below the Law, as well as the formation of Government Regulations as implementing regulations of the Law, must clearly regulate the basis for the application of discretion, whether the discretion is free or the discretion is bound.

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JURNAL NURANI HUKUM : JURNAL ILMU HUKUM
Volume 5 Number 2, December 2022, pg 172-180
Fakultas Hukum, Universitas Sultan Ageng Tirtayasa, Serang-Banten, Indonesia
P-ISSN: 2655-7169 | e-ISSN: 2656-0801
https://jurnal.untirta.ac.id/index.php/nhk/index

The Limitations of Notary Legal Liability in Indonesia towards Disputed Authentic Deeds

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Article Info:
|Submitted: 11 June 2022 **|Revised**: 30 November 2022 **|Accepted**: 26 December 2022

Recommended Citation: *Chicago Manual of Style 17th edition (full note)*
Santa Indah Theresia Pardosi, "The Limitations of Notary Legal Liability in Indonesia towards Disputed Authentic Deeds", *Jurnal Nurani Hukum : Jurnal Ilmu Hukum*, Vol. 5 No. 2, (December, 2022)", P.172-180

ABSTRACT

This study aims to determine the legal liability of a notary as a general official for doing authentic deeds when disputed in a court by the parties. The research type is normative juridical by using a law approach and a conceptual approach. The data collection technique is by studying literature in the form of primary legal materials and secondary legal materials. The data analysis technique uses a qualitative descriptive method. The result of the study shows that the notary who commits acts against the law can be sued by the parties for criminal, civil, or administrative liability. Meanwhile, the notary cannot be blamed for the disputes that arise later between the parties if the notary has acted according to the procedure. It is because the notary has only liability for the formal truth, namely in recording what was conveyed by the parties as stated in the authentic deed. A notarial deed that is not appropriate or defective will lose its authenticity, so it is only considered valid as a private deed.

Keywords: *Liability, Notary, Authentic Deed, Dispute*

ABSTRAK

Penelitian ini bertujuan untuk mengetahui tanggung jawab hukum notaris sebagai pejabat umum dalam membuat akta autentik apabila disengketakan di pengadilan oleh para pihak. Penelitian ini berjenis yuridis normatif dengan menggunakan pendekatan undang-undang dan pendekatan konseptual. Teknik pengumpulan data dilakukan dengan studi kepustakaan berupa bahan hukum primer dan bahan hukum sekunder. Teknik analisa data menggunakan metode deskriptif kualitatif. Hasil penelitian menunjukkan bahwa notaris yang melakukan perbuatan melawan hukum dapat dituntut pertangungjawaban pidana, perdata, maupun administratif. Sebaliknya, ia tidak dapat dipersalahkan atas sengketa yang timbul kemudian dari para pihak apabila notaris telah berbuat sesuai prosedur. Hal ini karena notaris hanya bertanggungjawab terhadap kebenaran formil, yaitu dalam mencatatkan apa yang disampaikan oleh para pihak untuk sebagaimana dinyatakan ke dalam akta autentik. Kemudian terhadap akta notaris yang tidak sesuai atau cacat akan kehilangan sifat keasliannya sehingga hanya dianggap berlaku sebagai akta di bawah tangan.

Kata Kunci: *Covid-19, Pemberlakuan Pembatasan Kegiatan Masyarakat, Instruksi Menteri.*

Introduction

The need for written evidence is increasing in line with the growing demands for certainty and legal protection in various fields. In written evidence, there are the rights and obligations of the parties to a legal relationship, so it is expected to minimize the emergence of disputes. According to Article 1867 of the Civil Code of Indonesia (KUHPer), it indicates that proof by writing can be authentic writing or private writing. Although not sure that one day it would be used in a court, authentic writing (deed) is often done either by the parties as legal protection or documentary. According to Article 1868 of the Civil Code of Indonesia (KUHPer), it is stated that an authentic deed is a deed done in a form determined by law or before a general official authorized for that, at the place where the deed is done.

A general official is a person authorized by law to do authentic deeds. As long as the authority does not fall under other officials, the authority is owned by a notary.[1] The main task of a notary is in the realm of private law, so he is known as a general official, not a public official or a state administrative official. As Article 1 Paragraph (1) of Law Number 2 of 2014 concerning the Amendment to Law Number 30 of 2004 concerning Notary Position (the Notary Position Law) states that a notary is a general official authorized to do authentic deeds and has other authorities as referred to this law or other law. Article 1 Paragraph (7) of the Notary Position Law (UUJN) emphasizes that a notarial deed is an authentic deed done by or before a notary according to the form and procedure stipulated in this law.

A notarial deed contains the truth about what was notified by the parties to the notary. The notary must include a statement that the contents of the deed are genuinely understood and follows the parties' wishes. It is done by reading out the contents and providing access to the information, including access to the relevant laws and regulations, to the parties who signed the deed. Thus, the parties can freely determine and agree on the contents of the deed.[2] A notary must make these efforts before the deed is signed by the parties to ensure they understand, agree, and will not dispute it at a later date.

However, the position of a notary as an official who does authentic deeds cannot be separated from problems that lead to conflicts.[3] Not infrequently, a notary is sued by the parties who feel aggrieved or dissatisfied with the deed they made.[4] A notary is summoned to court to provide information about the disputed deeds.

It can be said that the authentic deed made by the notary is problematic or there is an element of a violation. It may be because the notary did not act under the Legislation or the Notary Code of Ethics, whether negligence or intentionally. It means there is a one-sided error or bad faith by the notary or one of the parties. Then if the notary has violated the law in carrying out his duties,

[1]Habib Adjie, *Hukum Notaris Indonesia: Tafsir Tematik Terhadap UU Nomor 30 Tahun 2004 Tentang Jabatan Notaris*. (Surabaya: PT Refika Aditama, 2008). P. 40.

[2]Dedy Pramono, "Kekuatan Pembuktian Akta Yang Dibuat Oleh Notaris Selaku Pejabat Umum Menurut Hukum Acara Perdata Di Indonesia," *Lex Jurnalica* 12, no. 3 (2015): 248-58.

[3]Anita Afriana, "Kedudukan Dan Tanggung Jawab Notaris Sebagai Pihak Dalam Penyelesaian Sengketa Perdata Di Indonesia Terkait Akta Yang Dibuatnya," *Jurnal Poros Hukum Padjadjaran* 1, no. 2 (2020): 246-61.

[4] I Wayan Paramarta Jaya, Hanif Nur Widhiyanti, dan Siti Noer Endah, "Pertanggungjawaban Normatif Notaris Berkenaan Dengan Kebenaran Substansi Akta Otentik," *Rechtidee* 12, no. 2, (2017): 267-85.

he may be subject to sanctions. From this background, the author is interested in discussing further the limitations of notary legal liability for disputed authentic deeds by the parties.

Methodology

This study applies a normative juridical research methodology with a law approach by positive law as a source of existing law[5], and a conceptual approach. Normative juridical research methods can be carried out by examining, studying, investigating, and observing research by legal theories, concepts, and principles.[6] The data used come from primary legal materials and secondary legal materials. Primary legal materials are in the form of legislation, while secondary legal materials are from books and scientific papers relevant to the discussion. Furthermore, the data obtained for analysis will first be identified according to the research target. The data analysis technique uses a qualitative descriptive method to get prescriptive truth.

Discussion

There is no specific definition of proof in the legislation. However, based on the provision of Article 163 *Herzein Inlandsch Reglement* (HIR) and Article 283 *Reglement voor de Buitengewesten* (RBg), proof in a juridical sense is the presentation of legal evidence according to law to a judge who examines a case to provide certainty about the truth of events.[7] It is because the judge must rely on other evidence besides his belief to avoid arbitrary decisions and to ensure legal certainty.

In civil cases, an authentic deed is evidence that is binding and coercive. It means that the judge must assume that all legal events stated in the authentic deed are valid unless there is other evidence that can eliminate the power of proof of the deed. An authentic deed has perfect evidentiary power, so if there are parties who judge or declare that the deed is not authentic, they must prove it under the rule of law. Unlike criminal cases, a notarial deed as an authentic deed is evidence that cannot bind the investigator and judge in proof. The proof power of a notarial deed in a criminal case is of perfect value, but it cannot stand alone, so it requires support from other evidence.[8]

A notarial deed as an authentic deed has the nature and strength of initial, formal, and material proof that distinguishes it from a private deed. An authentic deed proves validity because it is considered initial until there is evidence to the contrary. With the power of initial evidence, the proof issue is only about the authenticity of the official's signature on the deed. In Article 1875 of the Civil Code of Indonesia (KUHPer), it is stated that the power of outward authenticity does not exist in a private deed.

The private deed is free evidence as stipulated in Article 1881 Paragraph (2) of the Civil Code of Indonesia (KUHPer). It means that the judge is free to determine whether the evidence can be accepted or not because a private deed does not have the power of authenticity like an authentic deed. A private deed will have the power of proof if both

[5]M. Najibur Rohman, "Tinjauan Yuridis Terhadap Regulasi Mata Uang Kripto (Crypto Currency) Di Indonesia," *Jurnal Supremasi* 11, no. 2 (2021): 1–10.

[6]Mohammad Mashulin Amjad, "Tinjauan Yuridis Sanksi Rehabilitasi Terhadap Pengguna Narkotika," *Jurnal Juristic* 1, no. 2 (2020): 1–11.

[7] M. Yahya Harahap, *Pembahasan Permasalahan Dan Penerapan KUHAP Pemeriksaan Sidang Di Pengadilan, Banding, Kasasi Dan Peninjauan Kembali*. (Jakarta: Sinar Grafika, 2000). P. 283.

[8] Retno Wulan Sutantio, *Hukum Acara Perdata Dalam Teori Dan Praktek*. (Bandung: Mandar Maju, 1989).

parties to the deed have acknowledged the truth.[9]

The power of formal proof of an authentic deed lies in ensuring the truth of the date, the proper signatures, the valid identities of the parties, and the clear place about where the deed was done. In this case, the parties have explained what is written in the deed. Meanwhile, the power of material proof of an authentic deed is a certainty that the parties do not only explain to the notary but also prove that they have done as stated in the material of the deed. An authentic deed must be recognized as valid unless it can be established that the deed is fake. As the formulation of Article 1870 of the Civil Code of Indonesia (KUHPer) states that an authentic deed provides perfect proof of the contents.

Legislators give the authority to do authentic deeds only to a notary, while for other general officials, this authority is limited to certain deeds. The forms of notary's liability:[10] First, a notary must do a deed properly and correctly, under the law and the will of the parties, without making it up.

Second, a notary is required to produce quality deeds, namely those that can fulfill the legal will and requests of the parties. Third, the notary makes a deed that has a positive impact, meaning that the deed has perfect proof power to protect the parties. The deed can be about the notary's testimony about what he saw, witnessed, and experienced in his position as a general official, called a deed done by a notary. Meanwhile, information from the parties that an agreement has been made and asking a general official to declare it in a deed is referred to as a deed done before a notary.

Regarding the obligation to read the deed he made, in Article 16 Paragraph (7) of the Notary Position Law (UUJN), a notary is allowed not to read the deed he made with an exception, namely if the parties want the deed not to be read because the parties have read the deed themselves. Hence, they feel they already know and understand the contents of the deed.

Provisions regarding this matter must be stated in the closing part of the deed and on each page of the minutes of the deed initialed by the parties, witnesses, and the notary. Outside of that exceptional condition, according to Article 16 Paragraph (1) letter I of the Notary Position Law (UUJN), the notarial deed must be read by the notary himself without being represented by another person. It is because reading a deed by a notary is part of the formalization (*verlijden*) of the deed.[11]

Unfortunately, the practice of field (*das sein*), many notaries do not read out the deed they made though at the end of the deed, it is stated that the deed has been read by a notary, or many notaries let the parties sign the deed in the presence of their assistant. It can potentially lead to problems later on. The notarial deed is not under what the parties want, or the parties may not understand the contents of the deed, which will lead to misunderstandings and multiple interpretations regarding the contents of the deed made by the notary. Finally, one of the parties to the

[9] Dedy Pramono, "Kekuatan Pembuktian Akta Yang Dibuat Oleh Notaris Selaku Pejabat Umum Menurut Hukum Acara Perdata Di Indonesia," *Lex Jurnalica* 12, no. 3, (2015): 248-58.

[10] Abdulkadir Muhammad, *Etika Profesi Hukum*. (Bandung: Citra Aditya Bakti, 2001). P. 93-94.

[11] I Wayan Arya Kurniawan, "Tanggung Jawab Notaris Atas Akta Yang Tidak Dibacakan Dihadapan Para Penghadap," *Acta Comitas* 3, no. 3 (April 29, 2019): 489, https://doi.org/10.24843/AC.2018.v03.i03.p08.

deed may default, or the deed cannot be used properly.

In carrying out their duties, a notary must be guided by the Notary Position Law (UUJN) and other regulations related to the making of a deed, as well as the Notary Code of Ethics formulated by the Indonesian Notary Association. However, it is possible that in carrying out his obligations, a notary makes a mistake in doing a deed with legal consequences. It can be caused by the lack of knowledge (*onvoldoende kennis*), the lack of experience (*onvoeldoende ervaring*), or the lack of understanding (*onvoldoende inzicht*) from the notary.[12] Negligence of the notary in making the deed, which causes the deed to be legally flawed, will result in the notary being declared against the law. The act must fulfill the formulation that the act is prohibited by law and there are losses arising from the actions of a notary.[13]

The liability of a notary who commits an unlawful act can be divided into two, active and inactive. It is active if the notary does an act that causes harm to the other party, while it is inactive if the notary does not perform an act that is a must, thereby harming the other party.[14] Before the notary is sentenced to civil sanctions, it must be proven beforehand that there is indeed a loss due to the unlawful act of the notary so the notary concerned can be held liable.

Based on Article 1365 of the Civil Code of Indonesia (KUHPer), every action that violates the law and harms others obliges the person who caused the loss because of his mistake to replace the loss. Then, Article 1366 of the Civil Code of Indonesia (KUHPer) stipulates that everyone is responsible not only for losses caused by his actions but also for losses caused by his negligence or carelessness. Furthermore, Article 1367 of the Civil Code of Indonesia (KUHPer) mentions that a person is not only responsible for losses caused by his actions but also for those caused by the actions of people who are his dependents or caused by goods under his control.

The Notary Position Law (UUJN) does not stipulate the obligation for a notary to investigate the material truth of the data submitted by the parties. As a result, problems can arise from parties who falsify their identity documents or objects that are transacted with bad intentions and purposes, so they often drag the notary. Therefore, the judge will only involve a notary to seek the formal truth of the deed. Formal truth is the truth stated by the parties. The notary only records what is explained by the parties who appear before the notary and has no obligation to find the material truth.

Errors regarding the contents of the deed due to incorrect information (intentionally or unintentionally) from the parties cannot be liable for by the notary because the contents of the deed have been confirmed to the parties by the notary.[15] Thus, even though the deed contains the notary's name, he is not positioned with the parties whose names are listed in the deed. The notary is neutral in doing the deed and is obliged to provide legal advice if a party requests

[12] Koeswadji, *Tanggung Jawab Notaris Selaku Pejabat Umum*, ed. Center of Documentation and Studies of Business Law (Yogyakarta, 2003).

[13] Fransisco Ch. Poae, Henry R. Ch. Memah, dan Marthin L Lambonan, "Pertanggung Jawaban Hukum Terhadap Notaris Dalam Kesalahan Pembuatan Akta," *Lex Et Societatis* 8, no. 4, (2020): 115-24.

[14] Aprilia Putri Suhardini, Imanudin, dan Sukarmi, "Pertanggungjawaban Notaris Yang Melakukan Perbuatan Melawan Hukum Dalam Pembuatan Akta Autentik," *Jurnal Akta* 5, no. 1, (2018): 261-66.

[15] Sudikno Mertokusumo dan Iskandar Oeripkartawinata, *Hukum Acara Perdata Indonesia: Cetakan Kelima*. (Yogyakarta: Liberty, 1998). P. 3-4.

it. However, if there is an error in the legal advice later, the notary may also be sued liable for the material truth by the judge.

Article 1869 of the Civil Code of Indonesia (KUHPer) stipulates that a notarial deed has the power of proof as a private deed if the general official concerned is not authorized, the deed does not have a general official, or the deed is defective in its form.[16] A private deed can be canceled if there are no or less subjective requirements based on the agreement's validity, such as if the parties are not capable of acting in law or there is no agreement. Then, it becomes null and void if the deed is done not meet the objective requirements, namely a sure thing and a lawful cause.

The related parties or people who are directly affected by the loss due to a notary's error can demand civil sanctions in the form of payment of compensation fees or interest. This claim is not based on the assessment of the evidence that has changed due to violating the provisions of the Notary Position Law (UUJN), but on the legal relationship between the notary and the parties.[17] The next liability of a notary for violating the provisions of the Notary Position Law (UUJN) is administrative sanctions in the form of a written warning, temporary dismissal, honorable dismissal, or dishonorable dismissal. Meanwhile, the criminal liability of the notary is not found in the Notary Position Law (UUJN).

Considering the authority of a notary is regulated in the Notary Position Law (UUJN), a notary receives criminal protection as stated in Article 50 of the Criminal Code of Indonesia (KUHP) that whoever commits an act to implement the provisions of the law, will not be punished. However, this does not mean that a notary can be utterly free from criminal snares.

Criminal liability can be imposed if a notary commits a criminal action himself.[18] It means the liability arises not because of his position but because of his action that has fulfilled the offense element. Not infrequently notary is drawn as a party who participates or assists in committing a criminal act, namely making or providing false information in a notarial deed.[19] This aspect relates to violations of the Notary Position Law (UUJN) which can lead to acts of falsifying the deed as referred to in Chapter XII Second Book of the Criminal Code of Indonesia (KUHP) regarding the forgery crime of letters, particularly in Article 264.

Summoning a notary to the process of examining criminal cases is not easy. In requesting information on reports of certain parties, the police, prosecutors, or judges are required to get approval from the Notary Honorary Council.[20] The Notary Honorary Council may refuse an investigator's request to grant permission to examine a notary. If the notary continues to attend the examination process without approval from the Notary Honorary Council, the risk is borne by the notary himself. The imposition of criminal sanctions against a notary can only be carried out if the conditions collectively have been met; namely the notary fulfills the offense element in the Criminal Code of Indonesia (KUHP) and also violates the

[16] H.R. Daeng Naja, *Teknik Pembuatan Akta: Buku Wajib Kenotariatan*. (Yogyakarta: Penerbit Pustaka Yustisia, 2012). P. 65.

[17] Ahmad Farich Sulthoni, "Batas Pertanggungjawaban Notaris Atas Pembuatan Akta Otentik," *Jurnal Ilmu Kenotariatan* 2, no. 1, (2021): 69-90.

[18] R. Soegondo Notodisoerjo, *Hukum Notarial Di Indonesia: Suatu Penjelasan*. (Jakarta: Rajawali Pers, 1982).

[19] Habib Adjie, *Hukum Notaris Indonesia: Tafsir Tematik Terhadap UU Nomor 30 Tahun 2004 Tentang Jabatan Notaris*. (Surabaya: PT Refika Aditama, 2008). P. 24.

[20] Habib Adjie.

Notary Position Law (UUJN). It is done not only to minimize the potential for criminal sanctions against the notary but as a function of protection.

Although the law provides a liability burden for the actions committed by a notary, it does not mean that every loss suffered by the parties can be held liable by a notary. If the error element comes from the parties themselves, the notary, as a general official, cannot be held legal liability for the notarial deed. The notary only records what the parties say, so the false information submitted by the parties is the liability of the parties. Article 1865 of the Civil Code of Indonesia (KUHPer) essentially states that the party who feels his rights have been violated is obliged to verify that his rights have been violated by others. Therefore, if the party who thinks his rights have been harmed cannot prove the violation, the claim for compensation based on an unlawful act cannot be realized.

The notary's liability for the deed he has made continues even though the notary has retired from his position. It is because there is no further explanation regarding the limitations of the notary's post-retirement liability for the authentic deed he made, so it is still a debate among notaries until this day.[21] A notary must always be careful and thorough in his duties as a general official. A notary must avoid disgraceful acts and carry out the positions assigned by the state in doing good deeds. It is to maintain the image and dignity of the notary institution that carries out the duties of the office not solely for personal interests but for the benefit of society.

Conclusions

Based on the description, we can conclude that an authentic deed by a notary provides legal certainty in society. The deed becomes the strongest and perfect evidence that can contribute to dispute resolution. Because what is stated in the authentic deed must be accepted unless the interested party can prove the existence of defects in the authentic deed before the court.

There are still many cases of a notary being sued because of the deed he made, so the notary is said to have committed an unlawful act. It can happen because of the professionalism lack of the notary in his duties or there is an element of bad faith from the notary. A notary who makes a mistake can be sued by criminal, civil, or administrative liability, and the defect of a notarial deed will only be considered a private deed. Thus, the judge is no longer bound to judge the deed as perfect evidence and can be canceled or nullified by law depending on whether or not the legal conditions of the agreement are fulfilled. Meanwhile, if the fault comes from the parties and the notary has done his duties according to the procedure, the notary cannot be held liable.

A notary should always strive for professionalism and good faith in his duties of the position entrusted to him. On the other hand, the parties to the notary must also ensure that the deed they have made is following the will, consciously and without coercion. A notary must comply with applicable legal provisions and provide legal counseling before the deed is signed so the parties can understand the rights and obligations of each contained in the deed. These things are essential to minimize the risk of disputes arising in the future, which can bring harm to oneself or other parties.

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JURNAL NURANI HUKUM : JURNAL ILMU HUKUM
Volume 5 Number 2, December 2022, pg 181-189
Fakultas Hukum, Universitas Sultan Ageng Tirtayasa, Serang-Banten, Indonesia
P-ISSN: 2655-7169 | e-ISSN: 2656-0801
https://jurnal.untirta.ac.id/index.php/nhk/index

Implementation of State Theory of Law in The Country Based on Pancasila

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Article Info:
|Submitted: 30 September 2022 **|Revised**: 30 November 2022 **|Accepted**: 26 December 2022

Recommended Citation: *Chicago Manual of Style 17th edition (full note)*
Faridy and Musafi Miftah, "Implementation of State Theory of Law in The Country Based on Pancasila", *Jurnal Nurani Hukum: Jurnal Ilmu Hukum*, Vol. 5 No. 2, (December, 2022)", P.181-189

ABSTRACT

This article discusses the concept of the rule of law in the Pancasila State. In the rule of law theory, law has a very high position. It is above all. Indonesia as a state of law, as stipulated in the 1945 Constitution of the Republic of Indonesia Article 1 paragraph (3), has an obligation to carry out its state functions so that it is always based on applicable legal norms. Basing on this legal norm is a form of actualization of the values of Pancasila which are the ideals of national law. In the fifth precept, it is stated that justice is intended for the benefit of all levels of society regardless of social classes, so that law enforcement in Indonesia cannot be selective but must adhere to the principle of equality before the law.

Keywords: *State, Law, And Pancasila State*

ABSTRAK

Artikel ini membahas tentang konsep negara hukum dalam Negara Pancasila. Dalam teori negara hukum, hukum memiliki posisi yang sangat tinggi. Ia berada di atas segala-galanya. Indonesia sebagai negara hukum, sebagaimana termaktub dalam UUD Negara Republik Indonesia 1945 pasal 1 ayat (3), memiliki kewajiban dalam menjalankan fungsi kenegaraannya agar selalu berdasarkan pada norma-norma hukum yang berlaku. Pendasaran pada norma hukum ini sebagai bentuk aktualisasi dari nilai-nilai Pancasila yang menjadi cita hukum nasional. Dalam sila kelima disebutkan bahwa, keadilan diperuntukkan untuk kepentingan semua lapisan masyarakat tanpa melihat klas-klas sosial kemasyarakatan, sehingga penegakan hukum di Indonesia tidak boleh tebang pilih tapi harus menganut prinsip equality before the law.

Kata Kunci: *Negara, Hukum, dan Negara Pancasila*

Introduction

As it is known that Indonesia was initiated by its founders as *Rechtsstaat* (State of Law) based on Pancasila and the 1945 Constitution. This is because in human history in the world, there is no known concept of an Economic State or a Political State, but what is known is State law**.**

In the Constitution (UUD 1945) Article 1 paragraph (3) it is stated that Indonesia is a state of law and not a state of power (*machtsstaat*) or a corporatocracy. That is, Indonesia as a state of law makes the law as the holder of the main sovereignty in solving problems related to law. According to Mohtar Kusumaatmadja, that the meaning or substance of a state that adheres to a state of law is that power is subject to the law and everyone is equal before the law.[1]

The term rule of law as proposed by Mohtar Kusumaatmadja above, will have the consequence that every step or behavior by both the people and the government must be legally accountable without exception.[2] However, the main problem is; embodiment of the ideals of the rule of law itself. In reality, the realization of the ideals of the Indonesian legal state is still far from real implementation. In fact, it tends to be inconsistent with the concept of the rule of law itself which places the rule of law as the supreme commander.

Indonesia as based on law, the government's steps must refer to the provisions of the law and the constitution (basic law).[3] This is because the function of the constitution determines or regulates the limits of power, so that all state activities, in this case the government, must refer to the law. In other terms, Rukmana Amanwinata states that in a state based on law, every power must be limited and all policies taken by power must refer to applicable legal norms.[4]

The legal problem that arises is the "non-functioning of the law" in various social and constitutional issues. There are many problems that can be described how the law works ineffectively in a Pancasila state like Indonesia. Social inequality and law enforcement are still unequal and tend to be selective. In fact, as a state of law, Indonesia should further strengthen law enforcement and judicial institutions. Evaluation of the performance of law enforcement agencies and the judiciary is urgently needed in the midst of social problems that are increasingly dynamic and complex. This is a support for the implementation of Indonesia as a state of law.

Methodology

The research used in writing this article is normative law and library research. The data used in this normative legal research paradigm and library research are secondary data extracted from relevant laws and regulations, books, journals and other scientific papers. This data is then processed, described and analyzed in depth to find a complete and correct conclusion.

The approach used in this study is the statutory approach and the concept approach. Both approaches are used to explore the legal bases for using Pancasila

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[1] Mochtar Kusumaatmadja, *Konsep-Konsep Hukum Dalam Pembangunan - Fungsi Dan Perkembangan Hukum Dalam Pembangunan Nasional*, *Teori Hukum Pembangunan*, 1st ed. (Bandung: Alumni, 2002).

[2] Kusumaatmadja. pg.12

[3] Imam Subechi, "Mewujudkan Negara Hukum Indonesia," *Jurnal Hukum Dan Peradilan*, 2012, https://doi.org/10.25216/jhp.1.3.2012.339-358.

[4] Rukmana Amanwinata, "Regulations and Limits on the Implementation of Freedom of Association and Assembly in Article 28 of the 1945 Constitution" (Universitas Padjajaran, 1996).

as the basic norm for the formation of laws and regulations and explore the concepts of a rule of law. Through these two approaches it is expected to be able to find correct and complete conclusions.

The focus of this research study is the implementation of the rule of law theory in a Pancasila-based state. In Indonesia, Pancasila is the grand norm which is made into the soul of every national legal product. Through this research, it is expected to find a complete answer on how to implement the rule of law theory in Indonesia as a state based on Pancasila.

Discussion

1. The Concept of The Rule of Law

Historically, the dynamics of the rule of law have actually been around for a very long time, it can even be called older than the age of state science or state science. The conception or theory of the rule of law was historically first conceived by Plato, which was further clarified by his student named Aristotle.[5]

In initiating this rule of law, Plato said "that a good state administration is one based on good (law) arrangements". Plato's theory of the rule of law is hereinafter known as *Nomoi* (customs or regulations). The idea of a rule of law became increasingly popular in the 17th century after political events in Europe were dominated by absolutism.[6]

Aristotle through his work entitled *Politica* book IV, has initiated the importance of the existence of a constitution and the rule of law (*recht souvereniteit*) in a country. As quoted by Azhari, Aristotle said: "The constitution is a guide in the preparation of structures and positions in a country, and determines what is meant by the governing body, and what is the end of every society, the constitution is the rules, and the ruler must govern the country according to the rules." these rules.[7]

According to Aristotle, the rule of law is a state that stands above the provisions of the law and guarantees justice to every citizen.[8] The purpose of justice here is related to every state or government policy, both in the context of carrying out state functions or in drafting laws and regulations, must pay attention to social phenomena and the conditions of the people so as not to get out of the dimension of justice itself.[9]

According to Julius Stahl as in his book Miriam Budihardjo[10] a country will be called a legal state if it has fulfilled four elements, namely; a) the recognition of the human rights of citizens; b) there is a separation or division of state power to guarantee human rights, which is commonly known as the *Trias Politica*; c) government based on regulations (*wetmatigheid van bestuur*), and; d) the existence of administrative justice in disputes.[11]

Julius Stahl's conception of the rule of law above, in principle, can be elaborated with the theory of the rule of law in the common law tradition as proposed by A.V. Dicey that the rule of law must have three characteristics which include; upholding the rule of law,

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[5] Ni'matul Huda, *State of Law, Democracy and Judicial Review* (Yogyakarta: UII Press, 2005).

[6] Tutik Quarterly Point, *Civil Law in the National Legal System* (Bandung: Prenada Media Group, 2008).

[7] Azhari, *Indonesian State of Law, Normative Juridical Analysis of Its Elements* (Jakarta: UI Press, 1995).

[8] Muhammad Tahir Azhary, *The Rule of Law Is a Study of Its Principles Seen from the Viewpoint of Islamic Law, Its Implementation in the Period of the State of Medina and the Present* (Jakarta: Bulan Bintang, 1992).

[9] Azhary.

[10] Nany Suryawati, *Women's Political Rights* (Gorontalo: Publishing Ideas, 2020).

[11] Miriam Budiardjo, *Fundamentals of Political Science* (Jakarta: Gramedia Publisher, 1988).

equality before the law, and guarantees of justice and protection of the rights of citizens.

In relation to the conception of the rule of law developed by Julius Stahl above, Imanuel Kant through the concept of a formal state law or *nachtwakerstaat* asserts that, the state as a dual society institution must guarantee individual freedom as members of society, the state is not allowed to interfere in the affairs of its citizens. Therefore, such a legal concept is referred to as a liberal law state.[12]

Scheltema as in Arief Sidharta, suggests that the principles and elements of the rule of law include; recognition of human rights, enforce legal certainty, apply the principle of equality before the law (equality in the eyes of the law). Thus, in a state of law, the supreme commander in managing the social life of society is the law. That is, all problems that occur in the midst of society must refer to the applicable legal rules.[13]

This is in line with what was stated by Muhammad Tahir Azhary[14], that the characteristics of a rule of law are to have several principles including; the principle of power as a mandate, the principle of deliberation, the principle of justice, the principle of equality, the principle of recognition and protection of human rights, the principle of a free judiciary, the principle of peace, the principle of welfare, and the principle of people's obedience.

Apart from all the developments in the definition or understanding above, in essence the rule of law is a constitutional conception that places the law as commander in chief of all problems. The placement of law as commander in chief can be realized through the existence of a state constitution, guarantees of security and protection of people's rights and the guarantee of values of justice in the midst of society.

2. Pancasila as the Basic Norm of Indonesian Law

Pancasila in the Indonesian national legal system is the Grundnorm or basic norm. As a basic norm, Pancasila is used as the goal or ideal and inspiration of national law. The ideals of law (recht idee) here have the meaning that law is a means or tool to regulate human behavior which originates from the ideas, feelings, intentions and thoughts of the community itself which are collected in Pancasila. Because, Pancasila is in accordance with the view that the meaning of law consists of three elements, namely; justice, results of use (*doelmatigheid*) and legal certainty.[15]

As the basis of the state, Pancasila has become a legal ideal as the embodiment and actualization of the ideals of the Indonesian state[16], which has become a guiding star in the policy-making process and national law development. In Law No. 12 of 2011 concerning the formation of legislation Article 2 stipulates that Pancasila must be the source of all sources in every formation of legislation.

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[12] Suryawati, *Women's Political Rights*.

[13] Arief Sidharta, Barda, "Philosophical Studies on the State of Law," *Jentera Jurnal Hukum by Center for Law and Policy Studies (PSHK)* 3, no. 2 (2004): 124.

[14] Azhary, *The Rule of Law Is a Study of Its Principles Seen from the Viewpoint of Islamic Law, Its Implementation in the Period of the State of Medina and the Present*. pg.64

[15] Dedy Nursamsi, "The Nation's Legal Ideals Framework (Recht Idee) as a Basis for the Authority of the Constitutional Court to Examine Government Regulations in Lieu of Law," *Jurnal Cita Hukum* 2, no. 1 (2014).

[16] Max Boli Sabon, "Aspek Epistemologi Filsafat Hukum Indonesia," *Jurnal Masalah-Masalah Hukum* 41, no. 3 (2012): 425, https://doi.org/https://doi.org/10.14710/mmh.41.3.2012.423-431.

The meaning of Pancasila as a source of law is; First, every content of the legislation must not be outside the values of Pancasila. That is, Pancasila in the formation of legislation becomes the standard to determine whether the content of the law is correct or not and contains elements of the values of justice or vice versa, and Second, as a rule in the national legal system.

As a value system that lives in Indonesia, Pancasila must be placed as ideals, both political ideals, economic ideals, educational ideals, and legal ideals, and others. As a legal ideal, it is hoped that it will give birth to the values of the precepts in Pancasila such as religious morals, humanistic, nationalistic, democratic, and social justice.[17] Because actually the legal ideals of Pancasila have a core[18]: Belief in the One and Only God, respect for human dignity, national insight and insight into the archipelago, equality and worthiness, noble morals and character, and participation and transparency in the public decision-making process.[19]

It is in this context that the national legal system that develops in Indonesia must be in accordance with the distinctive character and rooted in the culture of each citizen. Because the law is in charge of protecting and serving the community, the substance of the law must not come out of the soul of a developing nation which has long been practiced by the Indonesian people.[20]

Therefore, every existing legal product must make Pancasila as its spirit. This means that the national legal system that is expected in the future is a legal system that is extracted from the Indonesian people's view of life contained in Pancasila.

3. The Relevance of the State of Law and the State of Pancasila

As explained above, that Indonesia is a State of Law. In the Preamble of the 1945 Constitution, paragraph IV, it is explicitly explained that "therefore, the independence of the Indonesian nation was drawn up in a Law of the State of Indonesia." This implies that it is imperative that the State of Indonesia be established based on the Constitution of the State.

In the General Elucidation of the 1945 Constitution, point I regarding the Government System, it is also stated that: "Indonesia is a country based on law (*rechtstaat*) and not based on mere power (*machtstaat*)". The mention of the term rechtstaat in this explanation, indirectly negates that the concept of the rule of law has inspired or inspired the establishment of the Indonesian state even though substantively it cannot be equated between the concept of rechtstaat and the concept of the rule of law in Indonesia, because the philosophy is different.

As a state of law, Indonesia is based on the constitution of the 1945 Constitution as the highest legal umbrella or as basic law. The legal ideal that the Indonesian people want is the legal ideal

[17] Irwan Hamzani, Mukhidin Achmad, and Havis Aravik, "The Ideals of Pancasila Law Among the Plurality of National Laws, Proceedings of the National Seminar on Transcendental Law" (University of Muhammadiyah Surakarta, 2019).

[18] Sidharta, Barda, "Philosophical Studies on the State of Law."

[19] Nursamsi, "The Nation's Legal Ideals Framework (Recht Idee) as a Basis for the Authority of the Constitutional Court to Examine Government Regulations in Lieu of Law."

[20] Dwiyana Hartanto, Achmad, "Implementation of the Philosophical Values of Pancasila and Islam in Countering Radicalism in Indonesia," *Jurnal Fikri* 2, no. 1 (2017): 314, https://doi.org/https://doi.org/10.25217/jf.v2i2.157.

of Pancasila[21], The ideal of Pancasila law is a law that encapsulates all values, concepts, interests that eclectically take the best elements of the legal awareness of the Indonesian people. At a macro level, the legal ideals of Pancasila must also pay attention to the dynamics of global law, especially international conventions, while still filtering them first.

In that context, it can be seen that Indonesia is not a state of law as understood in the theories of the rule of law originating in the west. Because the conception of the rule of law developed and adopted by Indonesia has its own characteristics, which are based on the philosophy of life of the Indonesian people.[22] The concept of a state of law Pancasila developed in Indonesia as the actualization of the crystallization of the values and characteristics of the noble life of the Indonesian nation, as stated in the Preamble to the 1945 Constitution and implied in the Articles of the 1945 Constitution of the Republic of Indonesia.

In the Indonesian legal system, Pancasila is the basic norm (*grundnorm*) of the Indonesian state which is sourced and inspired by all laws and regulations in Indonesia. This is because Pancasila is the ideal of the law itself or what is to be achieved, so that the development of law or the formation of legislation should not be outside the framework and paradigm of Pancasila. In that context, Pancasila can be called the fundamental rule of the state "*staatsfundamentalnorm*" by being included in the Preamble to the 1945 Constitution (UUD 1945).[23]

As a step to realize the idea and conception of the rule of law, the main foundation must be the principle at the level of implementation. According to Jimly Asshiddiqie, the pillars supporting the rule of law are:[24]

1) Supremacy of Law: the meaning of the rule of law here is that the highest leader in a country is not the President but the constitution which is the basic law.
2) Independent Mixed Organs: Arrangements for 'independent' government institutions, such as the central bank, TNI organizations, and the police. In addition, there are independent institutions such as the Human Rights Commission (KOMNASHAM), the General Election Commission (KPU), the National Ombudsman Commission, the Indonesian Broadcasting Commission (KPI), and others.
3) Free and Impartial Justice: In a state of law, the existence of an independent and impartial judiciary is urgent. In carrying out his judicial function, a judge must not be influenced by anyone, especially the interests of political positions and economic interests. This means that in carrying out their duties, a judge may not be intervened by anyone.

Even though Indonesia adheres to a rule of law, it is different from other countries in general. Indonesia as a constitutional state has characteristics and characteristics that are rooted in the character of its nation. That is, the Indonesian rule of law was born not as a reaction from liberalists against absolute

[21] Hamzani, Achmad, and Aravik, "The Ideals of Pancasila Law Among the Plurality of National Laws, Proceedings of the National Seminar on Transcendental Law."

[22] Arief Hidayat, "State of Law with Pancasila Character" (Grand Sahid Hotel, Jakarta, 2019).

[23] Hidayat.

[24] Jimly Asshiddiqie, *Teori Hans Kelsen Tentang Hukum* (Jakarta: Konstitusi Press, 2012).

government, but on the desire of the Indonesian people to foster a better life for the state and society in order to achieve the stated goals, according to agreed ways.[25]

For this reason, the Indonesian nation in the formation of its legal state was based on the legal ideals (*rechtsidee*) of Pancasila. In order to realize the ideals of a Pancasila legal state, life in a legal state must be regulated in the Constitution. The Constitution and the rule of law are things that cannot be separated from one another. A constitution is the main guarantee to protect citizens from arbitrary treatment. It is on this basis that the concept of a constitutional state was born, in which the Constitution is considered the most effective institution for protecting its citizens through the concept of rule of law or rechtsstaat.[26]

Indonesia as a state based on Pancasila has an obligation to carry out its state functions so that it is always based on applicable legal norms. This is a form of actualization of the values of Pancasila which are the ideals of national law. In the fifth precept, it is stated that justice is intended for all levels of society regardless of social classes. This means that law enforcement in Indonesia should not be indiscriminate as the principle of equality before the law.

In a more practical way, Indonesia as a state based on Pancasila law must make a constitution or legal norms a way out in solving problems relating to individuals and groups, both society and the state. Legal norms are not the only rules that regulate humans in their relationships with fellow humans. Laws are not made but live, grow and develop with society. The law must still contain ideal values and must also be upheld by all elements of society.

Conclusions

Based on the explanation above, it can be concluded that the implementation of the theory of a rule of law in a state based on Pancasila is different from a rule of law in general. The rule of law in the Indonesian context has its own meaning and characteristics. The statutory regulations or laws that are enforced in Indonesia are explored from the philosophy of life of the Indonesian nation which is accumulated in Pancasila. This concept is in line with the ideals of Indonesian law which makes Pancasila a source of values for the life of the nation and state. The Indonesian rule of law was born not as a reaction from liberalists against absolute government, but because of the desire of the Indonesian people to build a better life for the state and society in order to achieve predetermined goals, according to agreed methods.

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JURNAL NURANI HUKUM : JURNAL ILMU HUKUM
Volume 5 Number 2, December 2022, pg 190-204
Fakultas Hukum, Universitas Sultan Ageng Tirtayasa, Serang-Banten, Indonesia
P-ISSN: 2655-7169 | e-ISSN: 2656-0801
https://jurnal.untirta.ac.id/index.php/nhk/index

Analysis of the Institutional Position of Military Judges Against the Independence of the Indonesian Military Courts

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Article Info:
|Submitted: 3 November 2022 **|Revised**: 20 December 2022 **|Accepted**: 26 December 2022

Recommended Citation: *Chicago Manual of Style 17th edition (full note)*
Irwan Sanjaya Putra and Niken Wahyuning Retno Mumpuni, "Analysis of the Institutional Position of Military Judges Against the Independence of the Indonesian Military Courts", *Jurnal Nurani Hukum: Jurnal Ilmu Hukum*, Vol. 5 No. 2, (December, 2022)", P.190-204

ABSTRACT

Application of a theory of power-sharing which is divided into executive, legislative, and judicial branches in Indonesia has been applied to achieve checks and balances between state institutions. The judiciary must stand upright in carrying out its primary duties and functions as a law enforcement agency. In the context of military justice, judges have an undeniably important role in the running of a judicial body. The position of military judges has ties between two institutions, namely the Indonesian National Armed Forces (executive) and the Supreme Court (judicial) which should be of different clumps. Judicial bodies that should be independent, uninterrupted, and intervening must be reviewed from the perspective of laws and regulations. This research uses the normative-empirical method (applied law research). The approach in question is in the form of a conceptual approach by examining the structure of the state administrative organization based on applying a theory and legislation and their implementation in the field. Military judges indirectly stand on two legs institutionally, because both the Supreme Court and the TNI have the same role in determining the career path of military judges. In that case, military judges still have great potential for intervention. Several factors affect the independence of military judges in carrying out their duties within the scope of military justice. Military judges indirectly stand on two legs institutionally, because both the Supreme Court and the TNI have the same role in determining the career path of military judges. In this regard, the military courts in Indonesia are not yet fully considered an independent judiciary. This is because several factors that have great potential in determining a judge can be intervened by another party (executive).

Keywords: *Institutional; Military Judges; Independence; Military Court*

ABSTRAK

Penerapan teori pembagian kekuasaan yang terbagi dalam eksekutif, legislatif dan yudikatif di Indonesia sudah diterapkan guna tercapainya check and balances antar lembaga negara. Lembaga peradilan (yudikatif) haruslah berdiri tegak lurus dalam menjalankan tugas pokok dan fungsinya sebagai badan penegak hukum. Dalam konteks peradilan militer, hakim memiliki peranan penting yang tidak terbantahkan dalam jalannya suatu badan peradilan. Kedudukan hakim militer memiliki ikatan antar dua institusi yakni Tentara Nasional Indonesia (eksekutif) dan Mahkamah Agung (yudikatif) yang seharusnya berbeda rumpun. Badan peradilan yang seharusnya independen, tidak terintervensi dan mengintervensi perlu dikaji berdasarkan perspektif peraturan perundang-undangan. Penelitian ini menggunakan jenis metode normatif-empiris (*applied law research*). Pendekatan yang dimaksud berupa pendekatan konseptual dengan mengkaji struktur organisasai ketatanegaraan yang didasari atas penerapan suatu teori dan peraturan perundang-undangan serta implementasinya dilapangan. Hakim militer secara tidak langsung berdiri dalam dua kaki secara institusional, karena baik MA maupun TNI sama-sama berperan dalam menentukan jalannya karir hakim militer. Dalam hal itu hakim militer masih memiliki potensi besar untuk diintervensi. Terdapat beberapa faktor yang dapat mempengaruhi ketidakmandirian hakim militer dalam menjalankan tugasnya dalam lingkup peradilan militer. Hakim militer secara tidak langsung berdiri dalam dua kaki secara institusional, karena baik MA maupun TNI sama-sama berperan dalam menentukan jalannya karir hakim militer. Dalam hal itu maka peradilan militer di Indonesia belum secara utuh dikatakan sebagai peradilan yang independen. Ini disebabkan karena beberapa faktor yang berpotensi besar dalam menentukan seorang hakim dapat di intervensi oleh pihak lain (eksekutif).

Kata Kunci: *Institusional; Hakim Militer; Kemandirian; Peradilan Militer.*

Introduction

The State of Indonesia is legal as mandated in the 1945 Constitution of the Republic of Indonesia as the highest basic law in the state. The explanation regarding this matter is contained in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states "The State of Indonesia is a state of law". In Dutch terms, the rule of law is referred to as *rechtstaats*, although in some European countries, it has a different designation, such as *etat de droit* which is the name of the French state and the legal state or the rule of law by the British state which has the same idea expression.[1]It has become a consequence of a state of lawmaking law as the highest reference in regulating state governance. There is nothing else that can be a reference other than compliance with the law itself.

The supremacy of the law from the constitution and the regulations under it is the most important thing in the reference to the state, thus in the concept of the Indonesian state there is no absolute power like a country that adheres to a royal system where the power of the king influences the law that is enforced. Power in the life of the state, especially in the Republic of Indonesia, has a nature that is not owned by a single ruler alone.

According to Montesquieu in his book *L'esprit des lois* (The Spirit of Laws), power in the state is divided into 3 (three) parts, namely the Legislative, Executive, and Judicial.[2] Normatively, the Indonesian state itself makes the law an important instrument in state administration and good governance. Law is placed on the highest caste as the main reference for the state. In addition, the law also functions as a tool or means to achieve the ideals of the state.[3]

Based on this, when viewed from both a theoretical and practical point of view, the power that has the task of ensuring the law runs well in the administration of state life is judicial. Judicial power as bodyguard, supervisor, and law enforcement has a strategic position in the state system. Therefore, the Indonesian constitutional system mandates that judicial power is required to be independent or independent from interference from any party.

In the context of the Indonesian state itself, the independence of the judiciary has been guaranteed by the state constitution by confirming it in Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which reads:

> "Judicial power is an independent power to administer justice to uphold law and justice".

In more detail, the provisions that describe the independence of the judiciary in the constitutional mandate are Article 1 paragraph (1) of Law no. 48 of 2009 concerning Judicial Power which states:

> "Judicial power is the power of an independent state to administer the judiciary to enforce law and justice based on Pancasila and the 1945 Constitution of the Republic of Indonesia, for the sake of the implementation of the State of Law of the Republic of Indonesia".

So the urgency of the independence of judicial power is a must and is absolute. However, if studied from the perspective of the old-order era to the new-order era, judicial power is not independent as in the reform era. At that time the executive power still had a dominant role in

[1] La Ode Husein, *Negara Hukum, Demokrasi Dan Pemisahan Kekuasaan*, 1st ed. (Makasar: Social Politics Genius, 2019).

[2] A. Sakti Ramdhon Syah R, *Dasar-Dasar Hukum Tata Negara: Suatu Kajian Pengantar Hukum Tata Negara Dalam Perspektif Teoritis-Filosofis* (Makasar: Social Politics Genius, 2019).

[3] Moh. Mahfud MD, *Politik Hukum Di Indonesia*, 8th ed. (Depok: Rajawali Pers, 2018).

regulating the administration of personnel, financial administration, and office administration of judges under the auspices of the Ministry of Justice.[4]This of course creates an opportunity for the authorities, especially the executive, to intervene in the law enforcement process within the judiciary, and is an entry point for the development of collusion and other negative practices.

The consequences of the reform era resulted in very significant changes to the judiciary in Indonesia. The Ministry of Justice in the pre-reform era still regulates administration, and finance has been transferred to one roof authority under the Supreme Court. This started when Law no. 35 of 1999 concerning the Basic Provisions of Judicial Power as an amendment to Law no. 14 of 1970 which tends to be obsolete and no longer relevant. Then the regulations regarding judicial power changed to Law no. 4 of 2004, after which changes to regulations were made again through the ratification of Law no. 48 of 2009 concerning Judicial Power which is then valid until now.

All arrangements regarding judicial structural organization are under the auspices of the Supreme Court which is a high-state institution in judicial affairs. In its role, the judicial environment under the Supreme Court has the main tasks, functions, and specificities as well as the characteristics of each privilege, including military courts.

The Military Court is a judicial institution that has characteristics because its authority in law enforcement is special and is not owned by other courts. The specialty of this judicial body lies in its authority which only specifically judges certain legal subjects, namely a soldier, or someone who is equated with a soldier as well as a subject of civil law in the case of connectivity.[5]In addition, other privileges that are owned are the existence of a judicial and administrative institution that is not owned like other courts under the auspices of the Supreme Court.

Technically, until now, military justice is still attached to Law Number 31 of 1997 concerning Military Courts as the legal basis, which also includes the procedural law of military courts. The regulation is the basis for the most recent or most recently ratified regulations from other judicial circles, but the substance of the law lags behind other judicial regulations. This is because this regulation has not been amended following the constitutional amendments. It has been 24 (twenty-four) years that this regulation has not undergone any changes like other judicial environments whose legal basis has changed by adjusting the mandate of constitutional changes after the amendment to the 1945 Constitution of the Republic of Indonesia.

The statutory order regarding judicial power after the fourth amendment has undergone changes that are adapted to the conditions of the times regarding Law no. 48 of 2009. In the context of the military court, because it has not undergone any changes, the legal basis used in its considerations still refers to the law on judicial power before the amendment, namely Law no. 14 of 1970, so that the relevance of the current regulations regarding military justice needs to be questioned.

As a special judiciary, strategic positions in the organizational structure of the military justice system, from the military courts, high military courts, and the main military courts are also filled by a judge who is also a member of the military. This arrangement is contained in Article 18, Article 19, and Article 20 of Law no. 31 of 1997 concerning Military

[4] Patrialis Akbar, *Lembaga-Lembaga Negara Menurut UUD Negara Republik Indonesia Tahun 1945* (Jakarta: Sinar Grafika, 2013).

[5] "Law of the Republic of Indonesia Number 31 of 1997 Concerning Military Courts" (1997).

Courts. The regulation stipulates that it is mandatory for military judges from various levels from the first level to the appeal level to be the military judge.

If a judge in the military court is a member of the military, then it is certain that a military judge is also subject to all the provisions regulated by the TNI institution as the parent institution of a military person. Considering that indeed a military judge is a pure military person who is then appointed by the competent authority to become a judge in the military court environment.

In Article 7 paragraph (1) of Law no. 31 of 1997 concerning Military Courts, the structure of the military courts in terms of organization, governance, budget, administration, and finance, used to be under the auspices and guidance of the TNI Commander. Then all aspects of its management were transferred under one roof under the auspices of the Supreme Court since the fourth amendment of the constitution.

This transition was marked by the Decree of the President of the Republic of Indonesia No. 56 of 2004 concerning the Transfer of Organizational, Administrative, and Financial Courts in Military Courts from the Indonesian National Armed Forces Headquarters to the Supreme Court. This transfer under one roof of the Supreme Court is an effort to ensure the independence of the judiciary as a body that has a strategic position in law enforcement.

The transfer between these two state institutions does not cover all aspects that support the independence of the judiciary. This is because the TNI institution is still authorized to train soldiers in the military court environment. As a result, a military judge whose military status is very attached is still being fostered and supervised by the TNI institution.

In addition, the rank status attached to military judges is still valid today, so this reflects that the transfer between the two institutions to ensure the independence of the judiciary is something that needs to be questioned and reviewed. In addition, the assessment of the position of military judges as people who occupy strategic positions has a crucial role in the independence of judicial power as law enforcers, it is very necessary to study in depth.[6] So that the role of executive domination over the judiciary which should be independent is not created absolutely.

Methodology

This research uses normative–empirical legal research methods. Normative-empirical research is research that is often referred to as applied law research.[7]This study examines the application of the law (laws and regulations) that are currently in force (*ius constitutum*) and its implementation in the field in factual cases in every legal event that exists within the community.[8]the type of approach used to find light on the topic or issue to be studied. In normative research, the type of approach used is the statutory approach.[9] In addition, the approach that can be taken is to use a historical approach.[10].

This study uses a statutory approach and a historical approach in the form of a study of a constitutional organizational structure based on the

[6] Explanation Sheet of Article 3 of Law of the Republic of Indonesia Number 31 of 1997 concerning Military Courts.

[7] Muhaimin, *Metode Penelitian Hukum*, 1st ed. (Mataram: Mataram University Press, 2020).

[8] *Ibid*, Muhaimin.

[9] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Grup, 2014).

[10] Jonaedi Efendi and Johnny Ibrahim, *Metode Penelitian Hukum Normatif Dan Empiris*, 1st ed. (Depok: Prenada Media Group, 2018).

application of a rule and theory into a state system, as well as interpretation from a historical perspective on the enactment of a regulation. The approach to the legislation is studied comprehensively and combined with studies in the form of realities in the field to find implications for the suitability of regulation to the object that is the focus of this research. In this type of normative-empirical legal research, data collection techniques can be carried out together or separately.[11]So the data collection in this study was carried out using a literature study of primary, secondary, and tertiary legal materials, as well as through the results of interviews.

Discussion

1. Status of Military Judges in Institutional Dualism

A. History of the Implementation of Judicial Power in Indonesia

The separation of the judicial and executive functions is important in maintaining the checks and balance's function. The position of the two clumps is institutionally important to separate and not interfere with each other or interfere. An independent and independent judiciary will certainly be realized if the supporting components contained in it are also guaranteed their rights and obligations as independent law enforcers without interference from other parties.

In reviewing a judge's position institutionally, it is necessary to study from the perspective of the history of the regulation of judicial power in Indonesia. Since the 1945 Constitution of the Republic of Indonesia was ratified on August 18, 1945, there has been a determination and enthusiasm to replace all legal provisions that were in effect during the colonial period with regulations created by the minds of the nation's children. At that time the constitution had regulated the important role of judicial power. To fulfill the provisions of Articles 24 and 25 of the 1945 Constitution of the Republic of Indonesia, Law Number 19 of 1948 was established as a basic regulation regarding judicial power which previously applied regulations made during the colonialism period.

During the enactment of Law No. 19 of 1948, judicial power only consists of 3 (three) judicial bodies, namely: the General Court; Administrative Court, and Military Court. In addition, the technical implementation of judicial power only consists of General Courts; High Court, and Supreme Court. However, the implementation of Article 35 paragraph (2) encountered problems because the regulation states that all cases concerning the civil affairs of Muslims must be resolved according to their religious regulations. While at that time the religious court had not yet been formed so in its settlement at that time the judge in the case was a religious expert who was then appointed by the President at the suggestion of the Minister of Religion and the Minister of Justice.

Then the enforcement of judicial power regulations was changed by Law no. 19 of 1964. The change in regulation resulted in changes in the organizational structure of judicial power with the addition of a judicial body in the form of a religious court, as well as the addition of authority to each court and the Supreme Court as the highest court of all judicial bodies.

At that time the position of the judiciary was technically under the Supreme Court, but organizationally, administratively, and financially it was under the relevant Ministry. This has been stated in Article 7 of Law no. 19 of 1964, which reads:

[11] Efendi and Ibrahim., pg. 125.

1) Judicial power which has the personality of Pancasila and which carries out the function of law as protection is exercised by the Court in the following circumstances:
    a. General Court;
    b. Religious Courts;
    c. Military Courts;
    d. State Administrative Court;
2) All courts culminate in the Supreme Court, which is the highest court of all jurisdictions;
3) The courts referred to in paragraph (1) above are technically under the leadership of the Supreme Court, but organizationally, administratively, and financially under the authority of the Ministry of Justice, Ministry of Religion, and Departments within the Armed Forces;
4) The provisions in paragraph (1) still opens the possibility for efforts to settle civil cases amicably outside the court;

However, at that time the implementation of this regulation was still thick with the existence of a power that was more dominated by the executive than other powers (executive heavy). In addition, the enforcement of judicial power regulations is only used as a revolutionary tool towards a socialist society based on the Political Manifesto of the 1945 Constitution of the Republic of Indonesia, Socialist, Democracy, Guided Economy, and Indonesian Personality (USDEK).[12]

The organizational, administrative, and financial placements which were controlled by the relevant departments at that time were met with strong opposition from the judges' professional organizations, but the government did not receive any response at that time. The courts that were considered special courts at that time were military courts and religious courts. State administrative courts are not classified as special courts but are separate courts called administrative courts / civil service courts.[13]

The New Order government was determined to implement Pancasila and the 1945 Constitution of the Republic of Indonesia purely. So, the government at that time encouraged efforts to conduct a "Legislative Review" and created several laws. However, the enactment of the law created from the legislative review is considered contrary to the mandate of the 1945 Constitution of the Republic of Indonesia in terms of its content.[14]

But the regulation will still be enforced before a new law replaces it so Law no. 14 of 1970 concerning the Basic Provisions of Judicial Power. After this regulation was enacted, then another law was created that specifically regulates every judicial environment, be it general courts; state administrative courts; religious courts, or military courts. This law is used as the basis for touchstones or considerations for the specific regulations governing each of these courts.

This regulation also does not solve the problem of judicial power in Indonesia. The independence of the judiciary has become a hot topic of debate by legal scholars. The judiciary at that time was not considered fully independent because the judges in the four judicial circles still depended on the government and the Supreme Court. Then the regulation regarding judicial power was changed again with Law no. 35 of 1999 where the regulation is an implementation of the mandate MPR Decree Number X/MPR/1998 concerning the Principles of Development Reform in the Context of Saving and Normalizing National Life as

[12] Johan Bahder, S H Nasution, and M Hum, "Sejarah Perkembangan Kekuasaan Kehakiman Di Indonesia," *INOVATIF | Jurnal Ilmu Hukum* 7, no. 3 (2014), https://online-journal.unja.ac.id/jimih/article/view/2171.

[13] Bahder, Nasution, and Hum.

[14] Bahder, Nasution, and Hum.

State Policy by changing several articles in it.

Then enacted Law no. 4 of 2004 concerning Judicial Powers, one of which contains the unification of the organizational, administrative and financial roofs of judicial bodies into the Supreme Court. In the context of military justice, the transfer is regulated and determined by decree of the President of the Republic of Indonesia No. 56 of 2004 concerning the Transfer of Organizational, Administrative, and Financial Courts in Military Courts from the Indonesian National Armed Forces Headquarters to the Supreme Court.

After the end of the new order which was closely related to the military domination of important state institutions, including the judiciary, the policy of unifying the roof of the military courts under the auspices of the Supreme Court in 2004 did not solve the problem in terms of guaranteeing the independence of the judiciary. The position of a judge is one of the noble professions and has a crucial function in enforcing the law requires further study for the sake of justice and the enforcement of a law. A judge is required to be able to evaluate and examine cases to create an accurate legal decision. It is the demands of the task that require a judge to be free from tension, worry, and pressure.[15]

B. Military Judge Institutional Position

The status of military judges, which is normatively attached to their status as military officers, has consequences that need to be studied more deeply. Differences in functions that should not be in direct contact with each other, in the context of the position of military judges, are used as an exception formula for law enforcement. The status of military judges is purely soldiers who are employed outside the institution, namely the Supreme Court of the Republic of Indonesia. This is allowed by laws and regulations, the regulation of which is contained in Article 47 paragraph (2) of Law no. 34 of 2004 concerning the Indonesian National Army which reads:

"Active soldiers can hold positions in the office in charge of the coordinator in the fields of Politics and State Security, State Defense, Presidential Military Secretary, State Intelligence, State Code, National Defense Institute, National Defense Council, National Search and Rescue (SAR), National Narcotics, and Supreme Court".

The Military Court is one of the judicial bodies under the auspices of the Supreme Court which consists of the Military Court, the High Military Court, and the Main Military Court, all of the judges in the court are active military who serve as judges. At each level of the court, the status of military rank is attached to the judges in each court. A military judge before becoming a judge is a pure military soldier who is then selected, educated, and fostered by the Supreme Court to later be appointed as a judge.[16]

A military person who wants to have a career as a military judge must meet the requirements written in the legislation, then be appointed by the President based on the recommendation of the Commander in Chief and the approval of the Chief Justice of the Supreme Court. It is described in Article 18, Article 19, and Article 20 of Law no. 31 of 1997 concerning Military Courts, the general requirements to be appointed as judges in military courts (first level) are soldiers who have at least the rank of captain and have a law degree. Meanwhile, to be appointed as judges in

[15] Abdul Manan, *Etika Hakim Dalam Penyelenggaraan Peradilan*, 3rd ed. (Jakarta: Kencana, 2015).

[16] Result of Interview with Fredy Ferdian Isnartanto, Head of Military Court II-11 Yogyakarta. in Yogyakarta, 12 April 2022.

the high military courts and the main military courts, soldiers with the rank of lieutenant colonel and a law degree certificate are required to have experience in the field of law during their careers.

The profession of a judge in the military court environment is required one to be bound by the doctrine of both institutions at once. Status as a military officer, the judge is submissive and obedient to the Sapta Marga, 8 mandatory TNI and Soldier Oaths, and the TNI Officer Code of Ethics.[17] In addition, a military judge must also comply with the Code of Ethics and Code of Conduct for Judges (KEPPH) imposed by the Supreme Court.

The financial rights of military judges also differ from judges in other judicial circles under the Supreme Court. If judges in general courts, religious courts, and state administrations are fully regulated based on the regulations of the Supreme Court, a military judge in terms of basic salary rights still refers to regulations that are fully under the Indonesian National Armed Forces. The base salary of a military judge remains the same as the base salary of other TNI soldiers based on rank.[18] What makes the difference is that a military judge gets benefits like other judges in other courts. The financial rights in question have been regulated in Government Regulation Number 94 of 2012 concerning Financial Rights and Facilities for Judges Under the Supreme Court.

Furthermore, the study of the structure of the military judiciary needs to be questioned for its independence, this is because its position is on two legs. Although this is normatively regulated in law, its application must also take into account the provisions of the constitution that require judicial clumps or independent judicial bodies.[19] This study requires a review from a point of view that is not only studied normatively. The independence of a judicial body must be studied vertically and horizontally from various perspectives. The enactment of regulations that facilitate the position of military judges currently vertically from a constitutional perspective does not fulfill the element of the phrase "freedom" as mandated.

The phrase "*Merdeka*" based on the definition of the Big Indonesian Dictionary means free, not bound, and not dependent on other people or parties.[20] So in the context of law enforcement regarding the position of military judges, the author argues that contextually it is contrary to the constitution. In addition, the judiciary clumps institutionally must be upright and no interference is allowed in any way, including in terms of the administrative staffing of judges because law enforcement requires complete independence.[21]

2. Factors that can affect the independence of military judges in the Indonesian military justice system

The independence of the judiciary is a fixed price that must be guaranteed to achieve real justice efforts. The independence of the judiciary itself has

[17] Parluhutan Sagala and Farid Iskandar, "Kedudukan Hakim Militer Dalam Kekuasaan Kehakiman Indonesia," *Jurnal Hukum Militer STHM* 5, no. 1 (2018): 105.

[18] Fredy Ferdian Isnartanto, *Op.Cit*, Interview Result.

[19] Results of Interview with Muhammad Zaki Mubarrak, Academician of Jenderal Achmad Yani University Yogyakarta. in Yogyakarta, 10 June 2022.

[20] Independent. Definition Based on the Big Indonesian Dictionary (Online), Fifth Edition, Ministry of Education, Culture, Research and Technology of the Republic of Indonesia, 2016. Taken On 11 June 2022.

[21] Muhammad Zaki Mubarrak, *Op.Cit*, Interview Result.

also been guaranteed by the state constitution as an absolute thing. The intended independence is sought so that judges have freedom in carrying out their profession and also in enforcing the law.
In the context of military justice, military judges have a crucial position in terms of law enforcement. However, the problem of independence is still a matter of debate. The author in this case will describe several factors that can cause military judges to be independent in exercising their authority. The factors in question are:

A. Structural Factor

The organizational structure in the context of the military justice system requires special attention. This is because the status of his position which is closely related to the executive element is a form of direct intervention that has the potential to affect the freedom of military judges in litigation and careers. This organizational factor is influential when the structure is not an independent autonomous institution but is subordinated to other structures.[22]

In this case, military judges in organizational structure currently still rely on all provisions of the TNI institution as the parent institution where a person with military status takes shelter. In addition, a military judge is currently also under another organization, which is essentially a different family. This is a consequence of his profession as a judge who demands his position to be under the auspices of the Supreme Court.

The factors mentioned above have implications for military judges in terms of promotion, which in turn affects a career as a military judge. If a military judge is judged by the Supreme Court to be able to occupy a higher position in the military judicial structure, then a military promotion is also required as a condition that has been written in the legislation. For example, a military judge at the military court at the first level with the rank of a TNI Major, and then deemed worthy and able to occupy a higher position as a military judge in a high military court, or other structural positions within the judiciary, is required that the military judge be promoted to one level higher, namely Lieutenant colonel.

In the event of a promotion, if the Supreme Court wants a judge to be able to occupy a higher position, but the TNI institution does not increase his military rank, then a military judge cannot occupy the position determined by the Supreme Court. So that in the career of a military judge who will occupy a higher position than his previous position, both the Supreme Court and the Indonesian National Army must work together and have the same decision.[23]

In terms of the pattern of promotion of structural positions in military justice, a military judge who will be promoted or transferred to his position must obtain approval from the Chief Justice of the Supreme Court and the TNI Commander. This is regulated in the Decree of the Supreme Court of the Republic of Indonesia Number: 48/KMA/SK/II/2017 concerning the Pattern of Promotion and Mutation of Judges in Four Courts.

Based on this, military judges in their careers are still very dependent on other institutions outside the jurisdiction of the judiciary. The organizational structure that is still subordinated will cause the judiciary to be not free and independent and become an inseparable part of the executive.[24] From the

[22] Ahmad Kamil, *Filsafat Kebebasan Hakim*, 3rd ed. (Jakarta: Kencana, 2017).

[23] Fredy Ferdian Isnartano, *Op.Cit*, Interview Result.

[24] Kamil, *Filsafat Kebebasan Hakim*. *Op.Cit,* p. 249.

perspective of theory and legal principles, the mechanism or pattern mentioned above is not permitted and does not describe an independent judicial system, and this is contrary to the constitution.[25] The author also argues that the current structural factors contradict the provisions of Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which mandates that the judiciary must be independent. In addition, the arrangement of this organizational structure is also contrary to the Decree of the MPR RI No. X of 1998 concerning the Principles of Development Reform in the Context of Saving and Normalizing National Life as State Policy, which mandates that there is a clear separation between the judicial and executive functions.

B. Understanding Factor

Judges as law enforcers have an important role as actors in enforcing laws and regulations and as representations for upholding justice. So it is the role of the judge that greatly influences a judicial body to have independence or not. Several indicators affect the independence and freedom of judges, namely: a culture of dependence, professional guarantees, thinking patterns, employment status, and integrity.[26] In addition, there is a paternalistic culture that is still attached to the lives of some judges with the feeling of *ewoh pakewoh* towards their superiors, making judges have a feeling if not have the courage to take their stand and make decisions.[27]

Such an attitude could have the potential for judges to be shaky in carrying out their profession. Moreover, in the context of military judges, judges often receive requests from superiors of military defendants who have a higher military rank than the judges themselves to seek commutation of sentences for their subordinates who are accused.[28] Things like this illustrate that the understanding of a military judge is required to be extra, moreover, a military man has also been indoctrinated and required to obey the principle of unity of command. Military judges are needed who have high integrity and don't care about intervention efforts from other parties, including their superiors in their parent institution, the TNI. This sometimes becomes a dilemma considering that a military judge in examining and deciding cases must also consider the interests of the military and state security.

C. Power Factor

Throughout history, both from the old order, new order, and reformation, power has become a problem that continues to be debated in terms of discussing the independence of a judicial body. In the era of the old order and new order, law enforcement is always closely related to the intervention of the executive and legislative powers. At that time the law was not used as the main guardian of power, on the contrary, it was a power that controlled the law. So that judges are often trapped and do not have the freedom to block the intervention of a judicial process.

Interventions can occur not only outside the judiciary, vertical power at that time also often became an obstacle for a judge in deciding cases. So in this reform era, the power of the Supreme Court as supervisor of judges is also limited by the provisions of Article 39 paragraph (3) of Law no. 48 of 2009 concerning Judicial Power which states that internal supervision and authority

[25] Muhammad Zaki Mubarrak, *Op.Cit*, Interview Result.

[26] Kamil, *Filsafat Kebebasan Hakim*., *Op.Cit*, p. 251.

[27] Kamil. Ibid, p. 251.

[28] Fredy Ferdian Isnartanto, *Op.Cit*, Interview Result.

carried out by the Supreme Court must not reduce the freedom of judges in deciding cases.

However, in the context of military courts, the position of military judges as military officers is also attached to the TNI institution which is under the auspices of the executive family. The Indonesian National Armed Forces, which still has dominance that influences the course of military judges in their careers, has the potential to affect the freedom of judges.

In addition, the dominance of the TNI in the scope of military justice also lies in its authority in terms of investigation, investigation, and prosecution. In terms of investigation and investigation, the TNI institution oversees Ankum and the Military Police; also in terms of prosecution, the Military Oditurat is under the auspices of the TNI, if in terms of the judiciary, the dominance of the TNI is also binding on a judge and affects the career of military judges, it is feared that the legal decisions produced by the military courts are based on the will of the influence of the executive power. It is undeniable that the political order often makes an independent judicial power powerless against political pressures and tendencies.[29]

This condition can occur because the construction of the judge's position regulation is still high in the potential for intervention from outside a judge such as pressure, intimidation, the direction of opinion formation, and so on. Besides that, structural intervention against a judge from his superiors, leaders, or superiors is still common.[30] Judges in this case are required not to be complacent by the intervention of other powers by maintaining the integrity of the judiciary, even though the current regulations have a high potential for intervention.

At present, special attention is needed and efforts to change the legal regulations of military courts are needed so that the potential for intervention in the independence of the judiciary cannot be carried out by anyone. This is in line with the opinion expressed by Jimly Asshiddiqie, who said that the word independent and independent from the influence of government power has a functional meaning as well as an institutional meaning.[31]

Therefore, reform of military law in various fields, both in the legal structure (legal structure), legal substance (legal substance), and legal culture (legal culture) needs to be carried out.[32] This is because the legal regulations regarding military justice need to be understood as a systemic unit and there is a relationship that unites various special regulations, and the legal system for military courts also needs to be well understood so that the nature of the law can be understood correctly.[33]

The reform of military law in terms of the legal structure relating to institutions, implementation of the law,

[29] Kamaruddin Kamaruddin, "Otokritik Terhadap Kemandirian Peradilan Dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945," *Justicia Islamica* 11, no. 1 (June 1, 2014): 74, https://doi.org/10.21154/justicia.v11i1.93.

[30] Joko Sasmito, "Mewujudkan Kemandirian Hakim Untuk Menegakkan Hukum Dan Keadilan Dalam Lingkungan Peradilan Militer," *Perspektif* 20, no. 1 (January 29, 2015): 16, https://doi.org/10.30742/perspektif.v20i1.138.

[31] Andi Suherman, "Implementasi Independensi Hakim Dalam Pelaksanaan Kekuasaan Kehakiman," *SIGn Jurnal Hukum* 1, no. 1 (September 27, 2019): 42–51, https://doi.org/10.37276/sjh.v1i1.29.

[32] Agustinus PH and Yuliana Yuli, "Pembaharuan Hukum Pidana Militer Dalam Pembaharuan Hukum Pidana Nasional," *Jurnal Yuridis* 1, no. 2 (2014): 206.

[33] Dini Dewi Heniarti, *Sistem Peradilan Militer Di Indonesia*, 1st ed. (Bandung: Refika Aditama, 2017).

the authority of institutions, and personnel (law enforcement officers) requires changes. The legal structure is an element that has a strong influence on the legal culture that will be created (legal culture).[34] Legal culture itself can be interpreted as an attitude/mentality that will later determine how to use a law itself. Legal structures that are not able to move the legal system will create disobedience to the law so that the material/substance of the law determines the course of law.[35]

In the context of the military justice system, if law enforcement officers in this case a military judge are not fully independent as mandated by the constitution, then the legal culture that will be created is a legal culture that contains values that are contrary to the purpose of the law itself, namely the value of justice. A legal system that does not run progressively will create the wrong orientation because the legal objectives are not achieved (disorientation).

According to Mahfud MD, a country that is unfair or deviates from its intended purpose (disorientation), will cause a loss of public trust in its country (distrust), and loss of public trust will result in disobedience by the people to their country (disobedience), disobedience by the people will cause divisions. within the country (disintegration).[336] In addition, the law does not only talk about what is currently happening, which may or may not be possible, but the law also needs to be seen as a preventive effort to dispel things that are contrary to the rules, norms, and rules of the law itself.[37]

Conclusions

Military judges have an important role in law enforcement in the military justice environment. In carrying out his duties a military judge requires special attention considering the laws and regulations require a military judge to stand under the two major institutions which have different clumps, main functions, and authorities. Things that should not intersect with each other, in the context of the military justice system, are used as a formula for law enforcement. In terms of authority vertically and horizontally, which is related to its parent institution, namely, the TNI, military judges still have a direct relationship with matters of an administrative nature.

As a consequence of this, a military judge is still financially dependent on his parent institution. With the current position of military judges, the military judiciary has not yet found the point of pure independence expected by the constitution. This is because the financial position and matters related to personnel administration, which is still related to institutional positions, have a high potential for intervention. From the perspective of theory and the rule of law based on the constitutional mandate, the expected independence has not been fulfilled.

The enactment of legal regulations that are normatively valid at this time resulted in the position of judges being institutionally standing in both institutions. Therefore, several factors can affect the independence of military judges in the military justice system. The factors in question consist of: Structural factors, the current institutional position of

[34] Lutfil Ansori, "Reformasi Penegakan Hukum Perspektif Hukum Progresif," *Jurnal Yuridis* 4, no. 2 (2017): 150.

[35] Ansori.

[36] Dian Erika Nugraheni, "Mahfud MD Ungkap Gejala Hancurnya Sebuah Negara," Kompas.com, 2020, https://nasional.kompas.com/read/2020/02/17/12112401/mahfud-md-ungkap-gejala-hancurnya-sebuah-negara/.

[37] Muhammad Zaki Mubarrak, *Op.Cit*, Interview Result.

military judges has an impact on the military judiciary, which institutionally seems to be a subordinate body of the TNI;

Factors in the understanding of military judges who carry various doctrines from two different institutions are required to be able to consider and distinguish legal interests for the sake of upholding justice, and political interests or power;

The power factor that currently exists is the dominance of the TNI over the career path of military judges in terms of promotion, position and some of its financial elements put pressure on the judge so that the legal decisions made are not following the judge's conscience. In addition, the dominance of the TNI in terms of the military justice system, which oversees the body that has the authority from investigation to correctional terms, makes the role of military judges in giving legal considerations very important.

If judges in carrying out their duties have the potential to intervene, the independence of the military court will not be created. makes the role of military judges in giving legal considerations very important. If judges in carrying out their duties have the potential to intervene, the independence of the military court will not be created. makes the role of military judges in giving legal considerations very important. If judges in carrying out their duties have the potential to intervene, the independence of the military court will not be created.

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NURANI HUKUM: JURNAL ILMU HUKUM
P-ISSN: 2655-7169 | E-ISSN: 2656-0801

The Editors of **Nurani Hukum: Jurnal Ilmu Hukum** would like to thank all of our peer reviewers, both external and editorial board members, who have contributed to the journal in Vol. 5 No. 2 (2022) and whose valuable support is fundamental to the success of the journal.

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