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CUSTOMARY LAND OF THE INDIGENOUS PEOPLES IN PENINSULAR MALAYSIA: AN ANALYSIS ON THE ORANG ASLI LAND CLAIM CASES

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ABSTRACT

Beginning with the case of Adong bin Kuwau v Johor State Government [1997] 1 MLJ 418 which was decided by the High Court in Johor in 1996, the law in Malaysia through common law has developed a principle that recognizes the right of customary land of indigenous peoples in Malaysia including the Orang Asli in Peninsular Malaysia. The legal position regarding the legal status of land ownership by the indigenous minorities established by the cases has filled in the gap in the law in the jurisdiction, addressing the issue of land dispute among the minority communities. Using doctrinal legal research, this paper analyses the common law principles, the basis, the content and scope of the rights recognized by these cases. It is recommended that understanding this common law position is essential towards greater protection of land rights the Orang Asli and other indigenous peoples in Malaysia. Security of land is not only an essential foundation the vulnerable groups to maintain their livelihoods but also contributes to local, national, and global sustainable development.

INTRODUCTION

Orang Asli are minority groups and are considered as marginalised in Malaysia. After more than 60 years of independence they remain to be at the lowest rung of the society. More than one third of them are living in poverty[2] and experience household food insecurity resulting in malnutrition and chronic energy deficiency.[3] They suffer from poor health, with a disproportionately high number of deaths in childbirth and high infant mortality rates, a lower life expectancy compared to the national average, and higher reported rates of infectious and parasitic diseases and malnutrition.[4] In aspect of education number of dropouts from both primary and secondary schools among the Orang Asli children remains high with all-round poor academic performance.[5] These facts reflect a serious inequality of the minority communities compared to the rest of the population in the country.

An issue which is a significant concern of the communities is the security of rights to land including land that they have been living for a long time. Lands are also regarded as

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[2] Economic Planning Unit, 'Strategy Paper 02: Elevating B40 households towards a middle-class society', Eleventh Malaysia Plan, Putrajaya, May 2015, p. 8, <www.epu.gov.my/sites/default/files/Strategy%20Paper%2002.pdf>, accessed 15 June 2017. Poverty rate is for year 2014.

[3] See eg, Nor Haidanadia Hasni et al, 'Food Security among Orang Kintak in Pengkalan Hulu, Perak' (2017) 7(3) *International Journal of Academic Research in Business and Social Sciences* ; Pei CS, Appannah G, Sulaiman N. Household food insecurity, diet quality, and weight status among indigenous women (Mah Meri) in Peninsular Malaysia. *Lim H, Chee H,* "Nutritional status and reproductive health of Orang Asli women in two villages, Kuantan, Pahang", *Malays J Nutr. 1998 Dec; 4(1):31-54; Goy Siew Ching et al, 'Applying territorial approach to rural agribusiness development in Malaysia's aboriginal (Orang Asli) settlements: A comparative study of Pos Balar, Kelantan and Pos Sinderut, Pahang' (2016) 12(4) Malaysian Journal of Society and Space 12 issue 4, 109* .

[4] See, eg, Nicholas, Colin. (2000). *The Orang Asli and the Contest for Resources:* International Work Group for Indigenous Affairs. 33-6; Lim Y AL, 'Intestinal Parasitic Infections Amongst Orang Asli (Indigenous) In Malaysia: Has Socioeconomic Development Alleviated The Problem?' (2009) 26(2) *Tropical Biomedicine* 110.

[5] Suhakam, *Laporan Status Hak Pendidikan Kanak-kanak Orang Asli (Report on the Status of Education Rights of the Orang Asli Children)* (Suhakam, 2010); Nor, S. M., Roslan, S., Mohamed, A., Hassan, K. A., Ali, M. M., & Manaf, J. A. (2011). Dropout prevention initiatives for Malaysian indigenous Orang Asli children. The International Journal on School Disaffection, 8(1), 42–56; Abdullah, R. B., Mamat, W. H. W, Amirzal, W. A., & Ibrahim, A. M. B. (2013). Teaching and learning problems of the Orang Asli education: Students' perspective. Asian Social Science, 9(12), 118–124.

fundamental to the communities culturally and spiritually, integral to the identity of the community. However, the legal position on the status of ownership of land on which the communities are living is complicated. The *Aboriginal Peoples Act 1954,* a special statute providing for the governance of the affairs of the communities, provides some form of protection to the land of the Orang Asli. Under the Act, the state authorities may declare the land occupied by the Orang Asli within their jurisdictions as Aboriginal Areas (s 6) and Aboriginal Reserve (s 7). Nonetheless, in practice, based on report by the Orang Asli Advancement Department in 2015, less than 25% of the lands occupied by the Orang Asli are declared as such.

On the other hand, the courts in Malaysia, through decisions in a number of cases, has established an important body of case law recognizing the rights of the communities to their customary land, thereby giving another form of legal protection. Based on doctrinal legal research, this paper analyses the common law principles, the basis, the content and scope of the rights recognized by these cases.

COMMON LAW PRINCIPLES ON INDIGENOUS LAND RIGHTS RECOGNITION

In Malaysian common law, generally, the land of the indigenous peoples, including the Orang Asli, occupied by them for a long time is recognised as legally owned by the communities. There are series of court cases which affirm this position and have developed to become an established common law principles.

Briefly, the common law recognizes and protect existing rights of people including rights relating to land ownership. The legal rights which arose from custom of people continue to exist until or unless they are extinguished by legislative provision or act of executive government authorised by legislation. The legal rights neither depend on statutory provision nor declaration by executive government. It exists on its own and protected by the common law, subject to extinguishment through means authorised by law. On this basis, the state land ownership is not absolute but subject to existing legal rights.

This legal principle is the basis for the recognition of the land rights of indigenous people in Malaysia including the Orang Asli of Peninsular Malaysia and natives in Sabah and Sarawak. Specific to the Orang Asli communities, the rights recognised under the common law exist in tandem with, or complement, the rights protected by the Aboriginal Peoples Act 1954, which is a special statute providing for protection of the minority communities.

ADAT AS THE BASIS AND DETERMINANT FOR THE CONTENT OF RIGHTS

The basis of the customary rights is custom or known as ‘adat’ in Malay. Conceptually, *adat* or custom is used interchangeably with the term customary law or native law.[6] Under the Malaysian law, custom is one of sources of law recognized by the Federal Constitution and enforceable by the common law.[7] This is similar to the position of English law in which custom is also a source of law.[8]

In relation to the indigenous peoples’ land rights, custom practiced by the communities gives rise to the legal rights, recognized and enforceable by the court of law. The customary legal rights continue to exist unless extinguished by clear and plain legislation or by an executive act authorized by such legislation, but compensation must be paid.[9]

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[6] Ramy Bulan and Amy Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak* (Suhakam (Human Rights Commission of Malaysia), 2009), 17.

[7] *Federal Constitution* art 160(1).

[8] E K Braybrooke, 'Custom as a Source of English Law' (1951) 50(1) *Michigan Law Review* 71, 72.

[9] *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289; *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677; citing *Mabo (No 2)* (1992) 175 ALR 1, 3.

At present, customs of certain sections of society are codified in statutes. For instance, some part of custom on customary land of the Malay communities in Negeri Sembilan is regulated by Customary Land Enactment 1926. This statute, among others, provides for registration of the customary land. Another example of custom of local communities codified in the form of statute is distribution of *harta sepencarian* (jointly acquired property) governed by various Syariah enactments in all Malay states.

However, contrary to prevailing perspective, such statutes providing for codification of custom, do not necessarily preclude related or other part of customs as an element that may have the force of law. This is endorsed in *Nor Anak Nyawai (No 1)*[10] that asserted the enforceability of unwritten custom although part of it is codified. It has been held that where customs are codified, such codification does not extinguish uncodified, related customs.[11] This is similar to the position of Islamic law in Malaysia which has been incorporated into legislation. Reference to other written sources and to the opinions of experts on the contents of Islamic law are common practice and allowed although not specifically mentioned in the legislation.[12]

The Orang Asli, similar to other groups considered as natives in Malaysia, are also regulated internally by their own traditional laws on various matters including land and natural resources.[13] Even, under the relevant international law jurisprudence, the legal systems of indigenous peoples are recognized as an integral part of their identity.[14] This reflects the significance of the custom of the communities and understanding of it in the consideration of laws.

An important evidence essential to prove the existence of the customary land right is continuous occupation and control of particular area of land since a long time or several generations.[15] Occupation forms the connection of the communities to the land. This can be in the form of settlement or use of land for agriculture. The test of occupation to meet the evidentiary burden is the existence of 'sufficient measure of control to prevent strangers from interfering'.[16] Continuation of a long established practice of their custom and exercise of the customary right on the land is important to prove the connection.[17] Actual physical presence is however not a pre-requisite to establish continuous use and occupation.

Besides, forest areas used by indigenous communities to access for forest produces, hunting and fishing have also been recognised as the customary land rights if the activities continue to be in practice by the communities.[18]

As custom is the basis of the rights, the content are determined by custom of the particular communities. In other words, the types and extent of the rights are defined by practice, usage and traditions of the communities. Nonetheless, it was also held by courts that changes in the communities' traditional law and custom do not affect the connection of the communities to the land.[19]

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[10] [2001] 6 MLJ 241.
[11] Ibid, 285-6.
[12] Siraj, M, 'Recent Changes in the Administration of Muslim Law in Malaysia and Singapore' (1968) 17(11) International and Comparative Law Quarterly 221.
[13] See, eg, Yi Fan Chung, *The Orang Asli of Malaysia: Poverty, Sustainability and Capability Approach* (Master of Science Thesis, Lund University Centre of Sustainability Science, 2010) <http://www.lumes.lu.se/database/alumni/08.10/Thesis/YifanCHUNG_Thesis_2010.pdf>.
[14] *United Nations Declaration of the Rights of Indigenous Peoples,* Art 5.
[15] *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677.
[16] Ibid.
[17] Nor Anak Nyawai (No 1) [2001] 6 MLJ 241; Sagong (No 1) [2005] 6 MLJ 289; *Kerajaan Negeri Johor v Adong bin Kuwau* [1997] 1 MLJ 418; *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* [2008] 2 MLJ 677.
[18] *Sangka bin Chuka dan satu lagi v Pentadbir Tanah Daerah Mersing, Johor* [2016] 8 MLJ 289; *Mohamad bin Nohing v Pejabat Tanah dan Galian Negeri Pahang* [2013] MLJU 291.
[19] *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289.

CUSTOMARY RIGHT TO LAND

Courts have recognized that the communities have customary right to live on land that they occupied for generations and this right is proprietary in nature.[20] In the case of *Sagong Tasi v Kerajaan Negeri Selangor,*[21] the Court of Appeal held that the Plaintiffs in the case, who were also Temuan people, had ownership of the lands in question under customary community title of a permanent nature. The Plaintiffs sought compensation for the loss of areas acquired for construction of a highway. Part of the land was under gazette according to the Aboriginal Peoples Act 1954. The other part not under gazette was claimed by the community as customary land. The courts affirmed that the customary land of the Temuan tribal group is a proprietary right with full beneficial interest in, and to the land. The lands are inheritable, that is, capable of being passed down from generation to generation.

The land right may not only include the right to live on the land for settlement and agriculture, but also to the areas of land that they access for resources such as hunting and fishing, provided it is evident to be integral to the custom of the communities and continue in practice. In the case of *Adong bin Kuwau v Kerajaan Negeri Johor,*[22] which is the first land claim case by the Orang Asli, both High Court and the Court of Appeal recognizes the aborigines' rights in the areas on which they traditionally foraged.

Similarly in the case of *Mohamad bin Nohing v Pejabat Tanah dan Galian Negeri Pahang*,[23] the High Court held that the customary land of Semelai people, ie the Plaintiffs in the case, include the rights to exclusively occupy and use the land and its resources includes surrounding areas that they use to forage for resources. The right to hunt and forage for resources in the forest continue although the people are settled in a permanent place with modern amenities such as schools and hospitals.

Likewise, in a judicial review application, *Sangka bin Chuka & Anor v Pentadbir Tanah Daerah Mersing, Johor,*[24] Jakun communities in the area were required through a general notice, among others, to vacate the area of land which is part of Endau-Rompin National Park, Johor. The application was made by the communities against the state land authority to quash the notice and, among others, also for a declaration that the Jakun communities have native customary land rights over a particular area of land in the national park, their village and the surrounding areas where they have occupied and maintained traditional connection with the lands in accordance with their custom and practices. Summarily, based on evidence tendered by the communities, the High Court found that the community had established that they have common law customary land rights not only to the settlement areas but also encompass 'hunting and foraging areas'.

In other words, the customary land rights of the indigenous communities include the right to access to resources through activities of hunting, fishing and foraging on condition that these activities could be shown to be integral element to the custom and traditional activities of the community, 'which had long been the primary source and essence of their very existence and will continue to be essential to their future livelihood'.[25] His lordship, Mohd Nazlan JC, after reviewing the judicial precedents, held that

> In my view, the weight of authorities suggest that lands used for roaming, hunting and foraging cannot be automatically excluded from being deemed to constitute a part of the ancestral and customary lands of the *orang asli*. When determining the question on the contents and extent of the customary land rights under common law, in situations concerning both settlement sites and the surrounding foraging areas, the fundamental and pivotal question

[20] Ibid; *Mohamad bin Nohing v Pejabat Tanah dan Galian Negeri Pahang* [2013] MLJU 291.
[21] *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289, [35].
[22] [1997] 1 MLJ 418.
[23] *Mohamad bin Nohing v Pejabat Tanah dan Galian Negeri Pahang* [2013] MLJU 291.
[24] [2016] 8 MLJ 289
[25] [2016] 8 MLJ 289.

is decidedly one of evidence of occupation, which could but need not be physical in nature, and that of the continuous traditional connection with the lands.

Therefore, matter of actual practice by the communities is important to determine the extent of the rights of the communities.

In a recent case of *Mesara Long Chik v Pengarah Tanah Dan Galian Pahang,* Semoq Beri communities, a sub group of Orang Asli Sen'oi communities claimed for a declaration that they have rights and interest over an area of land of about 12 acres in Maran. They claimed that although they have moved from the area, they inherited the land from their ancestors and continue to frequent the land which were planted with a variety of fruit trees. They used to collect the fruits from the area during fruit season and sell them for cash income. In fact, they had in the year of 1985 and 1989 made applications to the state authority for land grant but there were no positive responses. Subsequently a grant of a temporary license was issued in 2004 by the state authority to an individual following which their fruit trees were destroyed.

The High Court in Kuantan found that the Plaintiffs had proved their rights over the land on the test of occupation and control over the land; and that these rights were recognized and enforceable by the common law. However, even though the court recognized that they have legal right over the land that the court termed as 'geran adat' under the common law,[26] the court only allowed for compensation for trees on the land according to s 11 Aboriginal Peoples Act 1954, which was an alternative prayer by the Plaintiffs.

Thus far, cases on land right claim have been confined to customary land of the indigenous communities. The principle, therefore may not extend to land occupied by the Orang Asli upon resettlement often by government initiatives. In relation to this however, it has been suggested by Azman J, in obiter, in the case of *Pedik bin Busu v Yang Dipertua Majlis Daerah Gua Musang,*[27] that the Orang Asli own the land that is given to them by the government through Resettlement Scheme although they were yet to be given title.

RIGHTS TO RESOURCES OR FORAGING

In view of the cases decided thus far, the customary land rights of the indigenous communities may extend to the area of land used for collection of forest produce, hunting and foraging commonly located surrounding the village of the communities provided that such activities could be shown to be continuously in practice integral to the communities' custom and vital to their livelihood.[28]

Nevertheless, there is a tendency in some judicial decisions to restrict the extent of the Orang Asli rights to areas that they have direct control ie the settlement and plantation areas purely on pragmatic reason. For instant, in the case of *Kerajaan Negeri Selangor v Sagong bin Tasi*,[29] the Court of Appeal, affirming the High Court position, restricted the rights of the Orang Asli to areas actually settled and not to the land on which they customarily foraged.[30] Mohd Noor Ahmad J in the High Court, states

I conclude that the proprietary interest of the orang asli in their customary and ancestral lands is an interest in and to the land. However, this conclusion is limited only to the area that forms their settlement, but not to the jungles at large where they used to roam to forage for their livelihood in accordance with their tradition.[31]

[26] *Mesara Long Chik v Pengarah Tanah Dan Galian Pahang* [2018] 1 LNS 1009, [22].
[27] [2010] 5 MLJ 849, [13].
[28] *Sangka bin Chuka dan satu lagi v Pentadbir Tanah Daerah Mersing, Johor* [2016] 8 MLJ 289; *Mohamad bin Nohing v Pejabat Tanah dan Galian Negeri Pahang* [2013] MLJU 291.
[29] [2005] 6 MLJ 289.
[30] *Kerajaan Negeri Selangor* v *Sagong bin Tasi* [2002] 2 MLJ 591, [40].
[31] *Sagong bin Tasi v Kerajaan Negeri Selangor* [2002] 2 MLJ 591, [40].

Similarly in Sarawak, the Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai,*[32] reversed the High Court ruling that the natives had a right to the disputed areas used for hunting, fishing and collection of forest produce within the community area *[pemakai menoa]*.[33] *Pemakai Menoa* (also spelt as *Menua*) is an area of land held by a district longhouse or village community, and includes farms, garden, fruit groves, cemetery, water and forest within a defined boundary [*garis menua*]. *Pemakai menoa* also includes *temuda* [cultivated land that have been left to fallow], *tembawai* [old longhouse sites] and *pulau* [patches of virgin forest that have left uncultivated to provide the community with forest resources for domestic use]. In other words, *pemakai menoa* is a geographical extent of the territory of each longhouse which is significance for the well-being of the community.

Access to *pemakai menoa* for resources was recognized by the court as part of the customary system of the natives. However, in determining whether the community has rights over the *pemakai menoa*, the court ruled that there was insufficient evidence to establish continuous occupation. The court also referred to High Court decision in *Sagong Tasi* which restricted the land rights of the aborigines to occupation by settlement and by cultivation. The pragmatic reasons behind this are revealed by Hashim JCA:

> Such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food.[34]

This position may have come to a closure in Sarawak when the Federal Court in *Director of Forest, Sarawak & Anor v. TR Sandah Tabau*[35] has held that native customary rights claim over land founded upon the concept of continuous occupation does not extend to areas where the natives used to roam to forage for their livelihood.[36] This ruling however interpret S 5(1) of the Sarawak Land Code, which in the view of the author does not apply to the position of the Orang Asli land in Peninsular Malaysia.

This view has been criticized as failing to fully appreciate the customary land system. The courts accept the principles that the customary rights are dependent on the custom and practice of the natives but they refuse to give full effect to them.[37] It goes against the common law basic principle of the recognition of the land rights of the indigenous peoples in which the content of rights are determined by their custom.

INALIENABILITY

As mentioned earlier, the court have also decided that the customary rights or title is inalienable, which means they could not be transferred or sold.[38] The case of *Kerajaan Negeri Johor v Adong bin Kuwau,* the rights in land are limited in the sense that the land is inalienable. Mokhtar Sidin J stated that the rights of the aborigines do not include 'the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein'.[39]

Therefore, the court held that similar to the land which is inalienable, the resources or produce of the land could not be dealt with commercially. This finding may be erroneous as the court treated the resources or produce of the land as similar to the rights in land. The custom of the community may not be the basis for the finding as it is well established in many

[32] [2006] 1 MLJ 256, [28].
[33] *Agi ak Bungkong v Ladang Sawit Bintulu Sdn Bhd* [2010] 4 MLJ 204, [11].
[34] *Nor Anak Nyawai (No 2)* [2006] 1 MLJ 256, [28].
[35] [2017] 3 CLJ 1 FC.
[36] *Director of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors And Others Appeals* [2017] 3 CLJ 1 FC, followed by *Government of Sarawak & Anor v. Busing Anak Jali & Ors And Another Appeal* [2019] 4 CLJ.
[37] Bulan, Ramy and Amy Locklear, *Legal Perspectives on Native Customary Land Rights in Sarawak* (Suhakam (Human Rights Commission of Malaysia), 2009).
[38] *Kerajaan Negeri Selangor v Sagong Tasi* [2002] 2 MLJ 591.
[39] *Kerajaan Negeri Johor v Adong bin Kuwau* [1997] 1 MLJ 418, 430.

anthropological studies that the Orang Asli communities have a long history of trading in forest produce.[40] To rule that the produce of the land could not be sold fails to take into account their practices and customs.

In cases involving native customary land in Sabah and Sarawak, judges differed on matters of land disposition and acquisition. In some cases, it was held that native customary rights (NCR) could not be acquired or transferred by way of sale and purchase or for value even within the community themselves,[41] 'as this could not have formed part of their customary practices'.[42] Others suggested that transfer can only be made in accordance with customary law and within the same community.[43] This principle was rejected by David Wong J in *Mohamad Rambli bin Kawi v Superintendant of Lands Kuching*[44] as discriminatory as other non-natives have no impediments to the disposition of their land. He held that native customary land rights could be exchanged for consideration as long as this was not inconsistent with customary law. He also asserted that the issue of whether natives in Sarawak have the right of disposition of NCR in land must be considered in the context of their customs and traditions together with the *Federal Constitution* which guarantees the special position of the natives. The custom of the Malay communities in the case allows disposition of land with NCR among themselves.[45]

CONCLUSION

Although limited, the *common law* provides some protection to customary land of the Orang Asli by recognizing their rights to the customary land that they have been living for a long time including access to the resources from the land. The right to customary land arose from the exercise of their custom recognized as a source of law. On this basis, the content and scope of the rights and interests of customary land are also determined by their custom. The rights continue to exist and protected by law unless it is extinguished through a legislative provision or act of executive government authorised by legislation. This right should be respected by all parties, especially the executives who play a major role in the administration of the land. In addition, knowledge and awareness of the general public is also important to safeguard the interests of the indigenous minorities.

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HALAL FOOD POLICY IN INDONESIA: IMPLEMENTATION OF HALAL FOOD GUARANTEES IN ENCOURAGING CULINARY TOURISM

[40] See eg, Lim Hin Fui, 'Aboriginal Communities and the International Trade in Non-Timber Forest Products: The Case of Peninsular Malaysia' in John Dargavel and Richard P Tucker (eds), *Changing Pacific Forests: Historical Perspectives on the Forest Economy of the Pacific Basin* (Forest History Society, 1992) 77; MN Tachimoto, *The Orang Hulu. A Report on Malaysian Orang Asli in the 1960s* (Center for Orang Asli Concerns, 2001).

[41] *Chelingga ak Asuh @ Asu (f) v Wong Sew Yun* [2009] 7 MLJ 84 (*'Chelingga Asuh'*); *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Divisions [*2008] 4 MLJ 415 (*'Bisi Jinggot (No 2)'*); *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Divisions* (Civil Appeal No. 01(f)-11-05/2012(Q)) (Federal Court) Judgment date: 11 July 2013 (Unreported) (*'Bisi Jinggot (No 1)'*).

[42] Hamid Sultan JC in *Chelingga Asuh* [2009] 7 MLJ, [10].

[43] Hamit Matusin in *Bisi Jinggot (No 1) [*2008] 4 MLJ 415.

[44] [2010] 8 MLJ 441, 43.

[45] Ibid, 37.

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ABSTRACT

Purpose of the study: This paper aims to identify factors of non-compliance with halal food certification in surakarta city and to formulate the concept of halal food product licensing in Surakarta as a culinary tourism icon after the enactment of Law No. 33 of 2014 concerning Halal Product Guarantee

Methodology: This paper is the field research using an empirical legal research methodology — research location in Surakarta City. Sampling was done by purposive sampling to get informants from the stakeholders of the city of Surakarta, Indonesian Ulema Council, academics, business people, and consumers. To obtain quantitative data, systematic random sampling was taken from SMEs in the culinary and processed food production sectors which were spread into five sub-districts in the Surakarta City

Main Findings: The findings of the study found that 90% of small and medium industry players in the field of food production do not yet have halal certification because there are no strict regulations at the regional level. Therefore regulations at the regional level are important to be immediately made and put into effect

The implication of this study: This research will provide benefits to local governments in formulating halal food product guarantee policies at the regional level.

Keywords: *Halal Food, Culinary Tourism, Product Guarantees.*

INTRODUCTION

Indonesia guarantees that every citizen is free to embrace their respective religions and to worship according to their faith and beliefs[46] . The number of citizens who embrace Islam in Indonesia is the largest, as many as 87% of the total national population of 207,000,000 people. Adherents of Islam in Indonesia are concentrated in Java and Sumatra as much as 84% with domestic growth of 1.56 % (BPS, 2010). This means that the state has the obligation and authority to guarantee Indonesian citizens of Islam as the country's largest population to carry out their religious orders.

One of the obligations of Muslims in carrying out their religious orders is that they are only allowed to eat halal and good food. Al-Quran arranges the law as the holy taboo of Muslims including Surat Al-Baqarah verse 168, Surat 'Abasa verse 24, Surat Al-Maidah verse 88, and Surat An-Nahl verse 114. The requirements for halal food are not forbidden , (2) Halal how to obtain it not from stealing, (3) Halal how to process it that is not by using something that is unclean such as using used cooking utensils used to cook contaminated food , and (4) Halal way to present, deliver and store it.

In a state life where one community interacts with other cities, it will not rule out the possibility of meeting basic needs such as food to be processed simultaneously in large quantities. For example, the food and beverage industry in Indonesia has become one of the

[46] The 1945 Indonesian Constitution guarantees the right to religion and worship as human rights as stipulated in article 29 paragraph (2). In addition, the Pancasila as an ideology and Grundnorm nation of Indonesia, in the first principle mentioned Belief in God Ice A which implies that 1) the State Guarantee residents to embrace each and worship according to their religion, 2) the State will facilitate the growth of religion and and the faith of citizens and mediator when religious conflict occurs 3) Tolerance in religion, in this case tolerance is emphasized in worshiping according to each religion.

mainstay manufacturing sectors in making a significant contribution to national economic growth. One of the keys to competitiveness in the food and beverage sector is food innovation and security. According to the Indonesian Minister of Industry, Hartato, In 2018, the food and beverage industry could grow by 7.91 percent or exceed the national economic growth at 5.17 percent. The food industry is one sector that supports the increase in the value of a public investment, which in 2018 contributed up to Rp56.60 trillion. Indonesian food and beverage products have been known to have competitiveness in the global arena through the diversity of types. This is indicated by the achievement of the export value of USD29.91 billion in 2018. (Industrial Ministry, 2018)

Food and beverage industry in a large scale industry, it is easier to administer and get halal certification due to adequate capital and professional management. Almost all food and beverage packaging originating from large sectors already have a halal label. However, food and beverage packaging arising from small scale industries still rarely includes a halal stamp.

In 2014, the Indonesian government passed Law No. 33 of 2014 concerning Halal Product Guarantee. This means that the state is obliged to provide protection and guarantee regarding the halal products consumed by the community as a guarantee for the people to worship and practice their religious teachings. With the existence of this Act, the regulation regarding the halal status of a product further guarantees legal certainty because it is already regulated in legislation.

At the local level in the regions, the application of the Act is still challenging to implement. For example, in the city of Surakarta as one of the culinary tourism centers in Indonesia that dominate the small industry in the city of Surakarta. The survey results concluded that 90% of small industry players in the culinary sector did not yet have a halal certificate due to various factors.

INDUSTRY	**Year**				
	2012	**2013**	**2014**	**2015**	**2016**
Small Industry (unit)	1,512	1,561	1,582	1,608	1,634
Medium Industry (unit)	126	150	151	158	167
Large Industry (unit)	59	63	67	68	69

Table 1. Number of Surakarta City Industries (Surakarta City Government, 2016)

Saeroji and Wijaya in their research related to mapping culinary tourism in Surakarta City said that the potential of Surakarta City has an excellent opportunity to be developed as a culinary tourism destination city so that it can attract tourists to visit Surakarta (Saeroji & Wijaya, 2017). This should be an awareness of the government given that the increasing global consumption of halal products increases from year to year, it is estimated that in 2020 the use of halal products will reach 2.6 trillion USD.

This is a massive potential for the food product industry, not least in Indonesia as the population with the largest Muslim population in Indonesia. Nowadays, halal is a universal concept, covering all aspects of quality, hygiene, health, and other services. Halal certification is the standard of choice not only for Muslims but also for non-Muslim consumption. Halal has become a global issue that now covers various aspects of people's needs and lives. Besides, halal certificates can provide added value to the quality of food products that can make food products able to compete globally and expand markets.

LITERATURE REVIEW

Hasan and Marso in their study related to religion and its consequences in the behavior of purchasing halal food, stating that religiosity, attitudes, and behavioral intentions influence someone in purchasing halal products. The results of this study will provide an overview for industry players and the government as policymakers to improve marketing strategies and make policies in Indonesia and Malaysia to prioritize the purchase of halal food and products. In other words, Halal is not only a matter of religion but also an opportunity to increase sales and gain competitive advantage (Hasan and Marso, 2017).

Halal products or food are being discussed all over the world because of its recognition as an alternative benchmark for safety, cleanliness and quality assurance of what humans consume or drink every day. Thus, the products or foods that are produced according to the halal recipe will be accepted by Muslim consumers and consumers of other religions. For Muslim consumers, halal food and drink mean that the product has fulfilled the requirements stipulated by Sharia law whereas, for non-Muslim consumers, it represents a symbol of cleanliness, quality and safety products when produced strictly under the Holistic Halal Guarantee. Muslim and non-Muslim consumer awareness describes their perceptions and cognitive reactions to products or food on the market. The findings show that religious beliefs, exposure, certification logos, and health reasons are potential sources of Muslim awareness about halal consumption. However, health reasons are the predictors that most contribute to the level of halal knowledge (Ambali & Bakar, 2014)

Nurachmi observed the existence of the halal food industry in developed and developing countries and ways to increase the acceptance of halal products from non-Muslim communities. The findings show that although developed countries have fewer Muslims but the market share for halal food is high. For example, Thailand, the United Kingdom, and Australia have successfully captured the opportunity of halal food in the global market. So, most of the halal food exporters come from these countries. The halal food industry can be a catalyst for developing other potential sectors that are negatively impacted by the economic crisis in a country with a smaller Muslim population. Awareness to consume halal food also comes from non-Muslims because it is safer and fresher. Therefore producers need to promote halal food that is suitable for safety. (Nurachmi, 2017)

According to Dube, Haijuan, and Lijun, many factors influence local companies to easily penetrate international markets including the environment, target markets, and regulations. Halal certification is one that can promote and facilitate local companies' access to global markets. The halal certification system is the main asset that can help companies overcome the obstacles inherent in the transition to global markets if the order is easy to apply (Dube, Haijuan, & Lijun, 2016).

The tourism sector is one sector that is able to increase employment and increase economic growth. Nowadays, halal tourism is starting to become famous. This is in line with the increasing number of Muslim tourists from year to year. The development of halal tourism

began to be carried out by various countries, both Muslim and non-Muslim countries. The main principles and/or requirements for halal tourism are providing halal food, no liquor (containing alcohol), and not serving products from pigs. An increase in Muslim tourists is an opportunity for the tourism sector to develop halal tourism. So that several countries began to take this opportunity by promoting halal tourism, both lands with a majority of Muslims and non-Muslims such as Japan, South Korea, Australia, and Thailand. It is expected that tourist attractions, hotels, restaurants, airlines, travel agents and all those involved in tourism can be engaged in halal tourism (Satriana & Faridah, 2018)

From the literature review above, it can be seen that with the halal certificate, the value of a food product does not go down even more. Evidenced by the interest in food products with halal labels compared to those who did not list it. Consumers who choose products with the halal stamp are not only Muslims who maintain the halal products they consume, but from non-Muslims who are confident of the guarantee of healthy food from products labeled as halal. The growth of the tourism climate with the concept of halal, making the number of tourists is also predicted to increase. Thus, the study of halal product guarantee is a critical study to be carried out. Especially in Indonesia with the largest Muslim population, but the guarantee of halal products is still implemented well, especially at the local level.

RESEARCH METHODS

This type of research is included in empirical juridical research, namely the kind of sociological, legal research (field research). This legal research examines the applicable statutory provisions and what happens in reality in the community (Arikunto, 2002). The approach used is a mixed method that is a combination of qualitative and quantitative approaches. Qualitative approach is used to obtain data related to the concept of halal licensing in Surakarta City Sampling in a qualitative approach was carried out *by purposive sampling* aimed at getting informants relevant to research data, from informants such as the Surakarta City government, the Regional People's Representative Council, Indonesian Ulema Council, Consumer Protection Foundation, academics and others. to obtain quantitative data, the sampling was carried out in a *systematic random sampling* to get respondents as research samples. The respondents came from small and medium businesses in the culinary sector which were spread into five different sub-districts in the Surakarta City area. Primary data collection techniques from stakeholders through in-depth interviews, while data collection from small and medium industry entrepreneurs conducted through surveys of food and beverage businesses using a research questionnaire.

RESULTS AND DISCUSSION

Factors of Non-compliance with Halal Food Certification in Surakarta City

The Muslim population in Surakarta in 2016 was 446,394 people or 78.19%. There are dozens of culinary industry centers with hundreds of business units scattered in the city of Surakarta. From the results of a survey in 2019 of 131 respondents in the food and beverage industry in Surakarta, there were not many small and medium industry players who had taken care of halal certification. In terms of quantity, 83.97% of the respondents had never taken care of halal certification. That is, only 16.03% of small and medium industry players who have taken care of halal certification.

This is an indication of non-compliance of small and medium industry players in the obligation to have halal certification for the products produced. However, the non-compliance factor to the requirement to take care of halal food certification is not because of the perception that considers halal certification is not essential to their products. Based on the survey results, 58.02% of respondents said that halal certification was "important," and 29.77% said "Very important". While respondents who stated that halal certification was "less important" by only 12.21%. This shows that the perception of Small and Medium

Industries in Surakarta City towards halal certification actually gives a positive value for the progress of their business.

The two findings above are counterproductive in that the understanding of small and medium industry players related to halal certification is fundamental to have as a value-added product that is produced, but apparently, only a tiny portion has halal certification for its products. This indicates there are other factors that hinder the implementation of halal certification obligations for small and medium industry players. From the survey results, several factors include:

1. Costs that are too expensive in taking care of halal certification. Although the majority considers halal certification necessary, right but regarding the expenses incurred to take care of halal licensing, 33.59% of respondents find it expensive, 19.08% of respondents find it quite expensive, 16.03% of respondents consider very expensive, and 15.27% respondents consider it quite cheap. Whereas those who feel reasonable 13.74% of respondents and very reasonable at 2.29% of respondent. This shows, the reason for the high cost incurred to obtain halal certification of 2.5 million for two years, is a factor that is quite burdensome for small and medium industries in Surakarta to take care of halal certificates.
2. The reasons of respondents who answered halal certification " Less Important" for Small and Medium Enterprises, were based on the perception as follows:

   a. There is an assumption without halal certification that the business is still running

   Respondents who stated that the assumption without halal certification continued to run a relatively large corporation that is equal to 56.67%. This happens because the government, as the enforcer still has not fully obliged SMEs to hold halal product certification. From the findings in the field, SMEs are only encouraged to take care of halal certification, not yet requiring. So it is not too much of a problem if the SMEs does not however have it Halal certificates in the products they produce.

   b. There is a mismatch of beliefs held by SMEs

   Perceptions of respondents who answered halal certificates were less important because of differences in their beliefs with the concept of halal originating from Islamic teachings. Therefore, there is a government obstacle in communicating the importance of halal certification for all SMEs in Surakarta.

   c. There is a presumption that there is no relationship between the halal certificate and the customer's trust.

   The public, as consumers or customers of SMEs products in the city of Surakarta are also considered not to be too concerned about whether the products they buy are officially certified halal or not. During this time, trust between customers and buyers has been built because of mutual trust despite the absence of halal certificates held by SMEs.

   d. There is an assumption that small-scale business is not the time to get a halal label.

   Although this factor is relatively small, namely 3.33% of respondents who stated that halal certification is less critical for SMEs, but this assumption is a linear reason with the high cost that is a factor causing small and medium industry players are reluctant to take care of halal certification. This is motivated by the fact that the net income per month of the SMEs is not enough to pay the cost of halal certification.

***The Concept of Halal Food Guarantee in Surakarta City As Culinary Tourism* Icon**

Halal food security at the regional level can be done by making local regulations. This is also a derivative of Law No. 33 of 2014 concerning Halal Product Guarantee as Stufenbau Theory

initiated by Hans Kelsen related to the hierarchy of laws and regulations. Some things that become the urgency and the basis for the submission of halal product guarantee regional regulations in the city of Surakarta are due to the following reasons:

1. **The majority of the population in the city of Surakarta are Muslim.**

From the data above, the Muslim population in the city of Surakarta in 2016 was 446,394 people or 78.19%. In understanding Muslims consuming halal food is an obligation for every Muslim. Because consuming halal food and drinks for Muslims is not limited to fulfilling the necessities of life but is a form of application of religious teachings. Mentioned in the Qur'an Abasa verse 24 that "man should pay attention to the goods consumed and used". Based on this theorem, the arrangement for giving halal labels to all major food products is very urgent to be done by the Surakarta City government.

2. **Consumer protection is an important thing that must be carried out by governments at all levels.**

The birth of Law No. 33 of 2014 concerning Halal Product Guarantee is a regulation that reflects consumer protection from the central government, especially for consumers who are Muslim in the entire territory of the Unitary Republic of Indonesia. Therefore, in regulating local products in each region, regional regulations can be made more specific and detailed, which is a derivative of law with general rules. Before the birth of Law No. 33 of 2014 concerning Halal Product Guarantee, the Government has ratified Law Number 8 of 1999 concerning Consumer Protection, in Article 7 this Law requires Business Actors to provide accurate and honest information on each product they produce. In principle, the Consumer Protection Act was born to give legal certainty to consumers of all forms of violations from producers or business actors that cause harm to consumers, including hazards or losses that may arise as a result of not providing accurate information.

Whereas based on article 4 of the Consumer Protection Act, it is explained that one of the rights of consumers is the right to comfort, security, and safety in consuming goods and/or services. Acts that result in detrimental to consumers due to the use of goods and/or services must be avoided. Like the act of putting a halal label on an illegitimate food product. Concerning the halal guarantee of a food product, it is normatively determined in Article 8 paragraph (1) letters a through Law No. 8 of 1999 concerning Consumer Protection, which states that business actors are prohibited from producing and or trading goods and/or services that:

a. It does not meet or does not comply with the required standards and statutory provisions.
b. Not in accordance with the net weight, net or net content, and the amount calculated as stated on the label or label of the item;
c. Not in accordance with the size, size, scale, and the number of calculations according to the actual size;
d. Not in accordance with the conditions, guarantees, features or efficacy as stated in the label, label, or description of the goods and/ or services;
e. Not in accordance with the quality, level, composition, processing, fashion style or specific usage as stated on the label or a description of the said goods and/or services;
f. Not in accordance with the promises stated in the name, emblem, description, advertisement or promotion of the sale of said goods and/ or services.
g. Not mentioning the expiration date or the best period of use/utilization of certain goods.
h. Not following the provisions of "halal" production which are listed on the label.

With the provision as mentioned above especially Article 8 paragraph (1) letter h, each business actor (producer) in producing goods and/or services has an obligation to:

a. Comply with or meet the regulatory requirements or conditions set by the government.
b. Guarantee that the food products are safe or harmless if consumed and labelled halal.

In the context of the city of Surakarta, which is a tourist destination, including culinary tourism in it, consumer protection to clarify the status of the food sold by the seller is essential to be regulated explicitly through local regulations . Especially in the city of Surakarta a lot of foods that are considered not for Muslims such as dog meat satay, pork satay , etc.

So with a definite arrangement, consumers who come from outside do not need to worry about the food they consume. Precisely with a clear label that will provide added value and the selling value of Surakarta City outside the region as a halal tourism destination. So that it can increase Regional Original Revenue for Surakarta City Regional Budget

3. With the existence of a halal guarantee regional regulation assisting the operation of licensing mechanisms at the local level is becoming increasingly evident.

As a legal product at the local or regional level, local regulations must refer to the rules above them such as Laws, Ministerial Regulations, and Higher Government Regulations. Included in the submission of halal guarantee regulations in the city of Surakarta must at least contain the points of the law regarding Supervision and Guarantee of Halal Products in Surakarta City, which can regulate the following matters:

a. To guarantee the availability of Halal Products, the ingredients of products declared as halal are determined, both materials derived from raw materials of animals, plants, microbes, and materials produced through chemical processes, biological processes, or genetic engineering processes. Besides, the Halal Product Process is also determined which is a series of activities to ensure the halalness of the Product which includes the supply of materials, processing, storage, packaging, distribution, sale and presentation of the Product.
b. This Regional Regulation will regulate the rights and obligations of Business Actors in the City of Surakarta by providing exceptions to Business Actors who produce Products from Ingredients originating from prohibited Materials with the responsibility to explicitly include non-halal information on the packaging of Products or in certain parts of Products that are easily seen , is read, is not easily erased, and is an inseparable part of the Product.
c. In order to provide public services, the Surakarta City Government is responsible for conducting supervision and guarantee of Halal Products the implementation of which is carried out through team coordination involving; local government agencies that carry out religious affairs, local government agencies that carry out health and drug and food control affairs, local government agencies that carry out trade and industrial cases, government agencies that carry out the cases of Small and Medium Enterprises and the Indonesian Ulema Council of Surakarta City
d. The procedure for obtaining a Halal Certificate begins with the submission of the application for a Halal Certificate by the Business Actor to the Authorized Halal Product Supervisory and Guarantee Agency based on statutory regulations. Furthermore, the agency or agency that is authorized to examine the completeness of documents. Product halal inspection and/or testing is carried out by the Halal Inspection Agency. The Halal Examination Institution must obtain accreditation from the institution, the authorized institution in cooperation with the

Indonesian Ulema Council. The determination of the halal product is carried out by the Indonesian Ulema Council through the halal fatwa session of the Indonesian Ulema Council in the form of a decision on the Determination of Halal Products signed by the Indonesian Ulema Council. Halal Products Supervisory and Guarantee Agency is authorized to issue Halal Certificates based on the decision to determine Halal Products from the Indonesian Ulema Council.

e. Business Actors applying for Halal Certificates bear the cost of halal certification. In order to expedite the implementation of Halal Product Guarantee, this Regional Regulation will later provide a role for other parties such as the Regional Government through the Regional Revenue and Expenditure Budget, companies, social institutions, religious institutions, associations, and communities to facilitate the cost of halal certification for businesses micro and small.
f. In order to guarantee the implementation of Halal Product Guarantee, the Surakarta City Government supervises the Halal Examination Institution ; validity period of Halal Certificate; Product halalness; inclusion of Halal Label; inclusion of non-halal information; separation of locations, places and means of processing, storage, packaging, distribution, sale, and presentation between Halal and non-halal Products; the existence of Halal Supervisors; and / or other activities related to the guarantee of Halal Products.
g. To guarantee law enforcement against violations of this Law, administrative and criminal sanctions are determined.

4. The role of the Regional Representatives in the involvement of Halal Product Guarantee in Surakarta

Then the mechanism for filing a local regulations can be proposed by the community through the Surakarta City government and then discussed with the Regional House of Representatives with active involvement or active participation from the district.

It could also be through the usual mechanism in accordance with the Surakarta City Regional Representative Council Regulation No. 1 of 2017 concerning Amendment to the Surakarta Regional Representatives Regulation No. 1 of 2014 concerning the Standing Orders of the Surakarta City Regional Representative Office in article 107 stated that:

1. Draft of local regulations originating from the Regional House of Representatives can be submitted by members of the Regional Representatives , the commission, the combined commission, or the Regional Formation Board.
2. Draft of local regulations that has been provided by members of the Regional People's Representative Council, commission, joint commission or Regional Formation Board, is submitted in writing to the leadership of the Regional People's Representative Council accompanied by an explanation or statement and/or academic paper.
3. Description or statement of the Draft Law proposed by members of the Regional People's Representative Council:
   a. main thoughts and material charge arranged;
   b. Name list; and
   c. Proposer's signature

From these points of consideration, the submission of a draft regulation on halal products in the city of Surakarta is not a difficult thing to do, staying *political will* from both the executive and legislative government to propose and carry out the further discussion in the future.

CONCLUSION

The implementation of halal food security in the city of Surakarta has not been appropriately implemented even though the Government of Indonesia has enacted Law No. 33 of 2014 concerning Halal Product Guarantee. This is due to the factor of SMEs entrepreneurs who still consider halal certificates, not an obligation due to the absence of strict sanctions. Also, the high cost of obtaining a halal certification is the biggest reason for SMEs entrepreneurs not to certify halal products. This is certainly counterproductive to the rights of the community as consumers who must get guarantees from the Government. Moreover, Surakarta is a culinary destination for both local and foreign tourists. To implement halal food security in the city of Surakarta, the Regional House of Representatives as an institution that has the authority to draw up regional regulations can submit initiatives to the city government of Surakarta to jointly make a Regional Regulation on Halal Product Guarantee. So that halal food security in the city of Surakarta will be easier to implement.

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EMPOWERMENT PRODUCTIVE WAQF FOR TO INCREASE PUBLIC WELFARE

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ABSTRACT

Waqf serves the economic potential and benefits of waqf property for the sake of worship and to advance the general welfare. Therefore, the management and development of the waqf property is done productively That will have more results, especially economically. The problem is that people do not understand the maximum of waqf empowerment productively. The research purpose for explained the empowerment of productive waqf to increase public welfare. The research is normative juridical research. The source of data in the research is secondary data. The technique to collecting data is library research. Analyzed data that used is qualitative approach. Based on the research discovered that the waqf can develop and be beneficial for the benefit of the people. One of the strategic steps to be done, among others, is to improve the role of waqf to advance the general welfare. Management and development of waqf is done productively for example used for production capital, and businesses that do not contradict sharia principles. Waqf can also be used for education and health fund of non-capable groups. So beneficial to the current generation and next generations.

Keywords: *Empowerment, productive waqf, public welfare*

INTRODUCTION

Waqf has function of worship to Allah SWT and social functions. Waqf is a form of manifestation or statement of the faith of a person who has a steady and high. Waqf is a means that can be used by a muslim to keep and nurture human relationships with Allah SWT and human relationships with other human beings in society, as a religious order.

Religion always has a melting point, because its teachings if deeply bioavailable always teach various social virtues. There is no religion in which his teachings give birth to thought and destructive actions to society (M. Qorib; 2018).

Waqf serves the economic potential and benefits of waqf property for the sake of worship and to advance the general welfare (article 5 Law Number 41 of 2004 concerning Waqf). Therefore, the management and development of the waqf property is done productively (article 43 Law Number 41 of 2004). For the sake of building economic strength, waqf needs to be developed. The problem is that people do not understand the maximum of Waqf empowerment productively.

The purpose of this research is to describe the empowerment of productive waqf to improve people's welfare.

LITERATURE REVIEW

Waqf and Productive Waqf

Waqf is as a legal act of wakif to separate and/or surrender part of its property to be utilized forever or a certain period in accordance with its interests for the purpose of worship and/or general welfare according to sharia (article 1 point 1 Law Number 41 0f 2004 concerning Waqf).

The definition of waqf according to The Compilation of Islamic Law (KHI) as stated in article 215 paragraph (1), it is stated that waqf is a legal act of a person or a group of people or a legal entity that separates some of its possessions and To institutionalized for the sake of worship or other general purposes in accordance with Islamic teachings.

Waqf is a binding transaction that has the legal force binding only with a speech or deed that indicates waqf. Therefore, it may not cancel by pulling back or otherwise (Mardani; 2018).

Waqf is a legal act of wakif to separate and or surrender part of its property to be utilized forever or for a specific term in accordance with its interests for the purpose of worship and or the general welfare according to sharia.

Productive waqf can be understood as a waqf to obtain a top priority aimed at the management efforts of waqf is more productive and produce. The social function of the waqf has a sense that the element of the benefit and benefits of waqf should be the primary basis for the act of waqf (H.A. Faishal Haq; 2017).

The productive waqf is a transformation from a natural waqf management to the management of a professional waqf to increase or add the benefits of waqf. In addition, productive waqf can be interpreted as the process of management of waqf objects to increase (maximize) The functions of waqf to meet the needs of the parties who are entitled to benefit, so that the needs of the right to accept the benefits of waqf in certain boundaries has been functioning for the welfare of the society (Jaih Mubarok; 2008).

RESEARCH METHOD

The research is normative juridical research. The source of data in the research is secondary data. The technique to collecting data is library research. Analyzed data used is qualitative approach.

RESULTS AND DISCUSSION

Waqf aims to provide benefits or benefit of the assets that are represented by the person who is entitled and used in accordance with Islamic Shariah teachings.

Waqf is not only beneficial for the waqif, but also beneficial for others. Rasulullah SAW has said on one of them is: "... Whoever cares about the needs of his brother, Allah always cares about his needs... ".

Waqf has social functions in people's lives. Waqf function in social context for example in the development of community economic life (Athoillah; 2014).

Waqf is not only beneficial for other parties, but also beneficial for wakif. For those who care about others, Allah will also care for him and the person who has sufficient needs of others, Allah has guaranteed the fulfillment of his needs.

Waqf has four functions (Muhammad Abid Abdullah al Kabisi, 2004), namely:

1. Economic function.
   One of the most important aspects of Waqf is the state as an effective wealth transfer system.
2. Social functions.
   If waqf is managed and implemented well, the shortcomings of the facilities in the community will be more easily resolved.

3. Function of worship.
   Waqf is a part of worship in the execution of the command of Allah SWT, and in strengthening relations with him.
4. Moral function.
   Waqf will foster a good ahlak, where everyone is willing to sacrifice what he loves for a higher purpose than his own personal interests.

Waqf is managed by the Republic of Indonesia Law Number 41 of 2004. In the Waqf Law regulated that the waqf property is a stationary object and moving objects (article 16). The goods that can be represented are money, precious metals, marketable securities, vehicles, HAKI, lease rights, etc. The allocation of Waqf objects is not solely for the benefit of worship and social facilities, but also directed to promote the general welfare by realizing the potential and economic benefits of the waqf property. If the waqf property is utilized and managed productively will gain more results, especially economically.

Economic development carried out will not be successful and beneficial if there is still a social gap and there is no equitable, both in the economic, social, and legal protection sectors (Rachmad Abduh and Faisal Riza, 2018). The high poverty rate can lead to social turmoil. One effort to reduce the economic gap in society is to do the management of waqf productively.

Waqf holds a large potential to be a productive asset, which in the end is not only able to support religious social services, but is also directed towards supporting various initiatives and objectives of social justice.

In the discussion of productive waqf is quite broad because the fact that the management of waqf is supposed to have a productive value that can present a mass value greater than before. But now, the term productive waqf is more on new forms in the waqf that can be empowered in the community among them (Siska Lis Sulistiani; 2017);

1. Waqf money or waqf cash,
2. Waqf gold or dinar dirham,
3. Wakaf HAKI,
4. Waqf of sharia insurance policy,
5. Waqf plantation,
6. Waqf land,
7. Waqf transportation,
8. Wakaf oil palm plantation,
9. Waqf tree jabon,
10. Wakaf family,
11. Waqf carde,
12. Wakaf khairi,
13. Waqf property,
14. Waqf qur'an,
15. Waqf animal cattle,
16. Waqf apartment,
17. Waqf company,
18. Waqf benefits,
19. Waqf building,
20. Waqf vehicles,
21. Waqf mosque, and others.

If the waqf property owned professionally managed and productive, then the property will generate large funds. The funds will be utilized for the benefit of the economic empowerment of the people (Suhrawardi K Lubis, 2010).

The spirit of empowerment of waqf potential is professional and productive is done solely for the welfare of the people, especially in Indonesia, for that in management there are

at least three basic philosophies that should be emphasized when empowering waqf productively, namely (H.A. Faishal Haq; 2017);

1. Integrated management pattern.
   This aspect requires a comprehensive design not partial, so that all functions and objectives that have been formulated can be optimally managed.
2. Principle of Nazhir welfare.
   Nazhir is the dominant factor in the development and empowerment of Waqf treasures productively, as a reward for the trust in which it should be the position of Nazhir considered optimally by providing award Proportional to the capacity and responsibilities in seeking the development of productive waqf. Thus Nazhir can be categorized as an alternative potential that can be expected to gain prosperity.
3. Principle of transparency and accountability.
   The Waqf body and the institution that was disputed must be periodic events related to the process of fund management to the people in the form of audited financial report, including the fairness of each post its costs.

The development and management of waqf asset function is productive and the effort to revive the property of waqf is static or prone to death.

In order for waqf to be developed and beneficial for the benefit of the people, one of the strategic steps to be done is to increase the role of waqf as a religious institution that not only aims to provide the means of worship only, but also to promote the general welfare, such as developing productive waqf that results can be used for the benefit of the wider community. The idea related to waqf is the main choice, when people are in the acute poverty (H.A. Faishal Haq; 2017).

Management and development of waqf is done productively among others by means of collecting, investment, production, partnership, trading, agrobusiness, mining, industrial, technological development, building construction apartments, flats, supermarkets, shops, offices, educational facilities or health facilities, and businesses that do not contradict sharia principles.

Through the worship of waqf, the underprivileged group will be helped from the proceeds of the waqf property. This is due to the large number of waqf assets collected and invested in productive efforts that can provide sustainable results. The result of this waqf was adopted to help the less capable people (Suhrawardi K Lubis and Farid Wajdi; 2016).

Waqf fund can also be used for education costs, especially for children who have achievements, children from the poor, capital assistance for the community, or also to open industrial factories that can receive a lot of workers.

In addition to contributing to the development of Community welfare, the practice of Waqf also planted the spirit of sacrifice and cooperation (Suhrawardi K Lubis and Farid Wajdi; 2016).

If the waqf property is managed professionally and productively, the funds will be utilized for the benefit of the empowerment of people (Suhrawardi K Lubis, 2010).

Waqf can be developed and beneficial for the benefit of the people, one of the strategic steps to be done, among others, is to improve the role of waqf to promote the general welfare, such as developing cash waqf that can be used for the benefit of the wider community.

Waqf is not only used as a place of worship. Waqf can be developed productively for example used for production capital. Through waqf are able to help the less capable. So it would be beneficial not only for the current generation, but also beneficial for generations to come. Example productive waqf is cash waqf.

Waqf cash is quite prospective and potential to raise the funds of society to increase and move the wheels of the existing economy becomes greater (Khairul Azmi Nasution; 2019). The sample of productive waqf is cash waqf.

Cash waqf commonly referred to as waqf in cash is the form of money in the form of rupiah that can be managed productively, The result is utilized for the *mafquh alaih*'. This means the money that is represented should not be represented directly to *mauquf 'alai*h, but

Nazhir must invest first, then the investment result that is given to *mauquf 'alaih* (Siska Lis Sulistiani; 2017).

Economically, waqf of money (cash) is potential to be developed in Indonesia, because with the model and concept of cash waqf is the power to reach the mobilisations will be more equitable to the target community in need compared to the concept of waqf traditional conventional, namely the form of physical property that is usually done by families who are able and located ([1] H.A. Faishal Haq; 2017).

As an example related to the potential of waqf in improving the economy of people can be seen in the description below (the waqf team of waqf assembly and ZIS PP. Muhammadiyah, 2010);

The number of Muhammadiyah members and sympathizers is estimated at 1.5 million people. Average monthly earnings Rp. 800.000,-up to Rp. 8. 000.000,-.

This amount can be achieved if 1500 potential congregation can be moved with the realization that waqf money same as value with infaq or charity jariah.

So the potential of waqf money is 12 x Rp. Rp. 38.500.000.000,-= Rp. 462.000.000.000,-

If waqf is well managed and correct, the asset is not impossible to be able to increase some members of the Indonesian community (especially poor people) and able to improve the quality of education, health, and others are even able to reduce the number of poverty and unemployment figures.

CONCLUSION

Waqf aims to provide benefits or benefit of the assets that are represented by the person who is entitled and used in accordance with Islamic Shariah teachings.

If the waqf property owned professionally managed and productive, then the property will generate large funds. The funds will be utilized for the benefit of the economic empowerment of the people.

Waqf can be developed and beneficial for the benefit of the people. One of the strategic steps that must be done, among others, is to improve the role of waqf to promote the general welfare. Management and development of waqf is done productively for example used for production capital and business not contrary to sharia principles. Waqf can be used for education and health fund of the less group. So beneficial to the current generation and future generations.

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SHARIA BANKING DEVELOPMENT THROUGH EMPOWERMENT OF ISLAMIC BUSINESS ETHICS

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ABSTRACT

Banking has an important role in developing and supporting the country's economy, especially after the promulgation of Law Number 21 Year 2008 concerning Sharia Banking. Islamic economics in Indonesia is now beginning to be recognized and approved by the community, given the proliferation of Islamic-based banks makes the community understand the systems in the Islamic economy. This research aims to 1). Describe the development of Islamic banking in Indonesia; 2). Describe the development of Islamic banking through the empowerment of Islamic business ethics. This type of research is a juridical – normative study with a qualitative doctirinal approach. Based on data from Bank Indonesia in 2018 there were 14 Sharia Commercial Banks, 20 Sharia Business Units and 167 Sharia People Financing Banks. Overall, the network of Sharia Commercial Banks and Sharia Business Units is 2,266 Units. Despite the positive growth trend, efforts to introduce Islamic economics and the role of Islamic economics in Indonesia need to be increased in order to support the development of the Islamic economy in people's lives through empowering Islamic business ethics. Legal predictability must have the ability to provide a definite picture in the future regarding the existence of sharia banking or relationships that are carried out now to develop sharia banking that upholds Islamic business ethics.

***Keyword(s)*:** *Islamic Business Ethics, Islamic Banking.*

INTRODUCTION

Indonesia as an archipelago with a population of 237 million people achieved an average economic growth of 5.9% during 2008 – 2014. In September 2015, the Indonesian government made 12 economic policy packages. The series of economic policy packages aims to revive the economy in Indonesia. Some policy packages are made, among others, to simplify the bureaucracy, remove regulations that hamper, reduce tariffs, adjust to international practices, and provide incentives to Micro, Small, Medium Enterprises "MSMEs" (Coordinating Ministry for Economic Affairs, 2015). So that the positive impact on economic growth in 2018 was recorded at 5.17%, with an upward trend compared to the previous year's growth of 5.07% and is the highest growth since 2013 (Bank Indonesia, 2018).

Since 1970, the world has witnessed various business scandals and controversies as a result of the operation of businesses, especially large – scale businesses, which are very detrimental to society. Various forums and movements that voiced morality in business were even louder. Correspondingly, business ethics as a field of study is developing rapidly, starting in the U.S and in recent years starting in Indonesia. The crisis experienced by the Indonesian people today can basically be defined as a crisis of credibility rooted in a crisis of moral integrity. The trust of the community and the outside world towards the political elite and the New Order economic elite and their remnants is diminished because of irresponsible behavior that has caused enormous harm to society and the outside world. The economic crisis and multidimensional crisis in Indonesia that occurred since 1997 actually originated from one thing, namely the not formulation of "*ethics*" where ethics plays a central role as a paradigm of state administration practices, one of which is in the economic field, namely in business. The credibility and success of the Indonesian people in international business is also determined by the extent to which our business understands and anticipates this development. In other words, the effort to get out of the storm of crisis that is being experienced by the

Indonesian nation today also involves increasing ethical performance in business behavior (Bangsawan M.I, 2017).

The role of religion in Indonesia has a very important role in social life. This is stated clearly in Pancasila as the ideology of the Indonesian nation's first precept "The Almighty God". The role of religion in connection with the development of human life, Djatmoko did not hesitate to declare that religion is the main factor that plays a role in realizing the patterns of world perception for humans those perceptions also influence the development of the world and the course of history. On the other hand, history also implements changes and continual adjustments to these patterns of perception, especially in a rapidly changing society. That perception has relevance to worldly activities that are motivated by the religious belief system. (Asifudin A, 2004). The development of Islamic banking in Indonesia began with the hope of the Indonesian Muslim community in the 1970s to be able to conduct sharia – based transactions, since in several other countries where the majority of the population is Muslim has established sharia-based banking. The Muhammadiyah Tarjih Council has made a decision regarding banking law (1968 & 1972) which in essence determines that usury in its law is haram with nash sharih Al-Quran and As-Sunnah, and advises the Muhammadiyah Central Leadership to realize the conception of the economic system, especially banking institutions, which is in accordance with Islamic principles (Jundian, 2009).

The Islamic finance industry is in accordance with the demands of the times and has become a historical obligation to be born and grow into an alternative financial system - solutive. To realize this is not easy, there are many challenges and obstacles that must be faced by the financial industry in the future. Islamic financial industry both banks and non-banks which is currently still in the early stages of its evolution. Although the growth rate is so fast, so far only occupy a small niche in the financial sector in Muslim countries, especially in the international financial sector. Despite a number of difficulties, the banking Islamization movement went well. Progress in the last quarter century shows encouraging results (Nurhisam Luqman, 2016). Islamic banks until 2018 have experienced rapid development. Quantitatively, the development of sharia banks can be seen from the number of banks conducting business activities based on sharia principles and in terms of business volume. Until 2018 there were 14 Sharia Commercial Banks, 20 Sharia Business Units and 167 Sharia People Financing Banks. In total, the Sharia Commercial Bank and Sharia Business Unit office networks total 2,266 offices (Bank Indonesia, 2018).

Islamic banking in carrying out banking operations is not only for business purposes, in the form of material benefits, but also to pursue happiness in the hereafter. For this purpose, Islamic Banks in carrying out banking operations are not only based on banking regulations in general but also based on Islamic regulations. Islamic banks must abide by the principles of sharia that are implemented from the establishment to the operations (Wahyu Danang, 2014). In terms of empowering Islamic business ethics, Islam is not bound by a particular economic system, liberal or socialist economic patterns are not disputed if it meets three characteristics, namely justice, not exploitative and always productive, especially among business people as one of the prerequisites for the development of creative industries. Based on this, it is necessary to study further and in depth with regard to the Development of Islamic Banking through Empowering Islamic Business Ethics.

MATERIAL AND METHODS

This paper is a scientific paper from the results of a literature study (Lawrence Neuman, 2012). library research studies based on data or materials needed in completing research, data obtained from the library consists of general reference sources consisting of theories in the form of books, encyclopedias and others, as well as special reference sources namely theories that are in the form of research journals and others (Nursapia Harahap, 2014). The method used is juridical – normative study with a qualitative doctirinal approach. In this type of legal research, the law is conceptualized as what is written in the legislation or the law is conceptualized as a rule or norm which is a benchmark of human behavior that is considered appropriate (Bani Ahmad, 2009). Research in literature studies is useful in locating and

concluding theories and concepts that will form the framework in making this paper. Data sources from this writing are the literature and library materials related to the focus of the problem which are then analyzed based on existing facts.

RESULTS AND DISCUSSION

The Important Role of Islamic Religion in Empowering Islamic Business Ethics

The economic sector is the place of origin of secularization, especially in the sectors of the economy which are being shaped by capitalistic processes and industrialization (Nadjib, Emha Ainun. 1995). Indonesia, especially in the economic environment, the existence of business ethics still seems to be a concept. According to I.S Susanto, the ethical dimension in business circles is very thin and even neglected. (Susanto, 1995). In a country whose people are religious, have the ideology of Pancasila and still uphold the moral values the condition seems very alarming. There are several things that cause the increasing importance of the role of Islam in business ethics that is applied correctly, including the public sector or government, as well as the corporate sector in general (Dochak latief, 2006). These include :

a. Declining Morality of Nations
   Rukmana, assessed that business practices carried out so far still tend to ignore ethics, a sense of justice and are often colored by dishonest business practices or moral hazard. Corruption, collusion, and nepotism which are increasingly widespread in societies that were previously only at the central level and now extend to regions, and borrow the term teacher of the nation namely Gus Dur, corruption that was previously under the table, now reaches to the tables being corrupted is a form of moral hazard among the political elite and bureaucratic elite. This indicates that in some of our societies there has been a moral crisis by justifying all kinds of ways to achieve goals, both individual goals of enriching oneself and group goals for the existence of group sustainability (Rukmana, 2004);
b. The Role of Business Activities is Increasingly Important
   The growing business activities in Indonesia coupled with the rapid flow of globalization requires the application of positive laws, clear moral standards are also needed, so that there is a balance between strong business people and weak business people. Therefore, the solution offered in the Islamic concept is cooperation either mudaraba, musharaka or murabaha whose profit sharing is based on real work, not predictions in the form of ascertained profitability over time with a certain percentage, such as interest instruments in conventional economics. The Islamic economic system is more characterized by ethics, where in an economic system such as this, all economic activities are related to the embodiment of aspects of the ethical value, also when faced with economic challenges (Jusmaliani, 2008);
c. Trust as a Main Requirement
   Trust or mutual trust is the main requirement in business activities. Business actors have long realized that in reality business relationships will not work well if there is not enough trust. Even the emergence of circles of exclusive business people based on ethnic classification stems from a relationship of trust that has been forged with a debt relationship of gratitude in earlier periods (Robby I.C, 1995). Frans Magnis - Suseno also confirmed that without this trust, business will not run well, because trust provides the possibility for interdependencies that allow mutual development (Franz Magnis Suseno, 1991). Trust will greatly save the cost of production and distribution of goods and services / cost efficiency which is an important part of increasing competitiveness;
d. Business Stakes Everything
   Business activities risk everything, self - esteem, good name, besides of course beneficial both in the sense of non-material material. Development in Indonesia is directed at the emergence of economic pockets controlled by certain parties which are expected to

provide a trickle of economic prosperity for the people or the economic sectors below turns out to be mere figments. It is precisely this large and developed business sector that is increasingly accumulating capital and even absorbing capital from lower and middle class people to invest in industries controlled by the business networks they control. Indeed the theorem in the world of economics always applies that once a human being has mastered certain economic activities and achieved them well, he will always repeat them in the years to come. Just as the theorem stated by Lord Acton relating to power: power tends to corrupt and absolute power, corrupt will also occur absolutely. Unlike the case in Muslim business people, when involved in business they are involved in dealing with two parties: each other, who buys and sells and the Creator, who presents him with the principles of equality and fairness in all actions in his business transactions. Muslims are required to always be aware of the fact that all their investments and efforts are a means to produce short-term results and profits, namely worldly benefits, and long-term profit gains, namely those that are ukhrawi (Ahmad Mustaq, 2003);

Development of Islamic Banking through Islamic Business Ethics

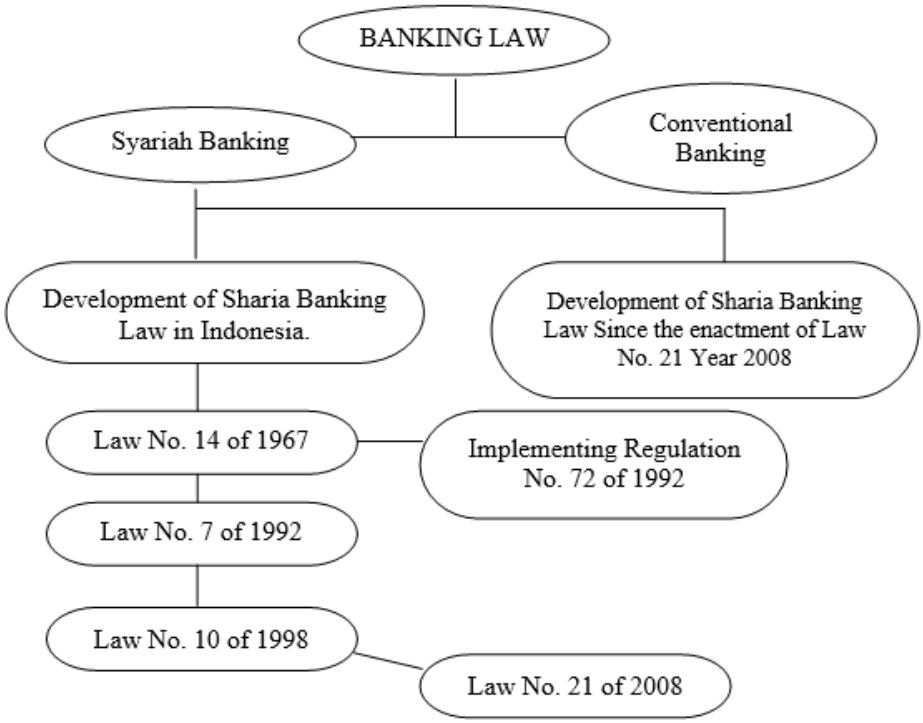
Commercial banks are defined as profit-oriented financial institutions, to obtain these profits commercial banks carry out the intermediation function, because they are allowed to collect funds in the form of deposits, these commercial banks are also depository financial institutions, different from Islamic banks that use mudharabah and wadiah (Syadullah Makmun, 2009). In the banking world in Indonesia since the 1997 monetary crisis, which has not yet been resolved until now, it seems that capitalistic banking systems and practices have developed that have been unethical because they emphasize the pursuit of maximum profit. The extremely severe economic crisis, and until now has not yet recovered, is a reflection of the poor business ethics in Indonesia, both among government and private sectors, both at the central and regional levels, as well as at all levels. In Indonesia, especially in the economic environment, the existence of business ethics still seems to be a concept. According to I.S Susanto, the ethical dimension in business circles is very thin and even neglected (Susanto, 1995). In a country whose people are religious, have the ideology of Pancasila and still uphold the moral values the condition seems very alarming. History has recorded the development of Islamic Banking in the world divided into four periods, namely:

a. The Esthablishment Period (1965 – 1976)
   Major activities across the Muslim word in the area of research in all fields that concern Muslim's daily live. The establishment of Muslim organization to promote cooperation and support among Muslim countries. The establishment of several Islamic banks across the Muslim world;
b. Spread Period (1977 – 2002)
   Fueled with the sharp increase in oil prices and huge wealth in the Middle East. The establishment of hundreds of Islamic Banks across the globe. The transformation of the financial system to complete Islamic banking Iran, Sudan, and Pakistan;
c. The International Recognition Period (2003 – 2009)
   The globe acceptance of Islamic Banks by the western and recognition american regulators. The growing interest of international banks in western Europe, the United Stated, and Japan in Islamic Finance;
d. The Evaluation Period (2009 – Present)
   The large, healthy gross of Islamic assets compared to the large decline in the conventional bank assets during the global crisis. Islamic banks were the least affected by the global crisis.

In the process of establishing Islamic banking, it is not enough just to fatwa the National Sharia Board which was later adopted by Bank Indonesia in the form of a Bank Indonesia Regulation. However, there is a need for regulations whose legal predictability must have the

ability to provide a definite picture in the future of the present situation or relationships. Based on this, finally the legal product of Law Number 21 Year 2008 concerning Sharia Banking was born in response to legal predictability. The following chart is the development of banking law in Indonesia in the legislation :

Chart. 1. Sharia Banking Legal Regulations in Indonesia



With regard to the development of Islamic banking in Indonesia, there has been a trend to shift investment preferences from conventional to Sharia stocks since the financial crisis. Starting from the 1997-1998 Asian financial crisis and the 2006-2009 global financial crisis, not only has the Sharia-based capital market developed in Muslim countries, but also started to attract attention in non - Muslim countries. Due to the importance of capital market development in the economy, a number of studies related to evaluating the performance of conventional Islamic and portfolio portfolios have been carried out in developed and developing countries, one of which is the result of comparison with Malaysia as a partner, Dewi and Ferdian (2012) found that Indonesian sharia mutual funds outperformed in terms of asset allocation funds and debt funds during the period January 2006 - April 2009 (Pranata Nika & Nurzanah, 2015). This can be achieved because the bank's interest system is used by conventional banks to obtain profits from funds invested through financing to customers regardless of whether the customer's business experiences profits or vice versa. But unlike the system in Islamic banks in looking for profits on invested funds, Islamic banks apply a profit sharing ratio, namely by dividing Profit and Loss Sharing (PLS) on financing products based on NUC (Natural Uncertainty Contract), namely a business contract that does not provide certainty of income both in terms of the amount of time, but based on profits or losses on businesses that are run, such as mudaraba and musharaka. This is applied to Islamic banks because Islamic banks are banks that all other operating systems must not conflict with Islamic teachings that prohibit usury or Riba. In Al-Quran Surah al-Baqarah verse 275 it has been explained that Allah forbids usury and instead uses the principle of profit sharing. With this principle, no party is disadvantaged in the contract, because this principle is based on the

pleasure of the two parties who entered into the contract (Sucingtyas Siti Aisyah, Latifah Durrotul. 2013).

In the period of Sharia Banking Growth in 2014-2015 and 2016 - 2017 even though the period 2018 - 2019 showed an increase again (Table 1). However, this should be noted why in previous periods it tends to experience a downward trend so that growth becomes less than optimal. Some of the factors causing suboptimal growth include; First, government commitment is still lacking, relating to government regulations that tend to limit the participation of the community in efforts to advance Islamic banking. In the Financial Services Authority Regulation Number 37 / POJK.03 / 2016 Concerning Business Plans for Rural Credit Banks and Islamic Finance Banks. For people who want to establish an Rural Credit Banks with a minimum core capital of 6 billion. So people prefer in the real sector because it absorbs a lot of labor. Second, the lack of socialization related to Islamic Banking, in the face of competition with conventional systems, it needs a precise strategy, namely Islamic banks need to design a growth leap that is satisfying / quantum growing. During one year carried out by Bank Indonesia based on the 2006 Bank Indonesia year-end report, socialization activities by Bank Indonesia during 2006 were only 51 times. A very minimal effort considering the large population of Indonesia. Ideally, a year of socialization can be done at least 5 million times a year, not 51 times. The increasing number of Islamic banks in Indonesia is also expected to be able to encourage public interest to be more open to the existence of Islamic banks, although this condition does not fully guarantee that people prefer Islamic banks as financial solutions from conventional systems that are also growing rapidly and are still in a position of high liquidity. . And third, public understanding of Islamic finance is one of the benchmarks for the rise of the Islamic finance industry in Indonesia. According to the results of the 2016 Financial Services Authority (OJK) Financial Literacy and Financial Inclusion Survey (OJK) in 2016, the level of users of Islamic financial products and services in Indonesia is only 11.06%. While the Islamic financial literacy index was 8.11 percent.

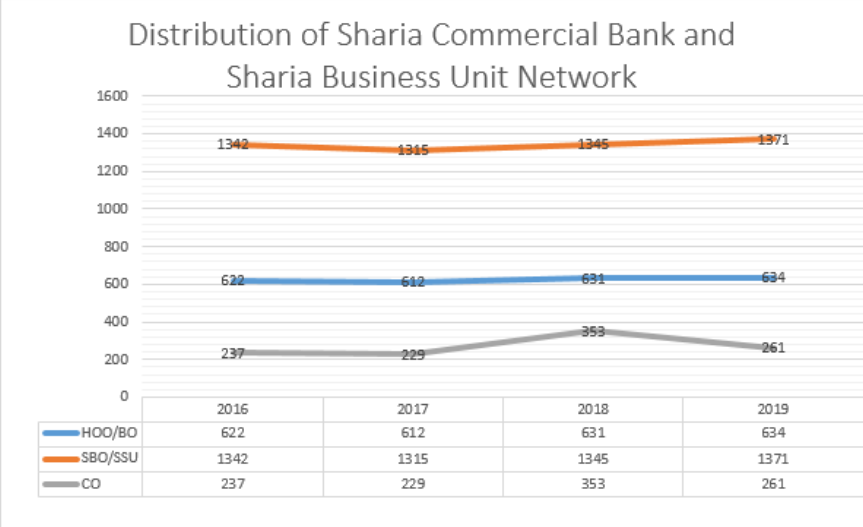


Figure 1. Development of Sharia Bank

The purpose of Islamic banks in Indonesia as stipulated in Act Number 21 of 2008 concerning Sharia Banking which was passed on July 16, 2008 is with the aim of Indonesia's national development to achieve the creation of a just and prosperous society based on economic democracy based on the values of justice, togetherness, and usefulness in accordance with sharia principles (Ikatan Bankir Indonesia, 2015). In line with that goal. The principles of

Islamic business ethics that must be applied in supporting the development of Islamic banking, include : (Muhammad Danang Wahyu, 2014):

a. *The Al-Ta'awun Principle*
   It is a principle of mutual assistance and cooperation. In this case Allah Almighty has ordered humans to help one another in doing justice and piety. On the contrary, Allah Almighty forbids humans from helping one another in the matter of sinning and transgression, as Allah says in the QS. Al-Maidah: 2 which means "*O you who believe, do not violate the Shi'ites of Allah, and do not eat honor of unclean months, do not (disturb) the animals of his, and the animals qalaa-id, and do not (also) disturb those who uphold the Baitullah while they seek the gifts and good pleasure from their Lord and if you have completed the pilgrimage, then it is permissible to hunt, and not once (your) hatred towards a people because they prevent block you from the Holy Mosque, encourage you to persecute (to them) and please help you in (doing) virtue and piety, and don't help helping in committing sins and transgressions. And be afraid of Allah, verily Allah is severely tortured* "
b. *The principle of avoiding Al-Ikhtinaz*
   This principle is in line with the function of money, which is not letting money be unemployed and does not revolve in transactions that benefit the general public. In the Islamic view, money is a flow concept, therefore it must revolve in the economy. The faster the money revolves in the economy, the higher the income level of the people and the better the economy. This principle is based on the word of Allah, which is stated in the QS. An_Nisaa ': 29 which means "*O you who believe, do not eat your neighbor's property in a false way, except by the way of trade that applies with equal likeness among you, do not kill yourself; surely Allah is the Most Merciful to You* "

CONCLUSION

Islamic business ethics is the application of the principles of Islamic teachings that originate from the Qur'an and the Sunnah of the Prophet in the business world, including in Sharia banking. The presence of Islamic banking has a mission / goal of Indonesia's national development in order to create a just and prosperous society based on economic democracy based on the values of justice, togetherness, and benefits in accordance with sharia principles. Banking conditions in Indonesia have experienced a trend for shifting investment preferences from conventional to Sharia stocks since the 1997-1998 financial crisis and the 2006-2009 global financial crisis. Islamic banks until 2018 there are 14 Sharia Commercial Banks, 20 Sharia Business Units and 167 Sharia People Financing Banks. In total, the Sharia Commercial Bank and Sharia Business Unit office networks total 2,266 offices. Nevertheless, efforts to promote Islamic economic growth and Islamic Banking must continue to be carried out with regulations that do not limit the participation of the community, the introduction of the Islamic banking movement movement and build trust in the community by promoting adherence to Sharia.

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EMPOWERMENT OF WOMEN SMEs IN IMPROVING THE USE AND REGISTRATION OF BRAND RIGHTS IN THE CITY OF MEDAN

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ABSTRACT

The signing of the ASEAN single market agreement was called the MEA (ASEAN Economic Community) in 2007 and entered into force in 2016 causing the City of Medan to be invaded by the flow of goods, service flow, free flow of investment, free flow of capital and flow of skilled labor. Vice versa, Medan can sell goods and services easily to other countries in Southeast Asia. The countries most likely to attack the Indonesian market are Malaysia, Thailand and Singapore. The more goods that come in, the more brands of goods circulating in the city of Medan that will be vulnerable to disputes / disputes because there will be many names of the same product brand, almost the same or the same in principle. Women SMEs as one of the business actors need to get protection and opportunity to compete healthily among business actors by using and registering brands on the products they produce. The research method used is normative juridical which is qualitative in nature to find suitable and appropriate models in increasing the use and registration of trademark rights for UKM UKM. The data obtained from this study shows the lack of participation of female SMEs in the use and registration of trademark rights due to things such as their lack of knowledge about brands and the benefits of trademark rights for the progress of their businesses, lengthy trademark registration procedures and the cost of registering trademark rights. This is what drives the importance of empowering women SMEs through workshops, integrated intensive training and dissemination of the importance of the use and registration of trademark rights among women SME actors.

Keywords: *Empowerment of SMEs, Women's Empowerment, Brand Rights*

INTRODUCTION

One of the important studies to discuss and immediately find a solution to solve is efforts to empower SME Women and provide legal protection to the brand rights of small and medium-sized businesses (SMEs) owned by North Sumatra women entrepreneurs from the invasion of industrial products from ASEAN countries and to increase the use of trademark rights and register trademark rights at the Regional Office of Law and Human Rights so that female SMEs avoid the loss and dispute of trademark rights.

As is well known that since 2016 Indonesia has entered the Southeast Asian free market known as the Asean Economic Community (AEC). The agreement made by the 10 ASEAN member countries in 2007 will create a single market in the Southeast Asian region. The purpose of the agreement This MEA, based on the ASEAN charter is in an effort to increase competitiveness in the regional and international arena so that the economy grows evenly. Also improve the living standards of the ASEAN community. The consequence of the implementation of the AEC is the liberalization of trade in goods, services, skilled workers without tariff and non-tariff barriers. Thus trade competition in ASEAN will also be more stringent.

The city of Medan will be invaded by the flow of goods, the flow of services, the free flow of investment, the free flow of capital and the flow of skilled labor. Likewise vice versa Indonesia, especially Medan can sell goods and services easily to other countries in Southeast Asia. The countries most likely to attack the Indonesian market are Malaysia, Thailand and Singapore.

The entry of goods or products from the AEC member countries will not be separated from the brands attached to the said products. The more goods that come in, the more brands of goods circulating in the city of Medan that will be vulnerable to disputes / disputes because there will be many names of the same product brand, almost the same or the same in principle.

According to the Head of the Medan City Cooperative and UMKM Office, Arjuna Sembiring, said that currently the number of UMKMs until 2017 in Medan City is 300,000 businesses. The Medan City Government has formed 6 (six) clusters namely; embroidery, shoes and leather bags, culinary, handicraft, rattan and batik. All the products of this UMKM will compete with products from other ASEAN countries.

A brand that is already widely known by the public and is relatively in demand in the market will be the target of other parties to emulate. Two similar items use, mimic or duplicate the other party's fame. Other parties who have a brand will certainly feel disadvantaged first, this is what causes a brand dispute. The specific purpose of this research is to find a suitable and appropriate model for the empowerment of women SMEs in increasing the use and registration of trademark rights. The use of a brand in every UKM product is a must as a form of protection for that product. The provisions regarding trademarks already exist in the Trademark Rights Act but the concept needs to be improved to be harmonized with female SMEs with the principle that by using brand rights, the products of women SMEs are protected from loss and protected from trademark rights disputes.

The discovery of a model for empowering women SMEs in the improvement and use of brand rights is the specific aim of this study.

The development of business law among countries in Southeast Asia (ASEAN) is increasingly advanced. This is evidenced by the birth of an agreement on the AEC which is to create a single market in the Southeast Asian region, namely a trade relationship without the need for tariff and non-tariff barriers. One way to protect women's SME products from loss due to turnover and trademark disputes is to socialize to women SMEs about the importance of using trademark rights and then registering the trademark rights with the Regional Office of Law and Human Rights because trademark disputes through the court will take time. a long time ago, it costs a lot and decreases the brand image of the disputed goods in the community. This is the main importance of this research.

RESEARCH METHODS

This research is a type of socio legal research. This study looks at how many SMEs are managed by women, whether the existence of these women SMEs is already familiar with brand rights and whether they have registered their trademark rights with the Director General of IPR.

DISCUSSION

The Importance of Empowering Women's SMEs

Protection of citizens from all acts of discrimination is an implementation of the constitutional rights contained in the 1945 Constitution of the Republic of Indonesia. Ums Women have an important role in alleviating poverty because these women's SMEs activities can absorb a lot of labor. according to Bank Indonesia Deputy Governor Rosmaya Hadi, 51% of small businesses and 34% of medium-sized businesses are owned by women. The results of the 2015 IFC research the contribution of women entrepreneurs to GDP in Indonesia

amounted to 9.1% compared to the contribution of women entrepreneurs which was only 5%. Data from the North Sumatra Regional Cooperative and UMKM Office said that the number of UMKM in North Sumatra was around 2.8 million and 380,249 registered business units were registered and absorbed 1.5 million workers. This number is increasing every year. In addition, female SMEs can also be a means to level the level of small people's economy because SMEs have locations throughout the region even far into remote villages that are not reached by transportation and technology. Thus the presence of women SMEs everywhere will be able to narrow the gap between the rich and the poor, so that small communities do not need to roll into the city to look for decent work. In addition, the importance of other women's SMEs is to be able to provide foreign exchange income for the State. According to data from the Regional Office of Cooperatives and UMKM medan, foreign exchange inflows reached 8 billion. This continues to increase every year. According to Bappenas, the advantages of UKM as one of the pillars of economic growth are: ability to focus on specific, flexible, low-cost businesses and speed of innovation.

Pursuant to Law No. 20/2008 concerning MSMEs, the purpose of the formation of UMKM is to grow and develop its business within the framework of national development based on just economic democracy. (Article 3). small-scale businesses are: small-scale people's economic activities with the business sectors provided are small-scale business activities and need to be protected for the purposes of unfair business competition. The role of Small and Medium Enterprises is very strategic in the national economy because its activities provide employment and provide economic services to the community. SMEs can create a market (segmentation) that provides a compilation market (buyers) that does not have an interest.

Small businesses as referred to in Law No. 20 of 2008 is a productive business that is small scale and meets the criteria of net assets of a maximum of Rp.50,000,000 (fifty million) to a maximum of Rp.500,000,000 (five hundred million) excluding land and buildings for business premises; or have annual sales results of more than Rp. 300,000,000 (three hundred million) up to a maximum of Rp.2,500,000,000 (two billion five hundred million rupiah) The characteristics of small businesses are: a. the type of goods sought is generally fixed, not easy to change; b. location or place in general has been settled not moved; c in general, has conducted financial administration although it is still simple, company finance has begun to be separated from family finances and has made a business balance; d. already has a business license and other legality requirements including NPWP; Human resources (entrepreneurs) have experience in entrepreneurship and there is already access to banking in terms of capital requirements. Women's SMEs as part of the National SMEs have a very strategic role in the Indonesian economy. Some of the advantages of SME women are: is patient, persistent, persistent, resilient, not easily surrendered by circumstances and fate. According to Hempri Suyatna, SMEs can survive in a state of economic crisis in Indonesia because: flexible, capital is not dependent from outside, able to return loans with high enough interest. SMEs are scattered throughout Indonesia, absorbing many workers and effectively becoming a tool to strengthen national stability. Tercatar UKM employs 107.6 million people in Indonesia

2. Brand rights for UKM.

Brand rights are intellectual property rights inherent in any goods produced by producers. Brands are very important in the world of advertising and marketing because the public often associates an image, quality or reputation of goods with certain brands. The popular brands of goods will eventually become valuable assets for the company because they can be sold or licensed to third parties. A mark is a sign that can be displayed graphically in the form of a picture, logo, name, word, letter, number, color arrangement, in the form of two dimensions and or three (three) dimensions, sound, hologram, or a combination of two (two) or more elements This is to differentiate goods or services produced by persons or legal entities in the trading of goods and services. The position of the brand is very strategic and important in the trade of goods and services, therefore a brand has a function as: a, the

distinguishing sign between a product or service product from a company and the goods or services of another company's products, b; as a means of promotion of a product c; as a guarantee of the quality of a product d; and as a point of origin for one product.

For brand SMEs can provide a. Economic benefits; (1) can be a company asset in the form of trading, licensing and transfer or can be used as a means of capital planning, (2) supporting business development because the brand can attract people's attention and introduce a product quickly and practically. b. legal benefits; (1) the existence of a mark provides the distinguishing limit between ownership of an item and a service product from another company. So as to prevent unfair competition in trade. Those who violate this provision may be subject to sanctions according to the Trademark Rights Law and the Anti-Monopoly Law and Unfair Business Competition Law. (2) protect the brand of goods and services in the equation in principle or in its entirety. c. the benefits of increasing creativity; (1) the presence of a brand on a product means that the State will protect the intellectual creativity of the owner of the brand and this will spur new creations in the development of intellectual works in the future; (2) enhance the character or image both on the said product or product.3.Pemberdayaan Ukm Perempuan Dalam Peningkatan Pengunaan Dan Pendaftaran Hak Merek Di Kota Medan

Based on a search on the Intellectual Property Database page, the Directorate General of Intellectual Property, pdki.indonesia and dgip.go, the data obtained are as follows:

Table 1:

No	Registration of Trademark Rights	Sumatera Utara	Indonesia
1	2018	7	328

Source: search results are complemented by interviews with informants

Application for registration of trademark rights from North Sumatra which can be seen in the table above, is still very small. Some of the factors causing it according to Selvie Sinaga, are: first; long and complex registration procedures, second; expensive registration / registration fees, and third; Weak law enforcement for IPR violators and specifically for SMEs one of the other inhibiting factors is the requirement for applicants to have the right to have a statement that it is true that the person concerned is a Micro, Small and Medium Enterprises (MSMEs).

The following data is the registration of trademark rights of SMEs.

Table 2:

No	Applicant Registering Trademark Rights	2018	2019	Gender
1	UMKM	6	3	1 girl
2	PT	1	2	2 men

Source: The pdki.indonesia website page is complemented by interviews with informants

According to the data in table 2 above, it is clear that the level of participation of women MSMEs in using their rights to obtain brands is still very small. For this reason, a model of empowering SMEs and MSMEs operated by women is needed so that the use and registration of their trademark rights has increased significantly.

Several approaches that can be implemented in this regard are the model of education for women SMEs. Education in order to increase the knowledge of the use and registration of trademark rights can be through workshops, integrated training and intensive socialization activities. It is hoped that with this massive and measurable empowerment model, the number of SMEs participating in exercising their rights to obtain legal brands can be seen as progressing.

CONCLUSION

Female UKM is a group of business actors that have an important role in the development of the Indonesian economy because it absorbs a lot of labor, is able to adjust to changing market conditions and is flexible in the sense that if there are problems in one line of business it is easy to move to another line of business. Actors of female SMEs must obtain intellectual property protection of their brand rights so that the products produced are not imitated by other parties resulting in losses and disputes in the future. The registration of trademark rights for SMEs is still experiencing problems due to the lack of knowledge of SMEs for women trademark rights, registration processes and high registration fees. For this reason, in order to increase the use and registration of trademark rights of women UKM in Medan, it is necessary to do: integrated socialization, workshop and training. Including special attention from the regional government in the form of exemption from registration fees for trademark rights.

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THE URGENCY OF REBUS SIC STANTIBUS PRINCIPLE IN LONG-TERM CONTRACT TO PROTECTING PARTIES

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ABSTRACT

The principle of pacta sunt servanda has known in contract law in Indonesia. Based on it's principle that the contract is considered as a law (Act.) for each parties who are bound by the contract. So that the parties in the contract have an obligation to fulfill the obligations based on those stipulated in the contract. However, in a long-term contract it can happen that one party in the contract is difficult to carry out its obligations due to fundamental changes in the contract that cannot be predicted when the contract is agreed, for example a change in the value of money due to inflation which is very detrimental to one party. This study is a normative juridical research, where the data used in this study is secondary data in the form of books, legislation, documents and other writings relating to the problems under investigation. Based on the results of the study revealed that the principle of rebus sic stantibus has not been adopted in the Civil Code, so in the preparation of the contract required the inclusion of rebus sic stantibus principle as an effort to provide protection for the parties in the contract, especially in the contract with a long duration, because it has the potential for occurrence fundamental changed.

Keywords: *Rebus Sic Stantibus Principle, Contract*

BACKGROUND

In general it can be said that contracts made by the parties will contain binding conditions for the parties like a law. This provision is based on the principle of pacta sunt servanda, so in this case the parties will endeavor to carry out their obligations as best as possible until the termination of the agreement. The implementation of the promises must of course be carried out with full awareness, sense of responsibility and taking into account the interests of the parties, as has been promised in the agreement.[1]

The principle of pacta sunt servanda is the basis for the implementation of the rights and obligations of the parties to the agreement. Based on the principle of pacta sunt servanda, the agreement party can ask the other party participants of the agreement to carry out what has been agreed in the agreement. It can almost be said that the validity of such a pacta sunt servanda principle is absolute. This means that anyone who has made a promise cannot not carry out according to his promise. Because the existence of this principle is also based on religious teachings. Even as said by Kelsen that the principle of pacta sunt servanda is a basic norm (grundnorm). So that the parties will be responsible for their failure to carry out obligations, even though the cause is beyond their control and not seen before signing the agreement. However, in its implementation it is very possible that changes occur that are contrary to the expectations or expectations of the parties, especially on agreements that have a long period of time, so that one party cannot carry out the intent of the agreement.

With this change, causing the agreement to be terminated or adjusted, this exception is known as the rebus sic stantibus doctrine. The rebus sic stantibus clause is a change in circumstances that is applied if the terms and conditions in the contract change not because of the impossibility in executing the contract but because of extreme difficulties for one of the parties to fulfill the contract. .[2] The existence of the sic stantibus stew principle has long been known in the community, both by legal experts and by court institutions and even today it has become part of positive law both in national law and in international law.[3]

Based on the description above, the author feels interested in conducting research in the form of scientific work with the title "The Urgency of Rebus Sic Stantibus Principle In Long-Term Contracts To Protect Parties".

PROBLEM FORMULATION

The problem formulation in this study is : What is the basis of rebus sic stantibus principles in long-term contract to protecting parties?

RESEARCH METHOD

This study is normative, because it uses secondary data, or often called the research literature. Normative legal research is legal research laying down the law as a system of building norms. Norm system in question is about the principles, norms, rules of legislation, court decisions, agreements and doctrines.[4] Secondary data used in this study include legislation relating to contract law, documents and writings relating to the cases studied.

Methods of data analysis used in this research is descriptive qualitative, meaning authors will present and explain the data obtained from the study of literature, which is manifested in a logical and systematic description. Once the ingredients necessary legal collected, the next step was made an analysis to clarify the settlement of the problem, then the conclusions drawn deductively, from things that are common to the things that are special. At this stage the legal material worked on and utilized in such a way to successfully conclude the truth of which can be used to address the issues raised in the study.

DISCUSSION

The term contract comes from English, which is "contract" which means an agreement.[5] In Dutch the contract is known as the word "overeenkomst", which also means the same as the contract that is the agreement.[6] Where one of the principles known in contract law is the rebus sic stantibus principle. Meanwhile, the rebus sic stantibus principle is regulated in Article 62 of the Vienna Convention on the Law of Treaties (hereinafter referred to as the 1969 Vienna Convention) which states that a change in fundamental circumstances that cannot be expected by the parties can be stated as the basis for termination or withdrawal of the agreement. The termination of an engagement in an international agreement must basically be agreed by the parties to the agreement and regulated in the terms of the agreement itself.[7] Furthermore, in the legal system in Indonesia the principle of rebus sic stantibus is regulated in Indonesian legislation namely Article 18 letter c of Law Number 24 on 2000 concerning International Treaties, which state:

"There are fundamental changes that affect the implementation of the agreement".

Even though the law on international treaties regulates the principle of boiling sic stantibus, it must be understood that this provision can only be applied to international treaties which the Indonesian state is a party to. And in the regulation of the Civil Code (BW) it does not regulate the application of the sic stantibus stew principle. In connection with this, the principle of sic stantibus boil can actually be applied even though in the national positive legal regulations the regulation on the principle of rebus sic stantibus has not yet been ratified as a positive legal rule. The condition is that the principle of rebus sic stantibus stew must be stated in the article regulations in the agreement and must be agreed by all parties.

If the rebus sic stantibus principle is stipulated in the contract and agreed by the parties, this principle can be applied as a contractual obligation even though positive legal regulations have not been regulated. Because contractual obligations are generally very broad, contractual obligations are agreed upon by the parties and / or contractual obligations that are required by law.

Furthermore, contract law generally recognizes the principle of hardship, which is a difficult situation whose substance is not much different from the principle of rebus sic stantibus. The use of this term was chosen because it is widely known in the practice of international trade law, which is strengthened by the inclusion of "hardship clause" in various

international contracts.[8] Difficult circumstances are new legal doctrines that are built and developed in essential and fundamental contract law. In contrast to the forced and default conditions set out in KUPerdata Book III, the difficult situation has not been regulated, but in many cases related to the difficult situation the judge will decide the force situation. Difficult circumstances or hardship have no positive legal rules, but the concept of hardship is apparently developing in the practice of international contract law which is supported and strengthened by the rules and doctrines of international contract law.

CONCLUSION

Based on the discussion above shows that by pouring the principle of boiled sic stantibus in an article of an agreement can be a legal remedy in anticipating fundamental changes that result in either party or parties not being able to carry out their obligations in accordance with those specified in the agreed agreement, so the use of this principle can minimize the occurrence of disputes between the parties on the basis of defaults.

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COMMUNITY ECONOMIC EMPOWERMENT AROUND THE KAPUAS RIVER THROUGH THE RIVER STRUCTURING PROGRAM IN THE PONTIANAK CITY

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ABSTRACT

For the people of Pontianak City, the Kapuas River is a pulse of life, so that the relationship between the community and the Kapuas river cannot be separated. But when compared with other countries that also have river areas, the lives of people living in the area around the Kapuas River are very different from those around the Chao Phraya River in Thailand and around the Malacca River in Malaysia. The arrangement of river areas in Thailand and Malaysia with the concept of water front city development has an impact on increasing the economy of the surrounding communities, while structuring the Kapuas river in Pontianak City has not yet had an impact on increasing the economy of the surrounding communities. This certainly raises a problem, namely why the arrangement of the Kapuas river as a water front city in Pontianak City has not had an impact on increasing the economy of the surrounding communities. The purpose of this paper is to find out why and how should be the arrangement of the Kapuas river in Pontianak City have an impact on increasing the economy of the surrounding communities. The writing method used in this article is a descriptive analysis method. The conclusion of this paper is that the arrangement of the Kapuas river in the city of Pontianak has not not yet an impact on increaing the economy of the surrounding communities because the arrangement carried out was merely a river normalization project.

Keywords: *River, Front City, Empowerment, economy, society.*

A. Introduction

West Kalimantan Province is one of the regions that has many large rivers, including the Kapuas River, Landak River, Melawi River, Sambas River, so that it is known as the Water Front City.[1] The river in West Kalimantan Province is used by the community for various activities, including transportation, MCK (bathing, washing, latrines), trade (because of the river as a floating market), housing (because the river also functions as a residential land) and economic activities (because the river also has various potential natural resources that can be utilized).

The existence of the city of Pontianak as the capital of the Province of West Kalimantan has a typical water city / river bank city, so it is often dubbed the province "thousand rivers". This nickname is in line with the geographical conditions of West Kalimantan which has many rivers both large and small, while the city of Pontianak itself is one of the cities that stands along the banks of the river, namely the Kapuas river which is the longest river in Indonesia.[2] In relation to the existence of the Kapuas river in supporting the lives of people in the city of Pontianak it can be said to be inseparable. The role of the Kapuas river for the people of Pontianak as if it were a vein in supporting various activities of life.

[1] Water Front City is an area on the banks of a river that is oriented to the body of the water and forms a river corridor, characterized by the orientation of the building / facade facing the river, Pontianak City Regulation Number 4 of 2002 concerning Regional Spatial Planning (RT / RW) City of Pontianak Year 2002-2012.

[2] The Kapuas River is the longest river in Indonesia (1,143 km), of which 942 km of river can be navigated. The Kapuas River flows from the east in Kapuas Hulu District through Sintang District, Sanggau Regency, and Pontianak Regency, which then branch 3 (three) in Pontianak City towards the Natuna Sea. Equator Expedition, 2012, Caring for and Preserving Indonesian Nature, Temprina Media Grafika, Surabaya, 2012, p. 50-52.

As a city divided by rivers, Pontianak city should have maintained and utilized its identity as a waterfront city. Therefore, the concept of city development that leads to the water front city needs to be implemented with professional management. The water front city area here is an area oriented to the water body (in this case in the form of a river) forming the character of a river corridor. The area is characterized by an orientation facing the river, or in other words the facade facing the river. The water front city area planned for Pontianak City is a unit consisting of varied activity centers with locations spreading along the Kapuas river.

The concept of structuring the city as a water front city can include cities located on the shore or cities on the edge of the river. Many cities in the world have been successfully developed with the water front city concept. There are 2 (two) international cities located on the banks of the river and should be used as a reference reference for the city of Pontianak, namely the state of Malacca in Malaysia and the city of Bangkok in Thailand. Structuring the river area in realizing the water front city concept in the Malacca river region in Malaysia and the Chao Phraya river in Thailand can combine the balance of the arrangement of commercial areas (trade and services) with neatly arranged residential areas, while also maintaining historic buildings and highlight the nuances of arts and local culture. The arrangement of the city center in the land of Malacca and the city of Bangkok as the water front city has proven to be the main attraction of tourists to visit the city.

Unlike the case with structuring the Kapuas river area which is in the center of Pontianak City. The arrangement of the Kapuas river area as a water front city land mark has not succeeded in integrating the balance of the arrangement of commercial areas with residential areas. The current arrangement of the Kapuas river area is limited to the river normalization program and does not include community empowerment programs in the vicinity, so what happens is that residential areas are not well organized and have no impact on improving the economy of the community.

B. Problems

Based on the preliminary description as mentioned above, the formulation of the problem that can be raised is: why the arrangement of the Kapuas river as a water front city in Pontianak City has not yet had an impact on improving the economy of the surrounding communities.

C. Purpose

The purpose of this paper is to find out why and how should the arrangement of the Kapuas river in Pontianak City have an impact on improving the economy of the surrounding communities.

D. Writing Methodology

The writing method used in this article is a descriptive analysis method. In collecting accurate data and information, the author conducts interviews and observations. The primary data collection technique is carried out by conducting a library / documentation study, while secondary data collection is carried out through other documents[3] relating to the substance of this paper, such as journals/scientific bulletins, magazines, newspapers.

E. Discussion

1. The Concept of Community Empowerment

The empowerment process should emphasize the process of giving or diverting some of the power, power or ability to the community to be more empowered and encourage or motivate individuals to have the ability or empowerment to determine what is their life choice

[3] Lexi J. Moleong, Qualitative Research, Remaja Rosdakarya, Bandung, 1994, p. 112.

through a dialogue process.[4] Furthermore empowerment can only be done through a process of participation.[5]

According to Sherry R. Arnstein, participation is divided into 3 (three) levels, namely:[6] Non Participative, Tokenism and Citizen Participation. The first level includes manipulation and therapy, meaning not participation because the goal is not to give the community the ability to play a role and make decisions but to educate and treat participants in the process of participation. Whereas the second level includes informing, consultation, and placation which are mere formalities because participant's aspirations, opinions or opinions are only material to be heard which is not necessarily the material for decision making. The third level, consisting of partnership, delegate power, and citizen control, the community can negotiate and even have the power to participate in decision making, and the latter is what constitutes real participation.

Community participation in the process of expressing opinions can be in the form of hearings, objection statements and other attitudes in the permit decision-making process. This is in accordance with the culture of the community towards law and the legal system, people 's attitude towards law and legal system as written by Lawrence M. Friedman. According to Friedman, there are 3 (three) elements or aspects of the legal system, namely:[7] Legal Structure, Legal Substance, and Legal Culture. Legal Structure involves institutions authorized to make and implement laws (executive and legislative). Legal Substance, namely material or form of legislation which is divided into written law (codification) and common law system. Whereas Legal Culture, is intended as the attitude of people towards law and the legal system, which involves the belief in values, thoughts or ideas and their hopes, people 's attitude towards law and the legal systems, their beliefs values, ideas and expectations.[8] The existence of a community in an area is expected to be able to help government institutions in formulating a regulation whereby the regulation makes people's thoughts, ideas and expectations so that what has been formulated can be effectively implemented and monitored together with the community and the government.

According to Koesnadi Hardjasoemantri, the main idea underlying the need for community participation can be stated as follows:[9]

a. Giving Information to the Community.

The participation of the community will especially be able to add to the treasury of knowledge about certain aspects obtained from the specific knowledge of the community itself as well as from experts who were consulted by the community. Community participation is very necessary to provide input to the government about the problems that can be caused by a government plan with various consequences. And information obtained from the community will add information and input to the decision-making process carried out by the government and can improve the quality of the decision.

b. Increasing Community Willingness to Receive Decisions.

Someone who has a chance to participate in the decision-making process and is not faced with a fait accompli, will tend to show greater willingness to accept and adjust to the decision. The participation of the community in the decision-making process will greatly reduce the

[4] Esmi Warasih, "Community Empowerment in Realizing the Purpose of Law (Law Enforcement Process and Justice Issues)," Speech Delivered at the Inauguration of Associate Professor in Law in the Faculty of Law of Diponegoro University, Semarang, April 14, 2001, p. 28.

[5] *I b i d.*

[6] Sherry R. Arnstein, A Ladder of Citizen Participation, Classic Readings in Urban Planning: An Introduction, quoted by Esmi Warasih, Ibid, p. 29.

[7] Lawrence M. Friedman, The Legal System: A Social Science Perspective, Russel Sage Foundation, New York, 1975.

[8] Further see T. Gayus Lumbun, Role of the Community in the Management of the Environment in Law and the Environment in Indonesia, 25 years Prof. Dr. Koesnasi Hardjasoemantri, SH. ML, Ed, Erman Rajagukguk and Ridwan Khairandy, Jakarta, UI Press, 2001, p. 495.

[9] Koesnadi Hardjasoemantri, "Legal Aspects of Community Participation in Environmental Management," in Abdul Gafur Anshori and Sobirin Malian, Building Indonesian Law, Speeches for Inauguration of Professor of Law, Yogyakarta, Kresi Total Media, 2008, p. 146-148.

occurrence of conflict, as long as the participation is carried out at the right time. That a decision will never satisfy all interests, all groups or all citizens, but the willingness of the community to accept government decisions can be increased.

c. Helping Legal Protection.

If a final decision is taken by observing the objections raised by the community during the decision-making process, in many cases there will be no need to file a case with the court. If a case is brought to court, the case is usually focused on a particular activity. Thus there is no opportunity to suggest and consider alternative activities.

d. Democratizing Decision Making.

There is an opinion stating that in a government with a representative system, the right to exercise power is in the people's representatives. Thus there is no necessity for the forms of community participation because the people's representatives act in the interests of the community.

Furthermore, according to Koesnadi Hardjasoemantri, there are several requirements to utilize and produce community participation, as follows:[10]

a. Open executive leader;

b. Accommodative regulations;

c. Environmentally conscious society;

d. Responsive Non-Governmental Organizations (NGOs);

e. Right information; and

f. Cohesiveness.

The thing that also needs to be considered in organizing the management of community empowerment is the active participation of the community. In simple terms, community participation can be interpreted as a planned effort to involve the community in every planned process to involve the community in every process of activities carried out from planning to monitoring and evaluation.[11] Community participation is also a process where the community as an object and subject that will have an impact (positive and / or negative) influences the direction and implementation of activities, not just accepting the results.

2. Water front city area

Wate Front City is essentially a settlement that places waters as a "page" and utilizes the "yard" for the public interest and is managed in such a way that it can be a source of funds for maintenance, sadness, beauty and function to maintain sustainability. The Water Front City area can be defined as follows:[12]

1. The Dynamic area of the cities and towns where land and water.
2. Land or river bank, harbor or land that semaca in a city.
3. Waterfront or part of town bordering water, harbor area.
4. Land or areas that are bordered by water are mainly part of the city that faces the waters in the form of sea, river, lake and the like.

Development of Water Front City is an arrangement and development of parts or areas of the city that scale activities and functions that are very diverse with high intensity as urban activities both for the function of housing, ports and trade and industry to tourist areas.

Breen, in Tahir[13] distinguishes Water Front City based on its meeting with the water body as follows:

1. Water front of river bank.

[10] *I b i d.*

[11] Directorate of Environmental Services and Nature Tourism of the Directorate General of Forest Protection and Nature Conservation, Guidelines for Community Empowerment Management in Buffer Areas, 2008, p. 35.

[12] M. Tahir, Utilization of Coastal Area Space for Recreation in Supporting Tanjung Pinang City as a Water Front City Area, Thesis, Diponegoro University, Semarang, 2005.

[13] *I b i d.*

It is a water front which occurs because there is a direct encounter between the land and the water body in the form of a river bank, generally having the following characteristics:

- Generally transportation routes;
- Used as irrigation of agricultural land and plantations;

Its development is very dependent on the condition of the surrounding environment and season.

2. Waterfront water front.

Is a water front area that occurs due to direct meetings between the mainland with a body of water in the form of beaches and waterfronts, in general have the following characteristics:

- Generally as an ocean port area;
- As a fisherman settlement area;
- As estuaries of various rivers;
- Its development can be dominated by the characteristics of the sea itself.

3. Lake edge water front.

It is an area of water front that occurs due to a direct meeting between the land and a body of water in the form of a waterfront that is a lake edge and in general the development is special.

In addition, the division of Water Front City is also based on the activities developed, namely:

1. Cultural water front, accommodates cultural, educational and scientific activities.

2. Environmental water front, the development of a water front that rests on efforts to improve the quality of degraded environments, utilizing the potential of the natural environment that grows naturally.

3. Historical water front, in general, develops as an effort to conserve and restore historic buildings in water areas.

4. Mixed Use water front, development is directed at combining the functions of trade, recreation, housing, offices, transportation, tourism and sports.

5. Recreational water front, development of water fronts with recreational functions.

6. Residental water front, development of water fronts with the main function as housing.

7. Working water front, water front area that displays the marine side.

F. Conclusions

Based on the description that has been stated, the conclusion of this paper is that the arrangement of the Kapuas river in Pontianak City has not yet an impact on improving the economy of the people living around it because the arrangement carried out is merely a river normalization project. The effort that should have been done by the Pontianak City Government to improve the economy of the people living around the Kapuas River is by empowering the community, providing business business conseling, and provide business capital assistance to the community.

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ALTERNATIVE ARRANGEMENT OF INTELLECTUAL PROPERTY RIGHTS TO PROTECT CREATOR ARBITRATION

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ABSTRACT

Copyright is part of the intellectual property that has the most extensive scope of the protected object, as in science, art and literature (art and literary) in which also includes a computer program. The development of the creative economy became one of the mainstays of Indonesia and various countries as well as the rapid growth of information and communication technologies, which requires the protection of Copyright, considering Copyright becomes the most important basis of the national creative economy. Law Number 28 the Year 2014 regarding Copyright regulates the types of conduct violations and penalties as well as the settlement of disputes that occur both civil and criminal. This Act contains a declarative system (first to use the system), the only legal protection granted to holders / first user of copyright. If others who claim to be the party entitled to the copyright, the holder/user first has to prove that he is a holder of the first user who is entitled to the result of the creation. In the framework of the copyright dispute, the copyright Act determines can be done through litigation of alternative dispute resolution. That is the path of litigation is through the civil and criminal process. In examining copyright infringement through a civil, legal basis of the Copyright Act. According to Law No. 28 of 2014 on Copyrights, civil disputes that occur in each of copyright infringement attempted settlement through alternative dispute resolution by arbitration in this regard. The law was put in order settlement of disputes can be resolved quickly, cheaply, and at low cost by following the principles of justice adopted by the Indonesian civil justice system. This Act puts alternative dispute resolution in the first place, followed by settlement through arbitration were placed in the second and third-placed on the court. Arbitration is a dispute resolution process that is more flexible than the settlement in court. In terms of time, examination disputes through arbitration have established a maximum term of 180 days. This period time could be longer if there are special circumstances and the complexity of the dispute to be resolved. However, the extension is performed after given notice to the parties to the dispute. Meanwhile, in terms of cost, resolve disputes through arbitration is also considered more efficient and the resulting decision in the arbitration process is binding, final, and independent. Each party shall implement the decision voluntarily.

Keywords: ***Dispute, Copyright, Arbitrage***

A. PRELIMINARY

1. Background

Copyright is the intellectual property in the fields of science, art, and literature that have a strategic role in supporting the development of the nation and promote the general welfare, as mandated by the Constitution of the Republic of Indonesia Year 1945. Indonesia Economic science, technology, art, and literature, so fast that need to improve protection and ensuring legal certainty to the creators, holders of copyright and other related rights owners.

Related to the protection and guarantee legal certainty for creators, copyright holders and owners of other related rights, the government has made rules to arrange it through Act No.

28 of 2014 on Copyright. One underlying the birth of copyright law is based on the desire to improve the protection and guarantee legal certainty for creators, copyright holders, and other related rights owners to the development of science, technology, art and literature at present time.

Regarding the creation of the protection and guarantee legal certainty by the legislation is the result of creative works in the fields of science, art, and literature produced by inspiration, ability, mind, imagination, dexterity, skill or expertise that is expressed in a tangible form. Therefore, to obtain exclusive rights to the creator of his creation in the form of inspiration, ideas or thoughts should be embodied in a tangible form.

Although rules are governing the Copyright, does not mean that the community, especially the creators are aware and understand about their protection and guarantee legal certainty in the work. Some creators ignore just like that on upload their work and did not even register it to the Director-General of Intellectual Property Ministry of Law and the Human Rights Republic of Indonesia as copyright registration authority. So often arise issues of copyright recognition by others who do not have good faith.

Recognition of copyright by others who are not like the original creator is a violation and against the violation was a dispute to file a civil suit to a court or criminal charges to the competent authorities. However, before a civil action in court or criminal prosecution should be done through the resolution of disputes to arbitration or in other words do court settlement (litigation).

Copyright disputes can be resolved through arbitration. Arbitration is a dispute resolution process that is more flexible than court settlement. Each party can first prepare to submit evidence and information related to disputes that are legally when in court. The parties are entitled to express the arguments. It is certainly different from the trial in the district court that seemed very stiff and only the assembly document exchange (Ermansyah Djaja, 2009: 57).

Since the issuance of Law No. 30 of 1999 on arbitration and alternative dispute resolution, many do use this alternative dispute resolution is arbitration. This was due to the settlement of disputes arbitration is considered more effective in terms of time can be shorter and the cost can be more efficient than the settlement of disputes through the courts (litigation). Passenger resulting from the arbitration process is final and binding (final and binding). The parties to implement the decision voluntarily.

In the framework of a copyright dispute resolution arbitration, the law provides a legal basis against it. According to Article 95 paragraph (1) of Law Number 28 the Year 2014 concerning Copyrights, stated that the settlement of copyright disputes can be done through alternative dispute resolution, arbitration or court. Copyright dispute settlement mechanism in the arbitration believed to be more profitable than follow the legal process in court. The parties can be more beneficial to use the mechanism of arbitration or other alternative dispute resolution such as mediation. Therefore, the settlement of disputes such as that conducted in private, efficient, and faster.

But the arbitration dispute resolution has not been much in demand, it is not the only procedure for its implementation are still many unknown by the public, but also a place to make a complaint and dispute settlement whose existence is still minimal. Besides the settlement through criminal law still tends to be in demand by the public for being quick to give effect to the criminal when copyright infringement is a means of last resort after efforts to arbitration or out of court settlement is done.

2. Formulation of the problem

a. How to Resolve Dispute By Arbitration of Intellectual Property Rights To Protect Creator.
b. How Legal Certainty Dispute Arbitration Award In Intellectual Property Rights To Protect Creator.

B. METHODOLOGY

This study used qualitative methods, the findings of the data and information in this study will not be obtained through statistical procedures or in the form of other calculations. The search process data to be collected for discussion material in this study using a variety of means. Means that includes observation, study documents, books (Faisal Riza and Rachmat Abduh, 2018). The purpose of this study was to determine the settlement of disputes by arbitration of intellectual property rights to protect creators, to determine the legal certainty of the arbitration decision in a dispute over intellectual property rights to protect creators.

C. DISCUSSION

1. How to Resolve Dispute By Arbitration of Intellectual Property Rights To Protect Creator

Disputes in the field of intellectual property rights is a matter of creator rights violations committed by the other party that capture, recognize, eliminate, change or damage copyrights results of others that have been realized in the form of intellectual property rights such as copyright. Against the dispute can be resolved through settlement out of court civil. Extrajudicial dispute resolution including arbitration conducted.

Arbitration as a means to resolve disputes regulated in Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution. These laws regulate in general about dispute or difference of opinion between the parties in a particular legal relationship which had held that the arbitration agreement expressly states that all disputes or differences of opinion arising or which may arise from the legal relationship will be settled by way of arbitration.

Arbitration is a way settlement of civil disputes outside the public courts based on the arbitration agreement made in writing by the parties to the dispute. District Court has no authority to adjudicate disputes that have bound the parties in the arbitration agreement. If the parties have agreed that disputes between them will be resolved by arbitration, and the parties have been authorized, then the arbitrator authority to determine in its decision on the rights and obligations of the parties if this is not stipulated in their agreement.

Various sources have suggested the primacy of arbitration compared with judicial dispute resolution. Prose arbitration settlement is more informal than justice because it opens the way to resolve amicably and peacefully. Arbitration process to resolve disputes has followed the principle of confrontation and cooperative, the parties find a way out of the problems they are facing. The parties can choose the arbitrators deemed professional, fair, and have expertise in the field of the disputed issues. The virtue lies like arbitration also ensures the confidentiality of confidential dispute resolution, so avoid the publicity that no dike-wills. Even the principle of confidentiality is considered confidential or as the sole virtue of the arbitration court,

Now, the arbitration dispute resolution extends the coverage that is up to the intellectual property rights disputes. In a dispute over intellectual property rights has settled a legal basis for the arbitration. This is evident from the presence of some of the rules that Act No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, and Law No. 28 of 2014 on Copyright.

According to Article 5 of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution stated in Paragraph (1) that the dispute can be settled by arbitration only disputes in trade and the rights under the laws and regulations fully occupied by the parties to the dispute , But in Paragraph (2) of that article restricts the dispute can not be resolved through arbitration is a dispute which, according to the legislation can not be held peace. When referring to this Article, the dispute on intellectual property rights that copyright can be done Arbitration.

Furthermore, we see the explanation of Article 66 paragraph b states the intended scope of the law on trade are among other activities in the field of commerce, banking, finance, investment, industry, and intellectual property rights. This further strengthens the legal basis

for the application of arbitration in resolving disputes and intellectual property rights in this respect copyright.

In the legal system in Indonesia, where the arbitration as one of the alternative dispute resolution outside the court, in fact, has been known for a long time, along with the enactment of Rv. (Reglement op de Burgelijke Rechtsvordering) in 1847, because of the original arbitration subject to the provisions of Article 615 Rv. s / d 651 Rv. However, this provision does not apply anymore with the issuance of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. However based on the development of arbitration in Indonesia, Institutional arbitration is gaining momentum with the establishment of the Indonesian National Arbitration Board (BANI) on December 3, 1997, as established by the Chamber of Commerce (Susanti Adi Nugroho, 2015, p 75).

Settlement of disputes by arbitration in the field of copyright provided for in Article 95 of Law No. 28 of 2014 on Copyright. Copyright Dispute resolution can be done through alternative dispute resolution, arbitration or court. Regarding the procedure for filing a lawsuit or claim of copyright disputes in the arbitration is not regulated in detail in the legislation. This means that the arbitration mechanism refers to Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution.

Institutionally, in the year 2011, Indonesia already has a special arbitration over disputes in the field of intellectual property rights. The Institute for the Board of Arbitration and Mediation of Intellectual Property Rights (IPR BAM). The development of arbitration and mediation is a sign of the need for alternative means of dispute resolution for the pursuit of justice related to intellectual property rights such as copyrights, patents, trademarks, industrial designs. Intellectual property issues that occurred during the many submitted to the court, should the settlement of disputes regarding intellectual property rights is not necessarily to court.

Ordinances resolve copyright disputes in arbitration refers to the Arbitration Act. Settlement of disputes by arbitration in the manner as provided in the law are as follows:

a. If there is a dispute, the applicant must notify by registered letter, telegram, telex, facsimile, e-mail or by a book of the expedition to the defendant that the arbitration requirement that no agreement by the applicant or respondent applies. The notification letter contains clearly:

1) Names and addresses of the parties

2) The appointment of the arbitration clause or agreement in force

3) Agreement or issues in dispute

4) Basic demands and the amount required, if any

5) How the desired completion

6) Agreements held by the parties on the number of arbitrators or if it was never held such an agreement, the applicant may submit proposals concerning the number of arbitrators desired in an odd number.

b. If the parties choose the settlement of disputes through arbitration after a dispute, the agreement on the settlement of their disputes arbitration must be made in a written agreement signed by the parties. The written agreement should contain:

1) Issues in dispute
2) Full name and residence of the parties
3) Full name and residence of the arbitrator or the arbitral tribunal
4) Points arbitrator or the arbitral tribunal will make a decision
5) Full name of a secretary
6) The term of a settlement of disputes
7) Commitment of arbitrators
8) The willingness of the parties to bear all expenses required for the settlement of disputes by arbitration

Regarding the copyright dispute, usually, the settlement in arbitration agreed by the parties after the (case) dispute. Therefore, approval made as described in point (b) above, if it

does not load it then consequently null and void. Made a written arbitration agreement would eliminate the right of the parties to submit the dispute or difference of opinion contained in the agreement to the District Court.

All of the dispute by the arbitrator or the arbitral tribunal held in private. The parties to the dispute have the right and equal opportunity to express their opinions respectively. Examination of the dispute in the arbitration shall be in writing. The place of arbitration is determined by the arbitrator or the arbitral tribunal unless determined by the parties.

The applicant must submit a letter of claim to the arbitrator or the arbitral tribunal within the specified time. The demand letter must contain at least:

1. Full name and place of residence or domicile of the parties;
2. A brief description of the dispute with attached evidence; and the contents of specific charges.

A copy of the claim to the defendant delivered by arbitrators with orders that the defendant should respond and provide the answer in writing within 14 (fourteen) days of receipt of a copy of the claim by the defendant. As soon as received response from the defendant, a copy of the answer given to the applicant. Along with that, the arbitrator or the chairman of the arbitral tribunal ordered that the parties or they are authorized in advance facing arbitration hearing set later than 14 (fourteen) days from the issuance of the order. The examination of the dispute should be resolved within a period of 180 (one hundred eighty) days of the arbitrator or the arbitral tribunal is formed, and with the consent of the parties, if necessary, this period may be extended.

2. How Legal Certainty Dispute Arbitration Award In Intellectual Property Rights To Protect Creator

Disputes concerning copyright can occur if there are parties who acts as stipulated in Article 112 to Article 120 of Law of the Republic of Indonesia Number 28 of 2014 on Copyright (Richard GE Rumbekwan, 2016), The results of the work of others if removed, altered, or destroyed and then used commercially, it will be punishable by imprisonment for a period of 2 (two) years and/or a maximum fine of Rp300.000.000.

In addition to criminal penalties, there are also penalties for damages for copyright infringement in the form of a request to surrender all or part of the revenue earned from organizing lectures, scientific meetings, performances or exhibition of works infringing copyright or related rights products. Moreover, it can ask for foreclosure work which is done Announcement or Doubling, and / or tools iterations used to generate a Work infringing Copyright and Related Rights products.

Berlakukanya Act No. 28 of 2014 on Copyright expected more attention to the balance between the interests of creators, copyright holders, with society, so that a violation of copyright can be prevented. However, if the violation occurred, then enforceable legal sanctions for the perpetrators, this is what is meant by the rule of law in the protection of copyright.

After a thorough examination of the dispute by arbitration, the arbitrator or the arbitral tribunal decides on the dispute. Copyright laws do not regulate the arbitral award mechanism. More details on the mechanism and the power of the arbitration decision can be read in the Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution. To ensure legal certainty against the decision of the arbitration, the arbitrator made a decision based on provisions of the law or based on fairness and propriety.

The decision is made within 30 (thirty) days after the dispute is declared closed. After the verdict was received within 14 (fourteen) days, the parties may apply to the arbitrator or the arbitral tribunal to correct administrative mistakes and / or increase or decrease the demands something verdict. The Arbitral award is final and has permanent legal force and binding on

the parties. To be able to have the power of arbitration is stated executorial final decision and has permanent legal force, then must contain the following:

1. Head of the verdict reads "FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD"
2. Full name and address of the party must be appropriate residency card
3. A brief description regarding copyright disputes
4. Establishment of the parties
5. Full name and address of the arbiter
6. Consideration and conclusion of the arbitrator or the arbitral tribunal on the overall dispute
7. The opinion of each arbitrator in the event of disagreement within the arbitral tribunal
8. verdict
9. The place and date of the judgment
10. Signature of the arbitrator or the arbitral tribunal. Not signing the arbitration decision by one arbitrator because of illness or death does not affect the strength of entry into force of the decision.

But the cancellation of the arbitral award may be requested by the parties if the decision is thought to contain the following elements:

1. Letters or documents during the examination, after adjudication recognized or declared false false
2. Once the decision is taken those documents which are decisive, which is hidden by the other party
3. Decision taken from the ruse carried out by one of the parties in the dispute.

To provide legal certainty, based on Article 72 paragraph (4) of the Act against the decision of Arbitration stated that the cancellation of the court may be filed an appeal to the Supreme Court to decide in the first and final level. However, the Arbitration Act does not regulate the provisions regarding the deadline for filing an appeal and memorandum of appeal, then it must be based on the provisions of the procedural law, which states that the submission of a memorandum of appeal by the appellant must be submitted within 14 days after the appeal is recorded in register registers. Since the appeal was received later than thirty days had to be disconnected (Grace Henni Tampongangoy, 2015).

Besides, to obtain legal certainty of the arbitration decision, then within 30 days of the arbitration decision delivered and registered by the arbitrator or attorney to the District Court Clerk. If it is not registered to the clerk of the district court, the arbitration decision regarding copyright disputes can not be executed or implemented.

D. CONCLUSION

1. Settlement of disputes by arbitration in the field of copyright provided for in Article 95 of Law No. 28 of 2014 on Copyright. Copyright Dispute resolution can be done through alternative dispute resolution, arbitration or court. Regarding the procedure for filing a lawsuit or claim of copyright disputes in the arbitration is not regulated in detail in the legislation. This means that the arbitration mechanism refers to Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution.
2. To obtain legal certainty arbitration decision, then within a period30 days of the arbitration decision delivered and registered by the arbitrator or attorney to the District Court Clerk. If it is not registered to the clerk of the district court, the arbitration decision regarding copyright disputes can not be executed or implemented.

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COMMUNITY BASED RECOVERY AS A PROTECTION FOR WOMEN AND CHILDREN OF SEXUAL VIOLENCE VICTIMS

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ABSTRACT

Violence against women and children is a serious crime as the implication of gender inequality that harasses and tarnishes the dignity of humanity. Women and children as victims of sexual violence often experience multiple layers of physical, psychological, economic and social violence which have tremendous impacts which have implications for trauma, hysteria and depression that threaten the lives of victims. Even victims also have the potential to become perpetrators of sexual violence in the future. If left unchecked, it will have broad social impacts on society. The purpose of this research is to uncover the urgency of recovery which is one form of protection for victims and a struggle for their rights. The results show that community-based recovery that relies on community participation and can strengthen the personality of the survivors and empower them, so as to be able to make decisions on themselves and be accepted in society. Victim recovery is not only determined in the context of the case, but also includes the organization and empowerment of women, including the support and involvement of the community, especially the family. Thus the seriousness of the state is demanded as a bearer of responsibility, to protect and provide relief to victims and ensure their rights. The state is obliged to provide sufficient budget for handling women and children victims of sexual violence.

Keywords: Community based Recovery, Protection, Sexual Violence Victims

I. INTRODUCTION

Basically the State through the constitution and the principles of Human Rights guarantee the fulfillment of the rights of citizens, including the rights of women and children victims of violence. In accordance with ideology and the constitution, every human being is entitled to his human rights, in the form of a sense of security and freedom from all forms of violence, no one can take the rights of others, including the rights of women and children. (Siregar, 2018). Therefore, violence against women and children is a violation of basic human rights and crimes against human dignity and forms of discrimination that must be eliminated. (Muhammad Taufik Makarao, Wenny Bukamo, Syaiful Azri, 2002).

Violence against women is the most serious consequence of gender inequality. Women as victims often experience multiple layers of violence, both physically and mentally, at home and in the community. Therefore, victims of violence that are generally women must get protection from the state and society in order to avoid violence or the threat of violence and torture which is an act that degrading human dignity and dignity.

The suffering of the victim and her family for the violence experienced will be prolonged, the victim will experience trauma and even depression. According to Fatahillah (Syukur, 2011) it is not easy for victims of violence to tell their bad experiences, because they doubt whether their stories will be trusted and get support, and are afraid that violence will recur. In the case of domestic violence, for example, the victim's concern arises so that it is not trusted when reporting violence that occurs because the act occurred in the domestic realm. Likewise, the case of sexual violence perpetrated by the family, for example the father against his child actually led to revictimization.

Based on the research results of Abdul Muhid et al, violence has a prolonged adverse impact on victims. Victims often experience multiple layers of violence, namely 1) physical violence such as; fractures, liseration and head trauma, various pain disorders, sexually transmitted infections and unwanted pregnancy. 2) Psychological violence that has a negative impact on psychiatric disorders such as depression, depression, stress, family disgrace, tend to be blamed, dirty contempt, no one is trusted, prone to headaches, disorders of the stomach, and asthma. The victim also loses economic benefits and loses some of his human rights and other suffering. 3) Mental health impacts including increased risk of depression, anxiety, post-traumatic disorders, suicide and the most detrimental are pregnancy and the risk of minor impacts such as premature birth, low birth weight and small birth weight. (Abdul Muhid, Lia Masfiatul Khariroh, Nailatin Fauziyah, Funsu Andiarna, 2019)

Trauma and depression experienced by victims can even have a negative effect because of the tendency of victims to become perpetrators when they are adults. (Ratih Probosiwi, Daud Bahransyaf, 2015) This was also revealed by Faulkher (2003), in Zahra, (2007) that; 31% of female convicts in America are victims of sexual violence in childhood. 95% of sex workers are child sexual victims. 40% of child sexual assailants and 76% of serial rapists experience sexual violence in childhood.

The impact of these injuries made it difficult for victims to reveal the violence they had experienced. In fact, according to Phebe Illenia S, Woelan Handadari most victims of sexual violence suffer post-traumatic stress disorder (PTSD). PTSD is an anxiety syndrome, autonomic lability, emotional inertia and flashbacks from a very painful experience after physical and emotional stress that goes beyond the limits of endurance of ordinary people. Victims need a recovery process from PTSD so that their quality of life can improve and not continue to regret the traumatic events they experienced. However, healing PTSD is not easy, because healing the victim from trauma does not mean he can forget the events he experienced. (Phebe Illenia, Woelan Handardari, 2011)

Based on the description above, the purpose of this study is: to explain the importance of recovery efforts for women and children victims of violence by relying on community participation so that they can empower victims to make decisions about themselves and be accepted in society as well as full of soft skills to their lives.

II. LITERATURE REVIEW

Research on Bibliotherapy: Self Help Book Improves Self Concept on Victims of Sexual Harassment, (Dian Dwi Nur Rahmah, Siti Iriyanti, Layily Maghfiroh, Nelly Agustina, 2017), more towards quantitative research with an experimental approach that focuses its discussion on creative communication techniques with child victims of sexual violence. Another article focuses his research on Judicial Review PP No. 4 of 2006 concerning the Implementation and Recovery of Victims of Domestic Violence. ((Heni Hendrawati, Agna Susila, 2017). Furthermore, Penny Naluria Utami, Optimizing the Fulfillment of the Rights of Victims of Violence Against Women Through Integrated Service Centers, which emphasizes the importance of the existence of P2TP2A in the regions. (Utami, 2016). Meanwhile (Abdul Muhid, Lia Masfiatul Khariroh, Nailatin Fauziyah, Funsu Andiarna, 2019), instead focused their research on "Quality of Life of Women Survivors of Sexual Violence: A Qualitative Study". Based on his research it was revealed that the survivors have a high quality of life, they can live their lives now happily. Psychological studies are presented in a study entitled: "Therapeutic Communication in Counseling (Descriptive Qualitative Study of Therapeutic Communication Stages in the Recovery of Traumatic Victims of Violence Against Wives At Rifka Annisa Women's Crisis Center Yogyakarta). (Anjar, 2017) He put forward the recovery for victims of domestic violence by using communication therapy. Meanwhile, Nurhasyim wrote the title: "Questioning the Recovery for Victims of Violence in Indonesia". Nurhasyim, 2016), but does not offer any form of recovery. Unlike Latipun, who specializes in writing on community-based recovery that relies on student groups, for victims of conflict and refugees, with the title: "Community-Based Trauma Recovery: Indonesia's Experience in Mass Trauma Interventions". (Latipun, 2014).

III. RESEARCH METHODOLOGY

This research is a normative study that portrays the object of research transparently based on data and facts collected by researchers supported by secondary data in the form of literature and regulations and primary data obtained through interviews with; Institutions that are concerned with the issue of women and children, namely: the Institute for Protection of Women and Children (LPPA) Labuhan Batu Induk, Hapsari and the Legal Assistance Association of Women for Justice Medan, as well as the P3AM Office of Binjai City. Based on the results of these interviews found an effective model used by women's and children's institutions in the handling and recovery of victims of sexual violence.

III. RESULTS AND DISCUSSION

A. Legal Protection of Victims of Sexual Violence

Violence against women, in principle, is an act of enforcing the will of women by using women's bodies and sexuality as their objects. The term violence against women has actually been voiced in the world almost since 3 (three) decades before. (Muhtaz, 2013). Human rights defenders have echoed the term violence against women in Indonesia and has become increasingly prominent in the presence of service provider institutions that provide assistance to women and victims of violence. Violence against women is a form of violation of human rights that can occur to anyone, across social, economic and educational status. Violence specifically experienced by women begins with the existence of unequal gender relations. Empirical facts show that women are a group that many victims of violence in various forms, such as physical, psychological, sexual, neglect, exploitation and other violence. (Ema Mukarramah, Tri Dewiyanti (Ed): 2018: 5), (Utami, 2016).

The concept of gender is different from the concept of gender. The concept of sex describes the absolute differences between men and women that refer to the biological characteristics of men and women. Men have a penis and sperm, while women experience menstruation and have a uterus so they can conceive and give birth and breastfeed. The biological nature of women and men lies in their respective biological characteristics. (Ema Mukarramah, Tri Dewiyanti (Ed): 2018: 5).

The occurrence of such violence is a result of labeling (stereotype), marginalization (marginalization) and subordination to it. As clearly stated in the Wolrd Conference report (1995) in Beijing, in item 113 that; "violence against women" means: any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. " Meanwhile, through the Draft Law on the Elimination of Sexual Violence, sexual violence is classified into nine forms, namely; sexual harassment, sexual control, rape, sexual exploitation, sexual torture, other inhuman treatment or punishment which targets the body and sexuality and / or reproductive organs

Victims of sexual violence are generally women and children and divabel. (Jane R. Chapman in Luhulima, (2000 :). Children are the target of victims of sexual violence, because children lack the power to fight offenders and in general, children cannot understand what they are going through (Chomaria, 2014). Chomaria's opinion is in line with what was stated by Iindrawaty Sinaga (Chair of the Labuhan Batu Induk Women's and Child Protection Institute (LPPA)) in an interview in May 2019, as follows: "Victims of violence especially children in general do not understand what they are experiencing. Of the many cases that occur, such as sexual harassment, sodomy and molestation, the perpetrators are the closest people, such as parents and neighbors. They consider it playful, because initially victims are usually given something like candy and or allowance that makes them like the perpetrators. "

The physical presence of women who are generally weaker than men, has implications for labeling that women are also weak in all respects. This condition is often used by men to discriminate against women or marginalize women, so they do not involve women in strategic roles. On the contrary, women are in a position of subordination and marginalization. As a

result of labeling, men often exploit their power to commit violence against women, both physically, psychologically and sexually.

Patriarchal culture, that is a culture that is centered on men and in the interests of men, is the biggest cause and contribution to violence against women. (Utami Zahirah Noviani P, Rifdah Arifah, Sesep, Sahedi Humaedi, 2018). An ideology that legitimizes men as authority and superiority. The belief that women are by nature soft and weak creatures, their position under men, inferior, serving men's sexual desires and so on has placed women as if they were allowed to be treated according to men's wishes, including by means of violence.

This patriarchal ideology influences the way of thinking of society, the interpretation of religious texts and policy makers so that it becomes the reason for acts of sexual violence against women. Inequality based on patriarchal ideology has the potential to create injustice, subordination and domination of women. This imbalance is the main source of violence against women. Through patriarchal culture, many systems and policies were born that did not accommodate the needs and interests of women. (Abdul Muhid, Lia Masfiatul Khariroh, Nailatin Fauziyah, Funsu Andiarna, 2019)

The community sometimes blames the victim and does not side with the victim, they do not protect and do not provide reinforcement to the victim, even accusing the victim as the cause of the sexual violence. The victim was blamed for his clothes that did not cover his nakedness or did not wear the hijab. It is women who are deemed to create "slander" (teasing and triggering male sexual desires. Whereas sexual violence also occurs against veiled women. These assumptions are precisely developing in society. Why do women who do not commit crimes must be blamed and have the right to be harassed and even raped? because of the clothes he chose.In some cases, it actually happened where the victim was even criminalized by committing defamation or being ensnared by the ITE Law so that he faced the police as the Bait Nuril case.

Based on the religious context, of course, all religions aim to free people from suffering, oppression and ignorance and uphold justice, share love and spread knowledge. This view is built on humanitarian principles, especially: Respect for Human Dignity, Equality, Liberation and Justice, as stated in Surah al Isra 'verse 70;

"And indeed we have honoured the Children of Adam, and we have carried them on land and sea, and have provided them with At-Taiyibât (Lawful good things), and have preferred them above many of those whom we have created with a marked preference".(Q.S. Al-Isra, [17]:70).

In addition, the Koran also mentions in Surah al Hujurat (49) verse: 11, as follows:

"*O You who believe! let not a group scoff at another group, it may be that the latter are better than the former; nor let (some) women scoff at other women, it may be that the latter are better than the former, nor defame one another, nor insult one another by nicknames. How bad is it, to insult one's brother after having faith [i.e. to call Your Muslim brother (a faithful believer) as: "O sinner", or "O wicked", etc.]. and Whosoever does not repent, Then such are indeed Zâlimûn (wrong-doers, etc.).* (Q.S. al-Hujurat [49]:11).

Based on that, the Indonesian Women's Ulema Congress made a fatwa in 2018, related to sexual violence. The fatwa mentioned that sexual violence both inside and outside of legal marriage is haram, because it violates human rights guaranteed by Islam. Therefore, all parties are required to take preventive measures and when they do, they must take various measures.

Cases of sexual violence against women and children such as the phenomenon of the iceberg, which were revealed to be fewer than the facts actually happened, so the numbers and percentages recorded in the report did not show the total number of cases that existed, especially in areas that still considered taboo to reveal cases of sexual assault. Based on a national survey of life experiences of children and adolescents in 2018, 2 (two) out of 3 (three) children and adolescent girls or boys have experienced one form of violence throughout their lives. Violence experienced by children and adolescents tends not to stand alone but is overlapping among types of violence. Children and adolescents who experience only sexual violence alone are 0.2% -1.2%, physical violence alone is 2% -8, and emotional violence alone ranges from 23% -36%. Meanwhile, based on the fact of violence against

children in North Sumatra in 2017, sexual violence showed the highest number of 180 cases out of a total of 641 cases.

Specifically for cases handled by the Office of Empowerment of Women for Child Protection and Community in Binjai City in 2018, there were 14 cases. This figure shows the high number of cases of gender based violence that occurred and were committed by people closest to and unknown people. According to Rini Elisa Danu (Member of the Binjai City Service), for 2019 from January to March there has been a handling of 5 cases of sexual violence against women and children. 4 cases of children and 1 case of adults.

The impact that is not light on women victims of violence that will trace throughout his life and will affect the way of acting and thinking of the victim. Shame, fear and feelings of inferiority and even stress will be experienced by women victims of violence. Based on an interview with Indrawaty Sinaga, Chair of the Labuhan Batu Induk Women's and Child Protection Institute, it was explained how the conditions and impacts of violence experienced especially children of victims of violence, along with their presentation;

Post violence, victims experience severe psychological effects. Victims are often frightened, do not want to meet with people, even with parents sometimes do not want to escape because they are haunted by the conditions they experienced before. Victims also become whiny, do not want to get along and tend to be a shy child. The impact of violence, especially rape also affects the future of victims who have had unwanted pregnancies (results of an interview with Indrawaty Sinaga, May 2019).

Physical violence experienced by the victim may heal in a matter of days or weeks, however, psychological injury is deeper and causes trauma, hysteria and depression. According to Indrawati, in certain situations or maybe every day, victims / survivors often experience trauma so that when they start to do their daily activities they often feel scared. Especially when someone touches a part of his body, he may cry and be scared. This trauma usually lasts a long time if no immediate recovery is made. Among rape victims are even reluctant to get married. Even if they can get married, they will find it difficult to have sex because it reminds them of bad events in the past. (Results of an interview with Indrawaty Sinaga, May 2019).

The condition of the victims was also stated by Sri Rahayu as a board of integrated service center for protection of women and children Deli Serdang management), as follows; in addition to being traumatized, the victims we have dealt with have also experienced hysteria such as sudden screaming when nothing happened. Because the victim is reminded of a bad incident that happened, the victim suddenly cried and stopped when he felt comfortable. Sometimes when the victim sees someone similar to the perpetrator, she can make him cry for help. (interview with Sri Rahayu; May 2019).

Depression experienced by victims / survivors causes severe disruption to the body and psychological. Victims tend to experience Self-blame, Guilty feeling, Avoiding and hiding, Instability and Over-sensitive. Someone with a condition of depression is usually difficult to live and feel afraid to do anything. When they are sleeping they often have unclear dreams. Especially when the victim experiences a pregnancy after sexual violence. If not resolved soon, they will suffer from mental illness by hurting themselves and committing suicide.

Neglected trauma will cause new problems that will create new trauma again. Conditions like this like a circle that has no tip base. Therefore recovery is an urgent step to break the vicious cycle. (Purnawan Kristanto, Kompasiana.com). Violence incidents experienced by a person include traumatic events that require serious treatment aimed at recovery. There are several ways for victims of violence to handle, one of which is to provide assistance to help victims recover, so that victims can find their true identity, become stronger and be able to function optimally and have resilience in dealing with problems.

Based on the impact of violence experienced by the victim, the victim needs protection. Victim protection can be in the form of preventive and repressive measures carried out by the community and the government and its law enforcement officers. Form of protection in the form of providing protection from various threats that can endanger the lives of victims, providing medical assistance, as well as adequate law, as stated in Law No. 31 of 2014 concerning Protection of Witnesses and Victims. In addition, a fair examination and trial

process for the perpetrators of crimes, is also one manifestation of the protection of human rights and balancing instruments. This is a philosophical basis for the urgency of protection for victims and or their families. (Jamaa, 2014).

Efforts to protect women and children who are victims of sexual violence to fulfill their rights to; justice, truth, guarantees of violence do not recur and recovery is still experiencing difficulties, if the existing laws and regulations are inadequate and even discriminate against victims of sexual violence. For this reason, new legislation must be formed which has the perspective of victims, gender, children and human rights, as made in the Draft Law on the Elimination of Sexual Violence.

The regulation intended contains an explanation of the types of sexual violence that are criminalized and extends the punishment of perpetrators such as restitution and special rehabilitation, and can improve the procedural law for criminal justice integrated with the recovery process, both physical, psychological, and economic and social recovery. These laws and regulations must also be able to encourage the improvement of the legal infrastructure and increase the capacity and professionalism of law enforcement officials, especially in interviewing victims, as well as being able to remove or eliminate the stigma against victims of sexual violence that can damage and inhibit the right to justice and truth.

Islam also gives obligations to the State to guarantee the fulfillment of the rights of every citizen, especially the rights of victims of sexual violence. The Indonesian Ulama Women's Congress in its fatwa urges the state to fulfill the rights of victims and protect victims so that their future remains secure and that they can build a decent life. "Countries in cases of sexual violence must be present to ensure the fulfillment of the rights of citizens, including victims " They also condemned the behavior of state officials who carry out neglect, complicates the legal process for victims of sexual violence, especially those who discriminate against victims and even become perpetrators of sexual violence, so they should be punished more severely (taqlidu al uqubah).

B. Community-Based Recovery for Women and Children Victims of Sexual Violence

Recovery is an urgent step to break the cycle that traps victims in a cycle of conflict and adversity. (Retired Kristanto). Recovery can be interpreted as a process to restore an individual, family, group, or community, so that after a traumatic event occurs, it can collectively become strong, function optimally and have the toughness to face problems, so that it becomes a productive and empowered society.

(Nurhasyim, 2016), meaning recovery as a process of meeting the needs of victims in crisis conditions and the needs of victims to be able to socialize with the environment, including; fulfillment of medical treatment, psychological, legal, psycho-social assistance in the form of return and reintegration with victims' families and communities.

Government Regulation No. 4 of 2016 concerning the Implementation of Recovery Cooperation for Victims of Domestic Violence states that victim recovery is all efforts to strengthen victims of domestic violence so that they are more empowered, both physically and psychologically. While the implementation of the recovery referred to in this PP are; all actions that include services and assistance to victims of domestic violence. The above understanding explains that recovery is limited to the recovery of physical and psychological aspects of the victim but has not yet reached other aspects such as; social, economic and political victims.

Meanwhile, Komnas Perempuan, which is a state institution that is concerned with human rights issues, especially women and children, gives a different meaning to recovery, namely; as the needs of victims of violence widely, not only medical, legal and psycho-social treatment, but also includes the process of recovery of victims so that they can return to power, so they are able to make decisions in their lives and can return to their role in society as a whole human being. Recovery according to the National Commission on Violence Against Women also includes the fulfillment of their basic rights as citizens, such as education, health, population and political rights, including reintegration, compensation and prevention of violence so that it does not recur, this has become an integral part of the recovery process in a broad sense. (Komnas Perempuan, n.d.).

The policy on recovery specifically is not integrated in a statutory regulation relating to types of sexual violence, but is spread in several laws and regulations, namely: Law No. 23 of 2004 concerning the Elimination of Domestic Violence, Law No. 13 of 2006 concerning Protection of Witnesses and Victims, Law No. 21 of 2007 concerning Eradication of Trafficking in Persons, Law No. 35 of 2014 concerning Amendments to Law N0. 23 of 2002 concerning Child Protection and the Regulation of the Minister of State for Women Empowerment and Protection of Indonesian Repubic Children Number 01 of 2010 concerning Minimum Service Standards for Integrated Services for Women and Children victims of violence which requires the government to establish an integrated service center for the empowerment of women and children.

As stated, the violence experienced by victims is a traumatic event and requires serious treatment aimed at recovery. Violence has caused various injuries to victims. Violence causes the victim to lose the most basic things in her life and has a serious impact on her life in the future. (Nursariani Simatupang, Faisal, 2018).

The importance of victims to get recovery as an effort to balance the condition of victims who experience disruption. Recovery is an urgent effort to recover victims from prolonged trauma as a result of the violence they experienced through psychological therapy. The goal of recovery is to help the victim know what response is appropriate in a traumatic condition. So victims can make decisions and understand the continued impact of their own decisions. The power of victims to make their own decisions is one of the things that helps the recovery process. Victims will experience prolonged adverse effects, if not done recovery. Victims are vulnerable to prostitution, away from families, the tendency of victims to choose shortcuts, revenge and allow victims to become new perpetrators of violence, even more extreme are victims of attempting suicide.

The discriminatory response from the community actually has implications for new vulnerabilities that hamper the victim's recovery process. For this reason, the main challenge in providing recovery is how to make the victims not feel more depressed or re-victimized (repeated violence). An important step to prevent this re-victimization is by building complementary cooperation between governments, law enforcement and the community and families in an effort to help victims according to their needs and choices.

Lely Zailani (Management of Hapsari) explained in an interview on August 28, 2019, as follows: "In the culture of victim blaming, the community greatly influences the attitude of the victim. Whether to report or not, whether to "open my mouth" or not. So, the community that supports the victims is very important and that is what we have prepared for a long time. In Hapsari, the process of victim recovery is not determined only in the context of the case. But included in the part of the organization and empowerment of women. So, until the recovery process, we have to involve the community (environment) where the victim lives. If for safety reasons the victim cannot live in their environment, we have prepared another community "community" that is aware of the victims and the cases they have experienced. There was a case where the victim felt insecure if she still lived in the house and the surrounding environment, because her husband wanted to kill her. So we brought it to Bambat Village and it happened that there was a family here. There was one incident, when her husband caught up with the victim, her purchase was even driven out by the community-based community service environment as a place for victims to take shelter for a while.

This will help restore the victim's confidence, and make her feel strong because she believes that she is not alone in dealing with the problem. When a person recovers, that person will realize that the problems they experience after the traumatic event are reduced, not as severe as previously experienced, and not bothering him as he initially felt the symptoms. He also began to feel empowered, motivated to take certain steps that were positive for his life and for the lives of others around him. Each victim must undergo a process of recovery varies depending on the situation and physical and psychological conditions.

Community-based recovery prioritizes community participation, where the community plays an important role in the planned steps. Social support from families, especially children and parents as well as people in the neighborhood also helped restore the conditions of the

survivors. In addition to the emotional support provided by those closest to the survivors, financial support and economic access, the provision of social roles, and the giving of responsibilities to the survivors in their assignments at home and at home became a factor for survivors to find happiness again. (Abdul Muhid, Lia Masfiatul Khariroh, Nailatin Fauziyah, Funsu Andiarna, 2019).

In addition to active participation from the community, this approach focuses on the community as a whole that influences one another. One of the institutions that has implemented this program is Hapsari, a grassroots institution that is concerned with women's issues and is included as a Service Provider Forum. The following are the results of the interview with Lely Zailani (the management of the hapsari foundation Hapsari) on August 28, 2019:

Hapsari has long been organizing women's communities by building grassroots women's organizations. Since 2014 we have found a pattern of handling in the form of community-based case handling services. Now we continue to consider this pattern as a community-based service program for handling (cases) of violence against women. The community itself is a villager, but is driven by a local grassroots women's organization, the Independent Women's Union in the Village. They are Hapsari members. The mechanism, we form the institution, called Community Based Service. This institution exists in the village, there is management and the village head is responsible. There is a Decree Village Head. Administrators are given training as needed for handling cases. For the purpose of empowerment, we also "urge" the existence of a Village Regulation which establishes a budget allocation for handling women's violence handled by Community Based Service. The Community Based Service programs includes; Case handling: Dissemination of information related to violence against women, capacity building for administrators, policy and budget advocacy (Perdes) and others according to village needs. Case handling, meaning from upstream to downstream.

Through community-based recovery, survivors / victims are invited together to investigate the root causes of the trauma they experienced. The characteristics of community-based recovery are; contextual, from and by the community, starting from the grassroots, sustainable, based on needs and carried out by the community. Participation of organized community members is very useful to provide support and assistance needed by victims, including referring cases of violence found in the community to institutions that can provide assistance in a professional manner, such as; Indonesian Women's Association Legal Aid Institute for Justice, for legal assistance. The community can also help by not discriminating against victims and providing opportunities for victims to socialize with other members of the community. This will help restore the victim's confidence, and make her feel strong because she believes that she is not alone in dealing with the problem. (Interview with Lely Zailani, Hapsari Administrator, 28 August 2019)

Lely Zailani further explained that in the process of community-based recovery, it does not stop until the case is "finished" handled. Victims will become survivors who are part of the community that was built earlier. They will be included in relevant community activities. There were survivors' forums, some then participated in paralegal training and they began helping other victims. There are even two (2) villages where the Village Regulation is urged to allocate a budget for the Community Based Services program. In Deli Serdang, there is the old Denai Village in Labu Beach sub-district, while in Serdang Bedagai, there is Bingkat village in Pegajahan sub-district. (results of the interview on August 28, 2019).

What was done by Hapsari was in line with Indonesian Women's Association Legal Aid Foundation for Justice Medan which involved survivors of violence in community empowerment and handling cases after receiving paralegal training. There are even survivors employed by Indonesian Women's Association Legal Aid Foundation for Justice Medan, so that they (the survivors) feel stronger and more confident. The concept of recovery was developed by Komnas Perempuan since 2005. This recovery is a process to support women victims of violence to be strong, capable and empowered in making decisions and seeking a just, dignified, and prosperous life. (Komnas Perempuan: 2018). The principle that must be emphasized in the recovery, is; that recovery is a continuous and personal process, according

to the needs of different victims. The path and method of recovery can change according to the needs and decisions of the victim. (Komnas Perempuan: 2018).

Aside from being oriented towards women victims, recovery must also be based on the rights of victims, namely the right to truth, justice, recovery, non-repetition of violent incidents, and as an inseparable part of human rights enforcement. The four victims' rights are multi-dimensional which are interrelated and influence each other. Therefore, to make victims recover, strive for aspects of physical and psychological health, economic resilience, and community acceptance are not separated from efforts to present recognition that the violence experienced by the victim is the truth, building a sense of justice in the victim, and guarantee that the violence experienced will not recur. . (Ema Mukarramah, Tri Dewiyanti (Ed): 2018: 86).

Recovery requires a mutually reinforcing and equal relationship between victims, advocates and the community. The companion helps and facilitates the victim to be able to rediscover his strength, so that the victim is able to make the best decision for himself. The victim is given choices and the consequences of those choices, not by giving orders or advice. Recovery steps that can be carried out include: Restoring security and reducing fear, identifying the source of anxiety and accommodating its impact, providing information, connecting the body and mind of the victim, reducing the pain suffered by the victim, increasing control through testimony or story telling, Expose traumatic matters, Reinstate relationships with others and close relationships and overcome feelings of sadness and loss, help develop connections, Overcome depression, Improve identity, meaning and purpose in life and Restoration of dignity and values.

Family, religious and community support and material are needed by survivors to be able to rise up and be economically independent. Shelter can actually be used to deliver cargo to the survivors. Through the shelter, the survivors were given recovery models such as that carried out by the Labuhan Batu Induk Women's and Child Protection Institute in the form of doodle therapy for children as victims of violence while still involving the role and participation of families and communities. "Families must provide great support to victims to be able to survive again. Through this doodle therapy model, victims / survivors are led to start thinking that what they are experiencing is something that is not true. While playing and given sweets, victims are encouraged to tell the bad events they experienced ". (the results of an interview with Indrawaty Sinaga, chairman of LPPA Labuhan Batu Induk).

Based on the results of the interviews also found several examples of handling cases, one of them by the Office of Women's Empowerment and Protection of Children and Communities in the City of Binjai, namely cases of violence experienced by Peni's mother from Binjai who was a victim of domestic violence by her own husband. The victim was doused with fire soda by her husband. The victim suffered wounds on the face and eyes that could not see. Through P3AM Binjai city, the perpetrators have been reported but the police have not been able to get it because they ran away. The victim suffered physical and psychological injury and even the victim did not have a house and had to stay with his neighbor's house.

For this reason, P3AM Binjai synergizes with P2TP2A Binjai City and Indonesian Women's Association Legal Aid Foundation for Justice Medan. Through Indonesian Women's Association Legal Aid Foundation for Justice Medan, victims were reported to the Witness and Victim Protection Agency to get recovery assistance for victims including their three children. The witness and victim protection agencies approved the victim's recovery request including the costs of operating the victim's eyes and also the needs of his children. (Interview with Sierly Anita: May 2019).

The above case is a form of recovery that involves the participation of the government and also the community. Another case that is handled in synergy and involves public participation is, the handling of rape cases by LPPA Labuhan Batu Induk. The 6th grade child who was raped by her neighbor is pregnant, so the school does not allow the child to go to school anymore. LPPA Labuhan Batu Induk then coordinated with the school and the Education Office to give permission for the child to stay in school and finally the school agreed.

After completing the final grade 6 exam, the child is evacuated to a safe house until he gives birth. By maintaining his identity, LPPA Labuhan Batu Induk asked for community support and coordinated with the Hospital so that he could get good service at the hospital during delivery. After giving birth, the victim, who was an orphan and came from a poor family, was taken to an orphanage by the family. Thanks to the support of many people, the child was able to recover and now he is at the level of High School. (Interview with Indrawaty Sinaga; May 2019).

When the victim recovers, he will realize that the symptoms he experienced after the traumatic event are less than what was experienced before, and do not disturb him as at the beginning he felt the symptoms. He also began to appreciate empowerment, motivated to take certain steps that were positive for his life and for the lives of others around him. (results of an interview with Indrawaty Sinaga, May 2019)

According to Sierly Anita (director of Indonesian Women's Association Legal Aid Foundation for Justice Medan), the recovery of victims of violence according to the victim version is very dependent on 4 (four) factors, namely: (1) Family as a reason to strengthen victims with or adequate support from the family. (2). Work as a resource for victims or the ability to obtain income to pay for their lives. (3) spiritual support (religion, belief) which can strengthen the victim so that he can get back from his downturn. (4) Community participation and support as a strengthening strategy for victims.

Through the role and participation of the community, survivors find people who are willing to listen to complaints and problems faced after sexual violence. The acceptance of people around the survivors is the beginning they are able to find life satisfaction. Furthermore, when survivors are convinced of their ability to return to their lives, at that moment the survivors begin to be able to portray themselves with social tasks such as being a mother, earning a living, and providing benefits to others.

V. Conclusion

Recovery aims to help the victim know what response is appropriate in a traumatic condition, so that the victim can make a decision and understand the continued impact of her own decision. The power of survivors to make their own decisions is one of the things that helps the recovery process. Changes in values that develop in the community and become the root of the problem of discrimination and the participation and synergy of the government, institutions and society are needed in the process of recovery for women and children victims of violence. Community-based recovery that has characteristics; contextual, from and by the community, starting from the grassroots, sustainable, based on needs and carried out by the community. The role and participation of the community is very useful to provide support and assistance in accordance with the needs of victims. Communities can take on the role by providing opportunities for survivors to socialize with fellow community members without stigma and not discriminating against them. Thus, the existence of victims becomes stronger and more confident in dealing with their problems. Through community-based recovery victims will become part of the community together with other survivors and engage in community activities including paralegal training and start helping other victims.

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CUSTOMARY LAND RIGHTS OF ORANG ASLI: A CASE STUDY IN KAMPUNG PARIT GONG, NEGERI SEMBILAN, MALAYSIA

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ABSTRACT

Orang Asli forms a minority community in Peninsular Malaysia whose livelihood mostly depends on their land and the surrounding area. Dispute over customary land rights of Orang Asli continues in Malaysia although Malaysian Courts in several cases have upheld the Common Law rights of Orang Asli to their customary lands. This constitutes a challenge faced by some community of Orang Asli and several State Governments. Based on the focus group discussion, profiling survey and library research methods, this paper analyses the land rights of Orang Asli in Peninsular Malaysia, focusing on Orang Asli in Kampung Parit Gong, Jelebu, Negeri Sembilan. The finding indicates that the Kampung Parit Gong Orang Asli follow strictly their customs of '*adat perpatih*' for a long period of time, and that they highly value the land, both through the usage of the land and by inheritance. Still, these raised important concerns of Orang Asli in Kampung Parit Gong, particularly on the security over their rights on the said customary land and the guarantee of their future generations' socio-economic wellbeing. This paper proposes legal and administrative measures to address the issues for the betterment of the rights Orang Asli in Peninsular Malaysia.

***Keywords**: Orang Asli, Customary Land Rights, Parit Gong, Negeri Sembilan*

Introduction

Orang Asli has a significant place in the Malaysian history. They may have inhabited the peninsula for over 50 000 years (Francois-X Ricaux et. al., 2006). They are divided into three main categories namely *Negrito*, *Proto-Malay* and *Senoi* and further subdivided into 18 subgroups (Rohaida, 2016). It was reported that the Negritoes have arrived in Southeast Asia between the end of the Last Glacial Maximum and the Neolithic expansion of the Holocene, ie, between 44 000 and 63 000 years ago (Francois-X Ricaux et. al., 2006). While the Sen'oi are Mongoloid people who are descendants of both the Hoabinhians and the Neolithic cultivators who arrived in the Malay Peninsula around 4000 years ago from the north (Colin Nicholas, 2000). It was also found that the Proto Malay groups have inhabited the southern areas of the peninsula for between 2000 and 3000 years. Orang Kuala, a subgroup of the Proto-Malay, migrated from Sumatra about 500 years ago (Colin Nicholas, 2000).

Orang Asli or an aborigine is defined in Section 3 of the Aboriginal Peoples Act 1954 [Act 134] (APA) to mean any person whose male parent is or was, a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal way of customs and beliefs, and includes a descendant through males of such person. The definition of an aborigine also includes any person of any race adopted when an infant by aborigines who has been brought up as an aborigine and adopted its culture and the child of any union between an aborigine female and male of another race. The main distinction between Orang Asli and the main population is their culture, language and social organisation. In this regard, their perspective towards land is unique in the sense that it has cultural and religious symbiosis which requires utmost protection. This paper explores the customary land rights of Orang Asli in Kampung Parit Gong, Negeri Sembilan in which the discussion includes the position of Orang Asli under Malaysian Law, legal position of customary land rights of Orang Asli and customary land of Orang Asli in Kampung Parit Gong.

This research paper employed focus group discussion, profiling survey and library research methods. Focus group discussion is when people from related backgrounds are grouped and asked about their perceptions, beliefs or ideas (HERD Publication, 2016). This method was conducted at Kampung Parit Gong on 12 February 2019, participated by the researchers and 11 villagers who are from the Board of Custom (*Lembaga Adat*), that is, *Tok Batin*, *Tok Mangku*, *Tok Jekerah*, *Tok Jenang*, *Panglima Hitam*, *Panglima Balai*, Panglima Gajah, *Panglima Tua*, *Panglima Kencang* and *Panglima Kecil*. Profiling survey was conducted on 120 Kampung Parit Gong's populations in order to collect the main demographic information therein including their educational backgrounds, jobs and monthly incomes. In addition, the library research method employed in this research comprises content analysis of statutes, particularly the Federal Constitution and the Aboriginal Peoples Act 1954 [Act 134], reported cases and secondary data such as books, journals, and online database.

Position of Orang Asli under Malaysian Law

Under the international legal framework, the protection of the rights of indigenous peoples are acknowledged in several international instruments, among others, the United Nations Declaration on the Right of Indigenous People 2007 (UNDRIP) and the Convention on Biological Diversity 1992 which are relevant to Malaysia. The UNDRIP requires states to, among others, provide strong protection of lands and resources rights to the indigenous people and impose a duty on the state to respect the special relationship between indigenous people and their customary land, with due regard to their cultural and spiritual welfare (Subramaniam, 2010). The UNDRIP holds a persuasive authority on Malaysia as a United Nation Member to provide statutory protection to the Orang Asli customary land rights, cultural and tradition.

The position of Orang Asli as a special group is recognised under the Federal Constitution by virtue of Article 8 (5) (c) which permits positive discrimination for the 'protection, well-being or advancement' of the communities. This provision enables states within the Federation to take necessary measures to remove disabilities of the Orang Asli in order to achieve equality in society. In this regard, the welfare of Orang Asli comes under the purview of the Federal Government. Any law made for the purpose of the welfare of the Orang Asli could be passed by the parliament as stipulated under Item 16, Ninth Schedule of the Federal Constitution (Yogeswaran Subramaniam, 2015). The Federal Constitution also requires that the Senate in the Parliament to compose members who 'are capable of representing the interests of aborigines' as an implicit intention of the Constitution to protect the welfare of the Orang Asli (Hishamudin, 2018).

The Federal Constitution also protects the rights of Orang Asli. For instance, the right of Orang Asli to livelihood may be embedded in right to life as stipulated under Article 5(1) of the Federal Constitution which stipulates that "no person shall be deprived of his life or personal liberty save in accordance with law". The Court of Appeal in *Tak Tek Seng @ Tan Chee Meng v Suruhanjaya Perkhidmatan Pendidikan & Anor* has made a wider interpretation to this provision by stating that "the expression of *life* appearing in Article 5(1) of the Federal Constitution does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life…it includes the right to live in a reasonably healthy and pollution free environment". Thus, the right to life under this interpretation should also encapsulate the right of Orang Asli to livelihood.

However, it has been narrowly interpreted by the Court of Appeal in the latter case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors & Other Appeals*. In this case, the respondents claimed that if the Bakun Hydro-Electric Project is carried through, their fundamental rights would be adversely affected in that the result of the environmental impact would affect their livelihood. Nevertheless, the Court of Appeal held that deprivation of the

life of the respondents under Article 5(1) of the Federal Constitution was in accordance with law since there is a law allowing such a deprivation. Based on these two cases, the right of Orang Asli to their livelihood should be embedded in right to life on the ground that right to livelihood is an integral part of life.

In addition to that, a specific legislation known as the APA was passed by the Malaysian Parliament to address the issues of Orang Asli in Peninsular Malaysia. The preamble of the APA states that its objective is "to provide for the protection, wellbeing and advancement of the aboriginal peoples of Peninsular Malaysia". The APA provides, among others, the definition of the aborigine, the dealings in land by aborigine, the compensation provisions for the impairment and extinguishment land use of the aborigine and other miscellaneous provisions pertaining to the welfare of the aborigines. The APA is considered as a 'human rights' statute by the Court of Appeal in *Sagong Tasi's* case as it contains a comprehensive statement on the human rights of the aborigines. Besides, a Federal agency known as Jabatan Kemajuan Orang Asli (JAKOA) was established to undertake the administration and welfare of the Orang Asli.

Notwithstanding the constitutional guarantee and the existing statutory provisions, the Orang Asli communities are facing continuous challenges in maintaining their identity and ecosystem, especially in defending their customary land against deprivation and acquisition by other parties although the Malaysian Superior Courts in several cases upheld the pre-existing rights of Orang Asli to their ancestral and customary lands according to common law. Moreover, they also have less safeguards in regard to several aspects such as languages, laws, customs and institutions as compared to other races (Yogeswaran Subramaniam, 2013).

Legal Position of Customary Land Rights of Orang Asli in Malaysia

The concept of land in Orang Asli's perspective is very diverse as it includes not only its economic value but also social, cultural, religious and historical significance. To Orang Asli, their customary land commonly termed as *tanah saka* or *tanah adat* has a sacred quality that they inherited from their forefathers since time immemorial (Hamimah, 2013). The customary land includes the land that they use for occupation, the areas that they commonly have access for resources or foraging areas (*kawasan rayau*) as well as land use for burial or other ritual purpose. (Communal Right). This understanding is in contrast with the concept of land ownership under the land administration system in Malaysia which identifies land ownership based on registration of title as provided under the National Land Code 1965.

There is no specific definition of customary land in the APA. In the earlier case *of Adong bin Kuwau v Kerajaan Negeri Johor*, the term *kawasan saka* was decided as referring to the 'traditional and ancestral land' which in this case relates to the area of land that they 'depended to forage for their livelihood in accordance with their tradition' (Yogeswaran Subramaniam, 2018). The definition of customary land was further discussed in the case of *Sagong bin Tasi v Kerajaan Negeri Selangor* which refers the term customary land as the land that the Temuan tribe have occupied continuously for generations. By virtue of the abovementioned cases, the court had given judicial recognition to the customary land rights of Orang Asli in Peninsular Malaysia (Cheah, W L, 2004). These decisions were affirmed by the Federal Court in the case of *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* and followed by the case of *Bato' Bagi v Kerajaan Negeri Sarawak.* These decisions have paved the ways for the judicial recognition of the customary land of Orang Asli in Peninsular Malaysia and natives in Sabah and Sarawak. One of the important implications of this recognition is that the acquisition process of any customary land of Orang Asli must follow strictly the due process and payment of compensation must be awarded in accordance with statutory provisions.

In order to achieve secured land rights, the judicial recognition per se is insufficient since it depends on case to case basis. Besides, different treatment by the respective state on this issue creates further uncertainties. The same concern was shared by the communities in Kampung Parit Gong, negeri Sembilan, the focus group of this research. For example, the Federal Court in *TR Sandah* refused to recognize the Dayak native customs *pemakai menoa* and *pulau galau* in their claim over native customary rights (NCR). On the other hand, in *Yebet bt Saman & Ors v Foong Kwai Long & Ors*, the Court of Appeal stressed that the customary land rights of Orang Asli under the common law could co-exist with APA. In the case of *Mesara Long Chik & Anor v Pengarah Tanah dan Galian Pahang & Ors*, the High Court allowed the claim for compensation made by the Plaintiffs (Semaq Beri communities) which was the alternative prayer by the Plaintiffs for the loss of the Plaintiffs' interests and rights over their customary inherited land on the ground that they have successfully proven the previous and continuous use and occupation of the land. Therefore, the actual practice by the Orang Asli communities is crucial in determining the extent of the rights of the communities.

Customary Land of Orang Asli in Kampung Parit Gong

Kampung Parit Gong is in the *luak* (Adat district) of Jelebu; the Undang who resides in Kuala Kelawang (Baharon, 1973). It is located in the mukim of Simpang Pertang in the district of Jelebu, Negeri Sembilan. It is about 2 ½ miles from Pertang and about 15 miles from Kuala Kelawang; the administrative town of the district. The access road to the Kampung from the main road is tarred and can be reached by car. The Kampung is equipped with the basic infrastructures such as water and electricity supply, internet line, schools, clinic and community hall. There is also a dewan *adat* built by the community for their traditional ceremonies. Administratively, the kampung is headed by *Batin* and aided by *Mangku*. These leaders are assisted by *Menteri*, *Jenang*, *Jekerah* and *Panglima* (Focus Group Discussion).

The first establishment of the community of Kampung Parit Gong began over a century ago in the jungle area, led by one *Batin* Bani and his followers from Tampin. The resettlement process of the community to the present location was conducted in 1972 where they were given '*rumah rancang'* (Baharon, 1973). Presently, there are 92 houses in the Kampung Parit Gong, occupied by 120 families. The total number of populations is estimated around 510. Based on the profiling survey conducted, majority of the villagers are self-employed while minority of them work as rubber tappers, small-holder farmers and public servants. In relation to their income, only a small number of them earn RM1000 and above while majority of them earn RM1000 and below. Most of the families have children or dependents from one to five and economically, they are still considered to be in poverty. Since most of them are self-employed, they need land and forests to carry out agricultural activities and seek other sources of income.

The Orang Asli in Kampung Parit Gong is from the Temuan tribe. They practise *adat perpatih*; the customary *adat* of Negeri Sembilan. *Adat Perpatih* is a combination of *Adat Minangkabau* (Tarik Baleh/Simumbang Jatuah), *Adat Langkah Benar* (Adat Siak) and *Adat Benar* (Adat Orang Asal). The practice of *Adat Perpatih* was originated from the presence of Minangkabau people from Sumatera hundred years ago. However, *Adat Perpatih* practised in Negeri Sembilan is slightly different from those practised in Minangkabau, Sumatera since it has been adapted to the local custom of Orang Asli, known as *Adat Benar* (Rosiswandy Mohd Salleh, 2017). *Adat Perpatih* upholds matrilineal concepts whereby ancestral property can be inherited and belong to the tribe as a joint property rather than individual property (Rosiswandy Mohd Salleh, 2017). As such, women are privileged in regard to the inheritance of property.

In Kampung Parit Gong, Orang Asli's land could be divided into three types of land, that is, customary land, ancestral land and foraging land. It was also notified during focus group discussion that the area of their customary and ancestral land have been gazetted as the

aboriginal reserve. The application for the land to be gazetted as aboriginal reserve was initiated by the Orang Asli at Kampung Parit Gong in the year 1960. It was only in 2015 that the government gazetted 700 acres of the land in Kampung Parit Gong as 'Orang Asli Reserved Area'.

Following the *Adat Perpatih*, in Kampung Parit Gong, the ancestral land of the communities are passed to daughters. For them, daughters will take care of the land for the community. This works like a trustee to the land of the community. Meanwhile, son is expected to work and find his own property (Focus Group Discussion).

As far as sale or exchange of land is concerned, this is in general strictly prohibited. It may only be allowed in exceptional cases in situation when the owner really needs money, such as costly medicinal treatment, but this is extremely rare. Such land could only be sold to other members of the community. The customary board at Kampung Parit Gong will be asked to be the witness for the sale (Focus Group Discussion).

The surrounding area is a foraging area where the Orang Asli can freely roam to find something for their foods or to add their sources of income. In contrast to the ancestral land which belong to family units in the communities, the foraging areas are not owned by anyone but may be considered as common access. Although relatively there are only small number of villagers going to the forest areas to find for various sources, it remains as important source of income for them (Focus Group Discussion). This indicates Orang Asli's overdependence on land and areas surrounding them (Kardooni, R., Kari, F. B., Yahaya, S. R. B., & Yusup, S. H. 2014). Currently, they are in the process to apply for foraging area to be gazetted because according to them, they have been working on the land for almost 50 years (Focus Group Discussion).

As a community who holds a unique relationship with their customary land, security of land tenure is the main concern of Orang Asli in Kampung Parit Gong. Nevertheless, there was a delay in the gazetting process of Orang Asli of Kampung Parit Gong's inhabited land in which it took around a long period of time for the application to be approved since the submission of the application in 1960. Section 7 (1) of the APA stipulates that "the State Authority may, by notification in the Gazette, declare any area exclusively inhabited by aborigines to be an aboriginal reserve, provided when it appears unlikely that the aborigines will remain permanently in that place it shall not be declared an aboriginal reserve but shall form part of an aboriginal area; and an aboriginal reserve may be constituted within an aboriginal area". This provision provides the power of the State Authority to declare any area inhabited solely by aborigines to be an aboriginal reserve. Even though the above provision provides a measure of protection of Orang Asli's lands, State Authority also has power to revoke wholly or in part or vary any such declaration by making notification in the Gazette as stipulated under Section 7(3) of the APA. This is also a matter that becomes the concern of Orang Asli in Kampung Parit Gong (Focus Group Discussion).

Further, Orang Asli are also in need of assistance and support by the Federal Government through relevant agencies such as the Rubber Industry Smallholders Development Authority (RISDA), the Federal Land Consolidation and Rehabilitation Authority (FELCRA) and the Federal Land Development Authority (FELDA) (Masron, T., Masami, F., & Ismail, N., 2013). They also appreciate if the government's measures in assisting them encompass consultative participation and active engagement. The provision for a just process that provides opportunity for Orang Asli to participate in decision-making process with special consideration on their norms and decision making institutions was suggested by Izawati Wook (2019). It is also important that any decisions taken by the government in relation to the development of Orang Asli will not affect the uniqueness and special conditions of Orang Asli (Aiken, S. R., & Leigh, C. H., 2011).

Conclusion

Based on the discussion, it is observed that Orang Asli in Kampung Parit Gong is a well-organized community and still strongly follow the *Adat Perpatih* in their society. They also greatly appreciate the land which are indicated through the use of the land for agricultural activity and custom of inheritance based on *Adat Perpatih*. Nevertheless, there is still less safeguard on their customary land rights and their future generations' socio-economic wellbeing as discussed above. Hence, a provision in the existing law recognising the customary land right of Orang Asli for their sustainable living is necessary. Besides, the government's support and assistance in various aspects may be enhanced for example in terms of implementing consultative participation and active engagement with Orang Asli in decision-making process affecting them.

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SPECIAL MEASURES FOR CHILDREN IN COURTS IN MALAYSIAN CRIMINAL JUSTICE SYSTEM

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ABSTRACT

The involvement of children in adversarial court system invites traumatic, distressing experience upon them, particularly when they are the victims of crime. As children are vulnerable group of people, their appearance in court to give testimony in trials facing the accused person could amount to secondary victimization. Although there is no conclusive evidence to show that children who undergo the court procedures is traumatized by the legal process, there is an urgent need to understand the process of law involving children as witnesses in the Malaysian courts. In this regard, this vulnerable group is entitled to a specific provision of law, which may provide appropriate protection for them. In Malaysia, the Evidence of Child Witness Act 2007 (ECWA 2007) provides for special measures in administering the presence of children in courts as witnesses. This Act is a piece of legislation that can provide protection for the rights of children as witnesses in criminal proceedings. Malaysia also has set up the Court for Children in order to assist children in facing legal procedures in the court of law. This article discusses the extent to which the ECWA 2007 can provide protection to children in giving testimony in courts. It also elaborates on the availability of such measures in the Court for Children. Relevant decided cases relating to the application of special measures for children in courts are referred for this purpose.

***Keywords*:** special measures, child witnesses, vulnerable, protection, court for children.

Introduction

The involvement of children in adversarial court system invites traumatic, distressing experience upon them, particularly when they are the victims of crime. As children are vulnerable group of people, their appearance in court to give testimony in trials facing the accused person could amount to secondary victimization. Although there is no conclusive evidence to show that children who undergo the court procedures is traumatized by the legal process, there is an urgent need to understand the process of law involving children as witnesses in the Malaysian courts. Realising that children should be treated differently from adults, there have been attempts to justify different path for children, especially children who are witnesses in the court of law process.

In this regard, this vulnerable group is entitled to a specific provision of law, which may provide appropriate protection for them. Thus, there have been introduction of court of justice created and established to handle matters specifically to children and young people. Hence, special measures are being developed by authorities to ensure children who are facing the process in the court are protected by the system of law. This paper aims to examine the legal process that will be faced by child victims who are called to the court of law to testify his/her evidence before a judge. Once a police report is lodged by the guardian or parents of the child victims, the basic process of law is also applicable to the latter.

Rights of Children as Victims in Criminal Proceeding

The most contentious issue in the field of victim's right has been the assertion of a right to participate in the justice process (Marlene A. Young, 2002). However, such assertion might

not be suitable to children who are victims to the incident. Although the United Nation Declarations on the Basic Principles of Justice for Victims of Crime Abuse of Power suggest that victims should be treated with compassion and respect for their dignity, children should be treated differently due to their vulnerability. These children's rights, following the aftermath of the incident must be given priority.

Malaysian jurisdiction, which is an adversarial system in common with the English system from which it is derived, has set out laws and procedures that are ostensibly friendly to victims, especially children. However, is having the legal provisions really benefited the victims? What, if any, improvements have there been in the management of certain groups of victims and witnesses? Previous studies have been conducted from a legal perspective on child abuse and sexual offences; these have clarified the relevant statutes and recounted their historical development. Most of the empirical studies on child victims and victims of sexual offences have principally discussed issues in terms of the medical and health, social or psychological aspects. There has been very little research in Malaysia on the extent to which the law and procedures are implemented in practice, particularly on the protection of child victims in the process of law.

Children Giving Testimony in Courts

The traumatic and awful experience of having to relive the worst episode in their lives in front of outsiders, in unfamiliar courtrooms, will render child witnesses vulnerable. This general phenomenon happens in various jurisdictions, including Malaysia. It is a problem acknowledged by the judiciary, and some judges have demonstrated their awareness of witnesses' vulnerability in a few decided cases.

The stress, trauma and emotional breakdown of child victims, especially of sexual crimes, can even obstruct clarity and frustrate evidence, and further damage the case. (Norbani, 2007:117) Vohrah J (as he then was) observed in Yusaini Mat Adam v Public Prosecutor (1999) 3 MLJ 582 (at 586), in this regard that emotional burdens of child witness include crying, turning pale, refusing to speak, refusing to identify the defendant and resistant. It is therefore understandable that the child in the case of Sidek bin Ludan v Public Prosecutor (1995) 3 MLJ 178 (at 184) was under great pressure, intimidated and nervous when she was asked to describe the incident that happened between herself and her neighbour as "it is quite embarrassing for her to expose the sordid rape episode in court".

Committing sexual relations with a child in a familial relationship is undoubtedly abusive, manipulative and exploitative because the children may be re-victimised by various aspects of the criminal justice system and professionals within it (Home Office, 2002: para 58). The vulnerability of incestuous rape victims relates to the ordeal that they possibly suffered, as the perpetrators are closely related to them. KN Segara J (as he then was) acknowledged in Ismail Rasid v Public Prosecutor (1999) 1 MLJ 307, that this offence is more serious and was of the view that: "when a father rapes his daughter and is convicted in court, any sentence passed must reflect the abhorrence of society to such a heinous and despicable act". This concurs with Rook and Ward's view that incest victims 'suffered physically and psychologically' (1997: 108); and were placed in a vulnerable position as the existing relationship creates fear and risk of being exploited.

Judicial responses in decided cases signify recognition of the existence of vulnerability among child victims of sexual offences. The victim's acquiescence in Public Prosecutor v Mohd Romzan bin Ramli [2008] 2 MLJ 741, to the respondent's warning not to say anything about the perpetrated crime demonstrates vulnerability. Apart of other reasons – i.e. 'an inability to resist' and 'a difficulty in calling for help' – the victim, who was aged 11 at the time of the offence, was considered vulnerable due to "a difficulty in testifying against the perpetrator" (at 750 para 14) because of her natural physical and mental limitations. Thus, evidence tendered by vulnerable child victims are not an easy issue to be dealt with by the legal practitioners. Thus, there is an urgent need to identify the best team to handle and prepare court's testimony in the Malaysian courts. Best team means a group of people who are not only child-friendly but also can assist children to be comfortable in court settings.

Accordingly, the usage of technology such as the live TV-link or screen might be helpful to children to lessen their fear.

The risk of fear, distress and intimidation is arguably high due to the victim-perpetrator familial relationship and the age of the victims. The judge in Safae Ing v Public Prosecutor [2006] 5 MLJ 698, regarded the appellant in a case of raping his daughter as the "predator to his own child", who has breached the trust invested in him to care, raise and protect his child with love and affection. The breach of trust is emphasized by Zawawi Salleh JC in Mohd Romzan's case as rendering a child victim "more vulnerable to such an offence". The respondent's abuse of his position as stepfather to the victim by raping her has exploited the close relationship that accompanies the role of a parent. The judge observed that any standard shall regard such act as "an abhorrent, despicable and dastardly crime". Therefore, it is important to imbue these victims with the confidence to come forward and give evidence as witnesses in court, however tender their age.

The judiciary identified the possibility of adversarial proceedings aggravating the vulnerability. Zawawi JC observed that, as the respondent had pleaded guilty, the victim had been spared "the unfortunate experience of having to give evidence in court, as well as the mental torture and anguish the victim would suffer" had she been asked to testify against the stepfather in open court. The judge has incidentally recognized the existence of pain and distress among victims when confronting and testifying in court against defendants who are known to them. It is arguably worth examining whether these judicial responses exert any influence on criminal justice practitioners' consideration in identifying vulnerable witness and implementing special measures.

Special Measures for Children in the Court Process

The concept of the 'best interest of the child' is basic principle in protecting children and it has a very wide scope. The provisions in United Nations Convention on the Rights of the Child (UNCRC) provides a general obligation on state to ensure necessary protection and care for the child's well-being (Article 3(2), UNCRC). In other words, when decisions for children need to be taken by adults, the paramount consideration must be made based on the children's best interest and welfare. This is also emphasised in the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (UNDOC: 2009). Paragraph 8 (c) of the Guidelines demonstrate the important of this basic principle to be taken into consideration, and to be given primary consideration, eventhough, it appear that there is a need to safeguard the rights of accused and convicted offenders at the same time (UNODOC:2009). It must be noted that, despite the existence of the ground rules on protection of the child, the way the principle of the best interests of the child is understood and applied may vary in the different jurisdictions across the world.

Article 12 of UNCRC provides on the manner of evidence adduced from children. This Article is silent on what would be the appropriate manner for children to express their views freely, but it only highlights that it must be "in a manner consistent with the procedural rules of national law". In Malaysia, the Child Act 2001 provides constitution and jurisdiction of Court For Children, which also state on the functions of the advisers in advising the parent or guardian of the child, if necessary. But the Act is also silent on the procedure of giving testimony for children in courts.

Under the Malaysian law, children can be called to give evidence or to testify in court. The determining factors to competency of children as witnesses are the ability in "understanding the question" and "giving the rational answers to it". Section 118 of the Evidence Act 1950 states that "All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind", however, it is the duty of the court to decide as to the admissibility of the evidence (section 136(1) of Evidence Act 1950). The condition of children especially those at young age may not allow the courts to administer the normal

procedure of taking oath before giving oral testimony as witnesses as provided under Section 4 of the Oaths and Affirmations Act 1949.

In a later development, Malaysia introduced the Evidence of Child Witness Act 2007 (ECWA 2007), which provides for special measures administering the presence of children in courts as witnesses. This Act is a piece of legislation that can provide protection for the rights of children as witnesses in criminal proceedings. It prescribes the available measures that van be applied to accommodate children as vulnerable witness in courts to include:

i. Use of Screens;
ii. Evidence by live link;
iii. Video recording of a child witness – in which previous video recording of a child witness may be proved;
iv. Intermediaries;
v. Accompanying Adults – i.e. to have adults accompanying child witness;
vi. Waiving Formal attire – where formal attire may be dispensed with; and
vii. Restrictions on media reporting and publication

Legal Provisions and Measures for Children in Courts

The Evidence of Child Witnesses Act 2007 [Act 676] (ECWA 2007) provides for a child witness to give evidence in the courtroom but shielded by a screen between him and the accused person or a child charged with the offence or by the live link or by video recording. The objective of the Act is to reduce the trauma experienced by child witnesses in giving evidence in court. The law is silent on who chooses the mode of giving evidence, presumably the party that calls the child witness will choose the mode. Section 3 of the Act provides that a child witness in giving evidence in court, a screen may be put up to prevent the child from seeing or being seen by the accused or a child charged with any offence.

The child witness may also give evidence without being in the court-room by live link or by video recording. “Live link” means a live TV link or other arrangement whereby the child while absent from the court-room is able to see or hear or be seen and heard by a person in the court-room.The video recording shall be admitted as evidence-in-chief. Examination of the child witness may be done through the court or an interpreter or an intermediary authorised by the court. The intermediary communicates the questions put to the child witness and communicates the child’s answers to the person putting the questions. He also explains the questions and answers to be understood by the child but shall not prompt or influence the child or disrupt the questioning.

In certain occassions, the procedure of live link and screen may be combined with the application of intermediary who shall be responsible to put the question to the child, interpret the language of the child and communicate the response of the child to the court. In some cases, the child, particularly of tender years, may need to be accompanied in the witness room or even the courtroom. An adult who are always the close relative to the child, such as the mother may sit beside the child who are testifying. The adult must remain silent but only to sit together with the child to extend courage and confidence to the child witness. (see Section 9, ECWA 2007) The applicability of the above methods and procedure of securing testimony from child witnesses include child witnesses suffering from physical, mental or intellectual disability. Any measure or the combination thereof shall be determined by the court on a case by case basis as provided in Section 12 of the Act.

Those are provisions in the ECWA relating to the mannner in which a child may give evidence. A child witness is now able to testify, at any stage of a trial, in any one of the methods prescribed. The giving of evidence in such manner is considered giving evidence in open court.

On the other hand, section 133A of Evidence Act 1950 states about the evidence of child of tender years where inter alia provides that “... though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code [Act 593] shall be deemed to be a deposition within the meaning of that section”. The purpose of this section is to obtain an accurate record from the witness of what he really

means to say and to give him an opportunity of correcting the words which the Magistrate has taken down". (Mallal Criminal Procedure, 5th Edition, 8679).

Section 16 of ECWA states that the Act is to be read together with related provisions in the Evidence Act and Criminal Procedure Code. In the Evidence Act 1950, it provides that the witness may be examined according to the following procedures. As mentioned in Section 135 of the Evidence Act on the order of production and examination of witnesses, Section 137 of the Evidence Act on the requirements of examination-in-chief, cross-examination and re-examination of a witness. Section 135 of Evidence Act is outlined in two parts i.e. (i)The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and (ii) in the absence of any such law by the discretion of the court.

In civil and criminal case, there is no such order, which only section 173(j) of the Criminal Procedure Code that says,

(j) (i) If the accused pleads guilty to the charge as amended, the plea shall be recorded, and he may be convicted on it and the Court shall pass sentence according to law:

Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

(ii) If the accused does not plead guilty to the charge as amended, the accused shall be called upon to enter on his defence.

(iii) When the accused is called upon to enter on his defence, he may produce his evidence and shall be allowed to recall and cross-examine any witness present in the Court or its precincts:

Provided that if the accused elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence:

Provided further that any accused person who elects to be called as a witness may be cross-examined on behalf of any other accused person.

According to this provision, if the child is called to give testimony, he can, either by way of unsworn testimony or sworn testimony, give evidence in open court. But the child is still subject to order of examinations and direction of re-examination under Section 138 of Evidence Act. When the child is giving evidence through video recording, he is considered as giving evidence-in-chief but is still subject to cross-examination, which the question will be put through intermediary.

Malaysia also has set up the Court for Children in order to assist children in facing legal procedures in the court of law as the way forward. Malaysian first special court to deal with cases involving sexual crimes against children were launched on 22 June 2017 in Putrajaya and claimed as the first of its kind in Southeast Asia. (Astro Awani, 22 June 2017). This special court is located at the Palace of Justice Putrajaya, and hears cases that occur in Selangor, Kuala Lumpur and Putrajaya. More courts of this kind will be set up in all 13 states in stages.

This special court handles sexual crimes against children where the victim is a child, unlike the existing Court for Children which hears cases where the perpetrator of the crime is a child. Aimed at fast-tracking the disposal of cases as well as hearing proceedings, Sessions Court judges with expertise in laws relating to children were appointed to hear cases. This court is equipped with infrastructure such as court recording and transcription facility, child-friendly waiting rooms and witness rooms for child witnesses, live video-link facilities, child witness screens and disabled-friendly tools.

In addition, the special court would focus on cases such as child pornography, child grooming and child sexual assault in tandem with the Sexual Offences Against Children Act

2017 that was passed in April 2017 recently being enforced on 10 July 2017. A working committee involving the court, Attorney General's Chambers and Women, Family and Community Development Ministry (KPWKM) and several children NGOs, including UNICEF has also drafted a special standard operating procedure as guidelines on how best to handle sexual crimes cases involving children. This guideline should also meet the requirements and needs of a child witness, in accordance with best practices in other countries in the world.

Conclusion

The vulnerability of child victims and witnesses, especially in the courtroom, is clearly manifested in the literature and case reports; hence, it has been widely acknowledged in the Malaysian criminal justice system. The focus on the need for support, protection and special measures applications for child witnesses in the criminal justice process and court proceedings has resulted in the development of legislative and administrative measures for them. The recognition of children as the main beneficiaries of protection and special measures applications is also acknowledged within the international legal framework; particularly on the basic principle of 'the best interest of children', which has a very wide scope. Meanwhile, the categorization of adults as vulnerable witness has instead generated a question of identification that is worth examining as it further relates to their eligibility for protection and special measures applications.

It is believed that the use of screen and live TV-link may help improving the experience of child victims and witnesses in the criminal justice system; especially for those children in cases involving sexually abuse children, where the memory of the incident can be frightening and traumatising. This is also important for example in the case of child abuse, since one of a child abuse victim's greatest fears is testifying in front of his or her abuser (Copen LM, 2000). The adoption of the special measures for children in court must be administered and conducted in a proper manner. This is crucial in order to ensure that the use of live TV links and screen is always driven by the interests of justice, and not by what is cost-effective.

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THE ROLES OF SUHAKAM IN ADDRESSING CORPORATE HUMAN RIGHTS VIOLATIONS IN LOGGING AND PLANTATION INDUSTRIES IN MALAYSIA

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ABSTRACT

Focusing on the roles of Human Rights Commission of Malaysia (SUHAKAM), the objective of this paper is to help companies enhance their human rights compliance and to provide solution to the issues of corporate human rights violations with particular focus in the logging and plantation industries. Also, the paper aims to provide the affected victims with greater access to alternative / non-judicial remedies, through which their grievances could be raised and remedied. The research methodologies adopted in the preparation of this paper included library-based research and two roundtable discussions (RTDs) which were held with corporate bodies and alleged victims, respectively. The RTDs were held to explore firstly the types of violations allegedly encountered; secondly, the best practice exercised by Malaysian companies in respecting human rights; and thirdly the possible role that SUHAKAM could undertake in addressing human rights violations perpetrated by business. Reference was also made to the outcomes from SUHAKAM's National Inquiry on the Land Rights of Indigenous Peoples. The research discovered that companies have limited understanding of human rights. In particular, companies' non-recognition of and engagement with indigenous communities during land development is an area of significant concern. The research suggests that the international human rights standards for business, such as the Ruggie Principles could reinforce companies' human rights commitment. To this end, as the national human rights commission, SUHAKAM is at the best position to facilitate companies in incorporating human rights standards into their business operations as well as in enhancing their compliance with human rights standards.

Keywords: *SUHAKAM, business and human rights, plantation and logging industries, corporate responsibility.*

I. INTRODUCTION

Malaysia has been a successful developing country and is forging ahead to become a full-fledged developed nation by 2020. However, in achieving the aim, Malaysia has been stuck at the crossroads between fostering its economic growth and protecting the human rights of its own people. The rapid growth in business and economic sectors which sometimes implemented without proper monitoring have to some extent abandoned the need to respect human rights of those within the business' sphere of influences (Ahmad, N.M, 2013). With nearly absent and inaccessible judicial remedy, both internationally and domestically, perpetrators of human rights violations have often gone uncharged while victims' rights remain unprotected without any proper redress.

The debate on human rights in a business context is not new but, in many regards, particularly challenging. It often takes place in an environment that is typically characterized by an imbalance with economically powerful companies, investors and states on the one side and individuals or even children or poor people as some of the most vulnerable members of

society on the other. From a conceptual perspective, the discussion on business and human rights involves different disciplines which developed fairly independently of each other, resulting in a rather fragmented body of regulations. Another layer of complexity lies in the fact that the debate is characterized by a variety of actors and instruments.

Accordingly, rules are often framed as formally non-binding or even voluntary instruments such as codes of conduct or guidelines. Dealing with human rights and business issues therefore implies facing a complex and dense web of regulations, some of a binding, others of a non-binding nature, some situated at the national, others at the international level. To make matters worse, the level of understanding amongst businesses in Malaysia on human rights and social responsibilities and their commitment to pursue such responsibilities is still at an infancy stage.

II. RESEARCH BACKGROUND AND OBJECTIVES

Realizing the above deficits, this research aims to explore the role of the Human Rights Commission of Malaysia (SUHAKAM) as the National Human Rights Institution (NHRI) to address the issues of corporate human rights violations. On the basis of its statutory functions, SUHAKAM - as an NHRI can play an important role in addressing and promoting human rights awareness among the business community and the regulatory authorities as well as in enhancing human rights compliance by businesses. This research will focus on companies from the logging and plantation industries due to their extensive presence and massive human rights impacts on Malaysian society.

In defining the roles of SUHAKAM in the area of business and human rights, this research relies fairly extensively on the UN Guiding Principles on Business and Human Rights - the John Ruggie's Protect, Respect and Remedy' Framework - as a foundation on which future efforts by SUHAKAM could be based such as the preparation of a draft policy on human and business to enhance human rights compliance among MNEs and business entities operating in Malaysia. This research believes that, in the absence of or insufficient hard laws and traditional judicial-based human rights regulatory framework, voluntary soft laws could serve as a complementary solution mechanism.

To determine the extent to which the SUHAKAM's mandated roles could be effectively utilized in enhancing companies' human rights compliance, a number of roundtable discussions with relevant institutions were convened to gain the practical knowledge and understanding on issues relating human rights and business in Malaysia. Reference will also be made to the outcomes from SUHAKAM's National Inquiry on the Land Rights of Indigenous Peoples. One of the expected results of the research is that SUHAKAM would provide recommendations in dealing with human rights violations in logging and plantation industries in Malaysia and that these recommendations should be considered by the Government and the related industries/companies. Recommendations with regard to the access to alternative/non-judicial remedies would also be made for the victims/potential victims, whose rights are violated, resulting from the activities or operations of those industries.

III. RESEARCH METHODOLOGY

This research employs a combination of library-based research and fieldwork. For the library research, documented materials as well as materials downloaded from the internet were analyzed. The primary materials include major international human rights frameworks and treaties, UN Global Compact principles, the UN Guiding Principles on Business and Human Rights, selected Malaysian legislation on business, newspapers and reports from human rights-based NGOs and organizations. Analyses on these materials were aimed at understanding fundamental principles of human rights with which companies and businesses have failed to comply. In addition, a number of secondary materials like annual reports,

textbooks, journal and non-journal articles, seminar papers and website materials were also analyzed for the purpose of the literature review. In addition, the reports, findings and outcomes from previous national and public inquiries undertaken by SUHAKAM formed part of this research's materials.

The fieldwork study in this research was done based on two roundtable discussions (RTDs) which were conducted on 7th and 8th November 2012, respectively. The first RTD was done with the alleged victims of business human rights violations whereas the second RTD was conducted with corporate bodies. The RTDs were conducted with the objective to generate responses to some research questions and objectives, mainly with regard to the types of violations allegedly encountered by victims of corporate aggressions, to identify the best practices by companies in relation to human rights, and the possible role that SUHAKAM could undertake in addressing human rights violations in business. The RTDs also provided a platform and the opportunity for the research team to evaluate generally how companies respect human rights, and how they comply with the John Ruggie Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework.

IV. BUSINESS AND HUMAN RIGHTS: THE PERSPECTIVES OF LOGGING AND PLANTATION INDUSTRIES IN MALAYSIA

Developing countries' dependency on business entities, especially the multinational enterprises (MNEs) has become almost inevitable, in particular during the 1980s, when events like the oil crisis, ensuing debt crisis and the liberalization of trade and capital flows were increasingly commonplace (Jerbi, S, 2009). While economic development was made their top priority, most developing country governments were persuaded that it was in their interests to be more lenient in their economic policies (Jerbi, S, 2009). In Malaysia, business activities particularly those of sizeable scale undertaken by the MNEs are among the key elements behind the government's effort to gain a fully-developed nation status by 2020. To this end, an active private sector of multinational and indigenous business and a public sector with extensive involvement in business (are equally important to materialize such an aim (Ahmad, N.M, 2012).

Nonetheless, there have been instances where economic development in Malaysia brought to the fore contending sectional interests which undermine the very notion of sustainable development and social responsibility. There are sections of Malaysian societies who find themselves trapped in the "development vs. human rights" dilemma and are quick to believe that economic development and social justice are opposed to each other, that economic development benefits only a few but victimizes many others (Mohamad, M., 2004). Indeed, the government's unbalanced focus in boosting the country's economic development at the expense of the people's social justice and human rights enjoyment may have paved the way to many corporate-related human rights violations (Nayagam, J., 2012).

A. Overview of logging and plantation industries in Malaysia

In general, Malaysia's economic development has had significant input from the plantation and commodities sectors. Since its early operation in the 1960s, the plantation sector has become one of Malaysia's major export earners. Out of the aforementioned major commodities, palm oil plantation has been the largest contributor to the national economy, being currently the second largest export revenue earner for Malaysia after the electrical and electronics (E&E) sector. Undeniably, the growth of palm oil industry in Malaysia has been phenomenal. Starting off as purely ornamental, the crop has developed to a multibillion-ringgit industry today. At present, Malaysia remains the world's top exporter of palm oil, accounting for 47% of global exports. More than 90% of the country's total production is exported to countries such as China, India, the European Union (EU) and Pakistan (Malaysian Rating Corporation Berhad, 2012).

The Government of Malaysia, through its Economic Transformation Programme (ETP) has given a special focus on national palm oil industries. The Palm Oil National Key Economic Area (NKEA) was introduced to reinforce the leading role of the private sector in steering the palm oil industry. The government's support to this industry was significant since Malaysia's palm oil industry is the fourth largest contributor to the national economy and currently accounts for 8 percent of the national gross national Income (GNI) per capita. With over 100 years of experience and a strong market leadership in terms of productivity and R&D, the government has set an ambitious GNI contribution target of RM178.0 billion in 2020 against the present GNI contribution of RM52.7 billion for the palm oil industry (PEMANDU, 2010). Among the key players in this lucrative palm oil industries are Sime Darby Berhad, ranked the largest globally based on size and of land bank, followed by Kuala Lumpur Kepong Berhad (KLK) and IOI Corporation Berhad.

B. Human Rights, Social and Environmental Impacts of Logging and Plantation Industries

The lucrative plantation and logging industries are not without controversies; indeed, these industries, and in particular the oil palm industry, have long been associated with reports of environmental and human rights violations. The violations of human rights by these industries primarily affect those which fall under the cluster of economic, social and cultural rights. More precisely, the violations concern issues of rights to land, poverty and inadequate standards of living namely inadequate access to basic needs such as nutritious food, healthcare, education, housing, clean and safe drinking water (Bidin, A. & Khan, S., 2010). Among the examples are the issues of displacement of people, the encroachment of native customary rights (NCR) in Sarawak as the result of developmental project like hydro-electric mega projects, plantation and logging activities.

In addition, tropical deforestation, biodiversity loss, water pollution, indiscriminate burning, decreased water quality and quantity, decreased forest cover, air pollution and soil erosion are among the environmental impacts of these industries (Dayang Norwana, A.A.B, Kunjappan, R., Chin, M., Schoneveld, G., Potter, L. and Andriani, R., 2011). The violations are not limited to the environment but also to the people within the companies' business operation. The local people, in particular the vulnerable indigenous people, have always been the frequent victims as their rights to livelihoods and adequate standard of living are affected by business operation of plantation companies (SUHAKAM, 2007).

In the state of Sarawak, for example, a plantation company was alleged to have destroyed a road linking three longhouses to their farms and gardens, thereby affecting the livelihood of the local people there. The locals claimed that the road did not belong to the company as it passed through the natives' customary rights (NCR) lands. When the affected longhouses' residents repaired the road themselves, the company workers came again this time escorted by police personnel from Miri, to cut off the road again despite protests. Unfortunately, a few days later, a longhouse chief and four others were arrested for allegedly stealing oil palm. The presence of the police gave rise to the unfortunate perception that government enforcement apparatus was being used to provide security to a private entity to oppress the native in this land dispute (Vinod, G., 2012).

The failure of the government enforcement apparatus to protect people and victims from human rights violations the question of whether accessible remedies are available to the victims. This question forms the very objective of this research which is to provide alternative channel and solution to the issues of corporate human rights violations. The above-mentioned incident is only the 'tip of the iceberg'. Other examples of violations gained from this research will be detailed in the findings section. Unfortunately, such incidents are rarely reported or if they were, the persons publicizing them were often labelled troublemakers or anti-establishment. Judicial decisions in favor of native customary land rights are not also given effect on the ground (Tawie, J., 2013).

V. THE ROLE OF SUHAKAM

SUHAKAM is the Malaysian NHRI established under the Human Rights Commission of Malaysia Act 1999 (Act 597). Among others, SUHAKAM is mandated to advise and assist the Government on human rights issues, to undertake national and public inquiries upon receiving complaints from the public on any infringement of human rights and to undertake research by conducting programs, workshops and seminars to disseminate and distribute the outcome of such research with the ultimate aim to promote awareness of human rights among Malaysians.

Interestingly, almost every area of SUHAKAM's work is related to intersection between business and human rights (Nayagam, J., January 2012). The issues of migrant workers, land acquisition, people with disabilities, gender discrimination and child labor are all related to the decisions and practices of business. In recent years, a number of business-related human rights issues have been referred to SUHAKAM, often in the form of formal complaints. Among notable examples of major issues facing communities are land acquisitions to develop dams, log timber or grow oil palm especially in Sabah and Sarawak as well the treatment of migrant workers in Malaysia.

To ensure better human rights compliance within the business sphere, SUHAKAM can assist and educate the private sectors to understand and implement human rights standards in their workplace, business practices and supply chains. Despite not having mandates for enforcement and prosecution, SUHAKAM can play, and in fact has played key roles in enhancing human rights compliance by business entities in Malaysia through a number of mechanisms, such as round table discussions, policy-making, issuance of press statements, conducting training and conferences, national inquiries, networking with other regional NHRIs, acting as intermediary body between government agencies and business and civil societies, receiving memorandums and conducting investigations, undertaking research on specific issues and duly disseminating reports and outcomes and finally; preparing policy guidelines and blue prints for relevant entities on human rights issues based on research findings.

VI. FINDINGS

A. Practices of corporate sectors

Based on the RTD with related companies, a number of initiatives have been taken by the companies in ensuring their respect to human rights of the people within the sphere of their business operation. Firstly, the corporate social responsibility (CSR) initiatives have been implemented to contribute towards positive impacts in the society. There are companies which have been doing social charity work by building orphanage homes, contributing to places of worships and providing scholarship to local students. However, in relation to land issues, particularly those involving indigenous people, most companies kept strictly with the domestic laws and procedures. This may place the indigenous people in a complex position, as they may not be the legal owners of the land concerned and the laws in some circumstances may not recognize their concept of land ownership.

Moreover, some companies have aligned themselves with Roundtable on Sustainable Palm Oil (RSPO)[14] to show their interest in promoting sustainable palm oil industry which includes in it respect for human rights. It is positively noted that most of the plantation and logging companies attended the RTD are members of RSPO. In addition, it was notified that there were companies which signed Memoranda of Understanding (MoU) or agreements with the Indigenous Peoples who were residing on the lands that were going to be used for development. The companies promised that the rights of Indigenous People and their (Native

[14] RSPO was established under Article 60 of the Swiss Civil Code composed of various organizations from different sectors of the palm oil industry for the purpose of developing and implementing global standards for sustainable palm oil. Refer to RSPO website at http://www.rspo.org/.

Customary Rights) NCR would be respected. In the event of disagreement or disputes with the company's plan, the matter would be brought to the respective Land Office and upon failure to resolve, legal action would be taken by the contesting parties. The court's interpretation of the law including matters pertaining to NCR, was considered the final authority.

Finally, it was observed that the companies' best practices mostly applied or limited to their protection of foreign workers. Companies had assigned special unit to manage foreign workers, which provided trainings, screenings overseas, conducts interviews and guaranteed of safe return to their home countries. Additionally, homes were built for foreign workers in strict compliance with minimum housing standards. Sufficient water and electricity supply as well as good security was ensured at the plantations.

B. Issues faced by Victims

Based on the RTD with the victims (who made up of mostly the Orang Asli), it was alleged by the victims that plantation and logging companies had encroached their Native Customary Land (NCR), resulting in the demolition of or damage to graveyards, pollution of rivers, loss of livelihoods and traditional ways of life as well as loss of their NCR land. They claimed that they had suffered loss of income from agricultural and farming activities, where they could no longer grow food, and extract herbs from trees that had been felled as a result of logging activities by companies.

The victims claimed that on many occasions, the companies failed to consult the communities prior to their operations, or if there were consultations, these were conducted only with the Department of Orang Asli Development (JAKOA) and the Heads of Villages. This is clearly against with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) that calls for free, prior and informed consent (FPIC). Often, if their lands were taken, the victims were not paid any compensation because the Indigenous People's right to land is not recognized. Sometimes, compensation was awarded without transparency and under suspicious circumstances. The list of those who received the compensation and the quantum was treated as confidential document. There have been cases where compensation was promised but not delivered in full or at all.

Also, companies and the Government can easily manipulate indigenous people's lack of education and understanding on human rights, where most of them are unaware of the rights they have over their lands. Even if they do understand the need for consent and agreement, they would not be able to comprehend the details of complex legal documents without a lawyer's presence. Companies may use such circumstance to their advantage, by obtaining false consent through non-disclosure of full information. There were also allegations of companies forging signatures in pursuing their corporate goals. It was claimed that the successful and educated Indigenous Peoples do not involve themselves in Indigenous rights advocacy.

In addressing their issues, the Indigenous Peoples had lodged reports to the relevant agencies such as JAKOA, the District and Land Office, the Department of Lands and Mines and other. They also wrote letters and submit memoranda to the relevant ministries including the Prime Minister, called for meetings with state governments, raised issues at the Parliaments with the help of opposition Members of Parliaments and Senator regarding their issues. In many scenarios, their complaints and official reports were often ignored by the authorities, including the police.

VII. RECOMMENDATIONS

This research underlines and recommends a few initiatives which could be taken by SUHAKAM in addressing corporate human rights violations in Malaysia.

A. Awareness raising on business and human rights

Having observed that there seems to be a lack of awareness on issues related to business and human rights as well as the Ruggie's framework among the corporate sectors, it is recommended that SUHAKAM intensify its role in raising awareness on business and human rights, especially on the Ruggie's framework among the corporate sectors. Additionally, to ensure their effectiveness, SUHAKAM needs to produce relevant printing materials such as brochures and ensure that awareness raising activities and materials are presented in languages suitable for corporate sectors of different background. Apart from that, the Commission could organize conferences/seminars on Business and human Rights to propagate/disseminate Human Rights concept among corporate sector.

B. Develop Special Module and Training for corporate sector

Besides that, on-going training and support should be given to all management officers and staff of the corporate sectors to enable them to implement human rights good practices in their daily work as well as ensure that such practices through their supply chain. In addition, training should also include understanding human rights, in particular Malaysia's commitment and ratifications of treaties, how to approach and resolve human rights conflict, and case studies and thematic modules including on environment and land related human rights.

C. Establish a 'monitoring mechanism'

SUHAKAM should come up with a monitoring mechanism on human rights violations particularly by corporate sectors. This mechanism would entail the need for SUHAKAM to closely monitor the situation and alert the relevant authorities and media to any infringement of human rights violations by the corporate sector. This system should also be accessible to the victims especially the Indigenous peoples as well as human rights defenders to alert the Commission on any breaches of human rights by corporate sector. If needed, the Commission could conduct inquiries and fact-finding missions to investigate allegations of human rights abuses by the corporate sector. Apart from that, the Commission also could review the relevant domestic legislation to ensure that the rules governing the creation and conduct of business by corporations contain appropriate regulations to ensure that corporations are required to operate in full compliance with international and domestic human rights standards. The Commission could encourage the government to introduce and implement legislation and regulations that meet international best practice in the prevention of human rights violations by corporations and continue advocate for ratification and domestic implementation of relevant international instruments.

D. Mediation Role

An important form of non-judicial remedy is mediation, which the Commission could facilitate between the parties involved in a dispute related to business and human rights such as the victims, corporate sector, relevant government agencies as well as other related stakeholders. Mediation is one of the roles that the Commission could develop in addressing business and human rights disputes.

E. SUHAKAM's role as Amicus Curiae

Judicial mechanism presents the most appropriate means of ensuring access to remedies for corporate-related human rights abuses as stated in the Ruggie's Guiding

Principles. Therefore, it is recommended that SUHAKAM explore its role as amicus curiae and should hold "watching brief" in cases related with infringement of human rights by the corporate sector. SUHAKAM could provide its inputs on the business and human rights perspective as well as Ruggie's framework, which could be taken into account by the judges in their decisions.

CONCLUSIONS

The research explores the role of SUHAKAM in bridging the human rights gap between plantation and logging companies and the affected people/victims. While it is not denied that the economic contributions of businesses are needed for the development of the country, at the same time, there is also the crucial need that such business operations are not undertaken at the expense of human rights of the people around their sphere of influence. John Ruggie, through his three-tier framework has made it clear that the business entities should draw on not only expertise and cross-functional consultation within the enterprise, but also to consult externally with credible, independent experts, from governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives. This is to ensure that human rights are properly respected while doing business.

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THE GOVERNMENT ROLES IN PROVIDING HALAL AND *THAYYIB* FOOD

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ABSTRACT

Purpose of the study: This paper aims to find out the government roles in providing halal food and *thayyib* with the regulation, supervision, and problem solutions.
Methodology: This descriptive research describes Indonesian government roles in providing halal food and *thayyib*. This research used a technique by comparing Indonesian government efforts and the government efforts of the United States of America. A literature study was used as a method to collect the data by using substantive legal rules, legal journals, and law libraries.
Main Findings: Indonesian government standardizes halal with MUI halal certificates, while to keep *thayyib* food, a BPOM is formed to test and label healthy and qualified consumed-food.
Implication of this study: Indonesian government can adopt the supervision of safety food by American government. Additionally, the government can support the citizen to get halal certificates which have a positive influence toward the selling level.
Keywords: *Halal, thayyib, government*

INTRODUCTION

The Indonesian population of 220 million with 85% Muslims needs halal and *thayyib* food. Halal means that the consumed food has to fulfill the permit as stated in Islamic Sharia. *Thayyib* means that the food must be healthy and does not have a negative effect on the health. The government's policy signing the free trade partnership with China and Australia has raised concerns for the consumers of halal guarantees and food import from both countries. Special institutions are needed to keep the commitment of halal and *thayyib* food availability for the society so the level of the trust to the government is maintained.

World Halal Center is the dream of Indonesian government. A number of efforts has been implemented, from the socialization of halal certification by LPPOM MUI to the issuance of the Halal Product Guarantee Act. With a total of 207 million Muslims[1], Indonesia is the first country to consume halal food. Nearly 2.5 trillion rupiah was spent to buy halal products[2]. It encourages the government to provide halal food for its citizen. Of course it is not only halal but also *thayyib* standardized food. Halal is the standards of consumed food. Halal food is connected to the Creator's command, the effects of consuming un-halal food are that the prayer will not be granted by the God and the eternal happiness will be only dream[3]. On the other hand, thayyib is connected to the consumers' health. *Thayyib* food is healthy food, has no side effect to the consumers and does not destroy the environment in the production process. The standardized halal product is done by the institution of MUI halal certification meanwhile *thoyyib* food (food safety) is in BPOM (Food and Drug Monitoring Agency).

[1] https://www.indonesia.go.id/profil/agama
[2]https://economy.okezone.com/read/2018/12/13/320/1990967/habiskan-rp2-465-triliun-ri-peringkat-pertama-konsumsi-makanan-halal-dunia
[3] https://www.halalmuibali.or.id/kepedulian-halal-ciri-ketaqwaan/

LITERATURE REVIEW

Halal means justified. The opponent is forbidden, or not justified according to Islamic law. While *thoyyib* means quality and does not endanger health. A Muslim is required to consume halal and *thoyyib* food meaning that we are only allowed to eat food in accordance with religious guidance and quality and safe for the health.

In Islamic teachings, all types of food and drinks are basically halal, except for only a few are forbidden. Those haram food could be halal in an emergency situation. On the other hand, halal food could also be haram if it is consumed beyond the limit[4].

" He enjoins upon them what is good and forbids them what is evil." (QS al-A'raf [7]: 157)

"O mankind! Eat of that which is lawful and wholesome in the earth." (QS al-Baqarah [2]: 168)

According to the Islamic concept, the *halalness* of the material must be viewed from four aspects, namely: the way to obtain, the types of the essence, the procedures to process, and the method to slaughter. The way to obtain the food and drinks must fulfill the Islamic ethics upholding the values of honesty, truth, endurance, and avoiding the ignorance.

METHODOLOGY

Descriptive research describes the phenomenon or situation under study and its characteristics. The techniques commonly used in descriptive research are survey methods of all kinds, including comparison and fact-finding enquiries of different kinds. Method of collecting data used in this study is through library and field research. The place and source of data, namely, substantive legal rules, legal doctrines, legal journal, or legal concepts and judicial decisions thereon, required for doctrinal legal research is law library.[5]

The Government Roles In Providing Halal Food

Halal and thayyib food arrangements is in line with the objectives of the state and the Constitution in the 1945 Constitution article 28E paragraph (2) of the 1945 Constitution stating that everyone is free to embrace religion and worship according to their religion, choose education and teach, choose work, choose citizenship, choose a place live in the territory of the country and leave it and be entitled to it again. While health is in line with the article 28 H paragraph (1) of the 1945 Constitution stating that everyone has the right to live a prosperous and inner life, occupancy and get a good and healthy living environment and deserve health services.

The state has sovereignty to regulate food security for its citizens. Food security is a condition of fulfilling food for the state to the individual reflected in the availability of sufficient food in quantity and quality, safe, diverse, nutritious, equitable and no contradiction to religion, beliefs and culture of the community to be able to live steadily, actively and productively sustainable.

The regulations of halal products in Indonesia are stated in several regulations, including: (1) Law No.8 of 1999 concerning Consumer Protection. (2) Law number 18 of 2009 concerning Animal Husbandry and Health. (3) Law Number 18 of 2012 concerning food. (4) Law N.33 of 2014 concerning Guarantees of halal products. (5) Government Regulation of 1999 concerning food labels and advertisements (6) Decree of the Minister of Religion No. 519 of 2001 concerning halal food inspection regulations.

Overall, according to the provisions known that the the current regulation of halal products in Indonesia contains three norms at once, namely: (1) voluntary (2) mandatory for

[4] https://www.halalmuibali.or.id/pengertian-halal-dan-haram-menurut-ajaran-islam/
[5] Khushal Vibhute, and Filipos Aynalem, 2009, Legal Research Methods Teaching Material, Prepared under the Sponsorship of the Justice and Legal System Research Institute, p. 47.

animal products and (3) mandatory if Required (mandatory if recommended). Where the protection of consumer rights must be understood not only as an anti-producer attitude but also as an appreciation of the rights of consumers universally. Additionally, the consumers have the right of a personal defense.[6]

As a protection for its citizens, the government passed the Halal Product Guarantee Act,[7] including the establishment of a halal product guarantee management agency that will work with MUI in providing product determination and Halal Auditor certification.

The standard MUI certificate is divided into several types, namely HAS 23103 for the category of slaughtering or slaughtering animals, HAS 23201 for halal materials, HAS 23101 for the packaging industry category, HAS 23102 for restaurants, and HAS 23104 for catering.[8]

LPPOM MUI includes the support and collaboration from various stakeholders launching various digital-based services. First, Halal Online certification service (CEROL-SS23000) version 3.0. This service allows people to register for halal certificates which are easier to use, faster, safer, with new responsive features, tabulation menu features, pop-up forms, scheduling and monitoring in real time. Secondly, LPPOM MUI also renewed the Halal MUI application version 3.0. This application by Lukmanul has been equipped with new responsive features.

LPPOM MUI has also launched QR Code Halal Resto version 2.0. Lukmanul explains that the function of the LPPOM QR is not solely for halal verification. With the iCash platform, QR LPPOM spread across 5000 Halal Resto networks can be utilized by fintech partners or payment managers in providing cashless transaction services at Halal certified restaurants and Provincial LPPOM MUI Online Payments for SMEs. Now, MSME Partners can make online payments easier, faster, simpler and safer. The fifth book series HAS 23000 contains a critical point of knowledge for the termination of medicinal ingredients, general Halal processing industry certification requirements, halal meat product industry certification requirements, Halal Restaurant certification requirements, certification requirements for the halal drug industry.[9]

In accordance with the halal guarantees and safety of imported products, there are 42 halal certification bodies recognized by MUI from 23 countries. The following are some of the world standardization institutions that are recognized by MUI to have the same halal standards as MUI.

1. Singapore Ugama Islamic Council
2. Position of Malaysian Islamic Progress (JAKIM)
3. Office of Muslim Affairs (OMA), Philippines
4. Thailand Islamic Central Committee (CICOT), Thailand
5. Taiwan Halal Integrity Development Association (THIDA), Taiwan
6. Jamiat Ulama E-Maharashtra (JUM), India
7. Japanese Muslim Professional Association (MPJA), Japan
8. Victoria Islamic Coordination Council (ICCV), Australia
9. Halal Quality Control, the Netherlands
10. Halal Food Authority (HFA), United Kingdom
11. Halal Food Council USA (HFC USA), United States

Lukman Hakim, chairman of the LPPOM MUI claims that the LPPOM MUI halal guarantee system has also been adopted by almost all halal institutions in the world, ranging from Asia, Australia, Europe, to America and Africa. MUI is also committed to developing its service network, by opening branches and representative offices in China, South Korea, and Taiwan

[6] Zulham, Peran Negara dalam Perlindungan Konsumen Muslim terhadap Produk Halal, Kencana, 2018, hlm. 23
[7] Law No. 23 Tahun 2014 about the Halal Product Guarantee Act
[8] Jaminan Halal dari Luar Negeri sama dengan Halal dari MUI?, https://www.cnnindonesia.com/gaya-hidup/20151017100852-262-85453/jaminan-halal-dari-luar-negeri-sama-dengan-halal-dari-mui
[9] https://kumparan.com/@kumparanbisnis/mui-berencana-buka-kantor-sertifikasi-halal-di-china-dan-korsel-1547616003496382210.

Even though regulations have been made in such a way, there are still a number of parties that commit violations. There is a MUI halal label rigging occuring in original branded Baso SB meatballs. The brand new taste of CV Tri Marga Jaya is written on Halal MUI certified packaging. There is also no counterfeiting of ingredients in mixing beef with pork meatball products. Criminal violations can be fined up to 50 million rupiah or revocation of a business license

The Government Roles In Providing *Thayyib* Food

Thayyib products are healthy food products regulated in: (1) Law No.18 of 2012 concerning food. (2) Government Regulation No. 24 of 2004 concerning Food safety, quality and nutrition. (3). Government Regulation No. 21 of 2005 concerning the biological safety of genetic engineering products.

Food safety is in the BPOM permit. Food (in this case snacks) importing to Indonesia must have a distribution permit, meet import requirements, and approval from the head of the Food and Drug Control Agency in the form of an import certificate (SKI). The needed special SKI Import of food is SKI Post Border. One of the requirements for the SKI Post Border application is the original document importer identification number (API). It means that the API is needed for food import management (snacks).

As an example from the case occurred at PT. Mustika Boga Foodnindo, officers succeeded in finding imported 45 types of processed foods and frozen processed foods without a distributor license (TIE) / illegal. Moreover, officers also found 1 type of illegal cosmetics. Those findings are estimated worth 1.7 billion rupiah with details of illegal imported foods valued at around 1.1 billion rupiah and illegal cosmetics worth 600 million rupiah. They included food products from Japan, Thailand and China bought from Singapore via air and sea routes illegally, to be sold to restaurants. Usually frozen processed food products are packaged in a large suitcase that is coated with styrofoam and added dry ice. The action is threatened with a maximum jail sentence of 5 years and a maximum fine of 10 billion rupiah.

The head of the Indonesian Food and Drug Administration Agency also warned that food service facilities such as restaurants should not accept supplies of processed food raw materials from illegal distribution methods, because they endanger the health of consumers.

The Indonesian National Drug and Food Control Agency once again encourages businessman to always obey the applied laws and regulations in running their business. The public is expected to actively participate by reporting when they find anything suspicious related to the distribution of illegal drugs and food including fake goods. The community must also be a smart consumer by always "Check CLICKS". Make sure the packaging is in good condition, check the product information on the label, be sure to have a POM agency distribution permit, and make sure that it does not exceed the expiration time. People can also check the legality of medicines and food products through the POM website or the "CekBPOM" android application. Supervision by BPOM is carried out in two stages, namely the pre-market and post-market stages. Pre-market is an evaluation of the quality, safety and effectiveness of the product's benefits before being allowed to circulate in the order of registration. Food preparation products importing to Indonesia must go through an evaluation phase to assess safety, quality, efficacy / benefits, and product labels / information. In this case only products that meet these criteria can be approved to be produced and marketed in Indonesia.

It needs to do post-market supervision, the inspection of the implementation at the site / facility (inspection) of imported food products so that imported food products which have marketing authorization or are expired / expired are known. Additionally, it is also for the sampling and testing of products in circulation as well as investigations and law enforcement actions. At this stage, BPOM inspects dream food products that do not have distribution licenses and are expired on the market to have direct supervision and to ascertain

whether entrepreneurs use methods production or distribution according to the agreement.[10] If the found product does not have a distribution permit and has expired on the market, the product will be destroyed. Moreover, BPOM conducts a public warning by sending to invited journalists.

Talking about food safety in general could not be separated from the quality problems such as GMOs, pesticide residues in food, cancer-causing chemicals, synthetic ingredients in food and microorganisms in food that can be transmitted to humans, [11] the thing being studied in food safety is also the use of animal medicines in livestock production and recent research on animal spongiform encephalopathy which can be transmitted to animals.[12]

As a comparison, Indonesia can adopt the supervision conducted by the United States of America with the FDA. Based on the FDA, food safety starts in agriculture. The US Bureau of Agriculture emphasizes that the Food Safety Modernization Act is a good step to support farmers in their efforts to supply healthy food.[13] FSMA provides new FDA and additional oversight and enforcement authorities to ensure the industry meets food safety standards.

To achieve the first goal, FDA is inspecting foreign food facilities, and the agency plans on using data collected from sources such as its Foreign Supplier Verification Program (FSVP) to focus on the riskiest facilities first. Officials also mention FDA's Accredited Third-Party Certification program and Voluntary Qualified Importer Program (VQIP) as pathways for expedited or less-resource-intensive safety reviews. FDA may assess specific foreign regulatory measures to determine equivalence. The agency's Corbo said the document does not announce any new programs. Many of the goals laid out in the statement fall flat since FDA has not come close to achieving many of the food import safety goals established eight years ago by FSMA.

To detect and refuse unsafe food at the border, the agency officials say that FDA is using its Predictive Risk-based Evaluation for Dynamic Import Compliance Targeting (PREDICT) tool to identify high-risk food imports. The agency hopes to use data from FSVP and VQIP to make the tool more effective.[14]

Whereas halal certification is mandatory for food entrepreneurs. But some entrepreneurs have different views. Halal certification is considered by employers as a dammed policy. This is related to the cost of certification. Based on the Halalmui page, the cost of halal certification for large industries ranges from 2 million to 3.5 million. Whereas the small industries ranges from 1.5 to 2 million and for the micro industry requires funds of 1 million rupiah. extended every 4 years.[15] In addition to certification costs, another objection is halal transportation which must be separated. According to the businessman, when transportation of halal products must be separated from non-halal products, new costs will not be incurred.

Regarding this matter, there must be legal awareness from entrepreneurs. The reluctance to follow the procedure to obtain halal certification will result in the product not yet being registered in the halal product table issued by the MUI. It is stated that the MUI certification issued is a certification recognized by the entire world population as a recognized credibility body. In addition, the absence of a halal label will cause the product to be eliminated as the product of choice for the world community. The tendency of people to choose halal products because they are guaranteed, healthy and does not cause bad effects on health. Australia's halal certification has increased food exports to a value of $13 billion per

[10] Mardiah dan Ernawati, Pelaksanaan Pengawasan terhadap Produk Makanan Impor, Fisip Universitas Islam Riau.

[11] R.E. Hester and R.M. Harrison. Food safety and food quality, Royal Soc. Of Chemistry, 2001

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[14] Roza, David, Food Safety Expert: Fda Needs Resources For Food Import Safety Plan, Insidehealthpolicy.Com's Fda Week; Arlington Vol. 25, Iss. 9, (Mar 1, 2019)

[15] http://www.halalmuikepri.com/biaya-sertifikat/

year. The halal certification process in Australia is a very transparent process. In the context of building a halal product, it will not be carried out with the aim of making a profit or as a commercial business.

Exporting meat from Australia to various countries is the activity of G to G (government to government) so that every decision or policy of the importing country must be submitted to the halal certification body in Australia through the Australian government. The Australian Government inspects three elements related to halal export activities every 6 months and is carried out separately. While the certification body checks into slaughterhouses every 3 months. This effort was made to maintain public confidence that the Australian Government is committed to maintaining halal certification and food security guarantees properly[16]

CONCLUSION

The government has sought to provide halal guarantees and food safety for its citizens, including food products imported from Australia and China. The government also has collaboration with halal certification bodies in several countries that have been certified by MUI. The existence of halal certificates for entrepreneurs can initially be considered burdensome, but in the future when halal awareness has been formed, halal certification will have a significant impact on increasing public confidence.

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INTERNATIONAL CRIME STUDY ON MAIL ORDERS IN WEST KALIMANTAN

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ABSTRACT

The efforts to protect Indonesian Citizens (WNI) turned back to face challenges with the rise of cases of mail order brides in West Kalimantan. The practice of mail order brides often occurs between women who are married to foreign nationals through the role of matchmaking agents or commonly referred to as "matchmakers", so in general this is known as the ordered bride. The practice of mail order brides occurs due to various factors including economic, educational and socio-cultural factors, so that Indonesian women who are victims, they feel that by having a marriage, they will be able to improve their family's economic level. However, in reality the practice of the bride of the order became a case that was indicated as an international crime, because Indonesian women who were married to foreigners were actually victims of violence and exploitation. This research is an empirical legal research (empirical legal research or social-legal research). The data source used in this study is divided into 2 (two) sources, namely primary data sources and secondary data sources. Primary data sources such as observations, interviews, surveys, questionnaires that are distributed to data sources or respondents. While secondary data sources are obtained from books, legislation, documents and other writings relating to the problem being investigated. The research method used in this research is the descriptive analysis method which is a method that serves to describe or give a picture of the object under study by taking a problem or focusing on problems as they were at the time the research was conducted. Based on the results of the study, it was found that there are women from West Kalimantan who have been victims of Trafficking in Persons (TPPO) with the bride order mode. The complexity of the case of ordered brides requires comprehensive handling.

Keywords: *International Crime, Mail Order Brides, TPPO/ Traffiking in Persons.*

A. INTRODUCTION

The Criminal Act of Trafficking in Persons (TPPO) especially women is a grave violation of Human Rights (HAM). Human trafficking itself is an international organized crime phenomenon that has international outreach, and can even be categorized as a crime against the international community (delicta juris gentium).

One form of human trafficking that is sticking out is the high number of cases such as mail order brides between Chinese citizens of Chinese descent from the city of Singkawang, West Kalimantan Province, occupying the third position after East Java and West Java as the highest areas of trafficking people (trafficking).

In contrast to other types of trafficking, violence or crime in the type of trafficking through brides ordered by a new woman is felt after the bride arrives in China. Although the actual crime has occurred during the recruitment of fraud, giving false promises and falsification of marriage identity cards that occur is not intended to find a life partner and independence, but rather the exploitation of certain parties to profit.

On Saturday, July 13, 2019, SBMI (Indonesian Migrant Workers Union) succeeded in repatriating 2 (two) female victims of ordered brides in China. Until July 2019, SBMI has received 26 cases of cases of TPPO victims who have ordered brides to China. Based on the

experience of handling cases of victims of ordered brides at SBMI, the victims are in a vulnerable situation. Such vulnerable situations include: before becoming a victim of TPPO, the bride was ordered. Of the 26 victims of TPPO who have a wedding order, it is known that they have an economic background that is less able, victims of domestic violence committed by their partners and difficulties in accessing employment. The above situation is a number of motivating factors that cause TPPO women victims of bride order to be easily deceived by their matchmakers with various enticements.

B. PROBLEM FORMULATION

Based on the above background, the problems to be examined in this study are: Why in the mail order bride often becomes an international crime?

C. RESEARCH METHODS

This study aims to examine the existence of international crimes in the event of a mail order bride that occurred in the city of Singkawang, West Kalimantan. This research is an empirical sociological research (empirical legal research) or (socio-legal-research). The data sources used in this study are divided into two, namely primary data sources and secondary data sources. Primary data sources such as observations / observations, interviews / interviews, surveys, questionnaires or questionnaires that are distributed to data sources or respondents. While secondary data sources were obtained from books, laws and regulations, documents and other writings relating to the problem being investigated.

The research method used in this research is to use a descriptive analysis method which is a method that serves to describe or give an overview of the object under study by taking a problem or focusing on problems as they were at the time the research was conducted, the results of the study were then processed and analyzed to conclude.

D. DISCUSSION

Mail order brides often occur between Indonesian women of Chinese descent and men from Taiwan. Called the bride order because it starts with the process of meeting and selection with matchmaker intermediaries. In Indonesia, the practice of mail order brides can be classified in the practice of trafficking or human trafficking. The practice of the bride of this order is mostly accompanied by violations such as falsification of identity, ownership of multiple passports, coercion of the will to employ underage children, deception to the bondage of debt. If the bride and groom fully understand what they will face in Taiwan, then this marriage arrangement cannot be called trafficking because of the agreement referring to Law No. 21 of 2007. If the agreement is obtained through the lure of material to the controlling holder of the prospective bride of the order so that coercion then occurs, then the category of "trafficking in persons" applies.

Forms of human trafficking that occur in one country with another have different characteristics, but generally include: sexual exploitation, forced labor, domestic servitude, illegal adoption of children between countries, debt bondage, the influence of orders and trade in human organs. The forms of trafficking in persons are very varied, including: organizing marriages between countries through mail order brides and the bride is completely unaware of the actual condition of the prospective husband.

In general, trafficking in persons or cases of an ordered bride are organized crime or syndicate crime. This syndicate crime has a meaning as a criminal act committed by a crime group that is systemized by social structure, by searching for the ultimate goal of profit obtained from illegal actions. The definition of international crime is : all acts that are prohibited by international law whether regulated in international conventions or customs.

The most important characteristic of international crime is the application of the universal principle, whereby every country has the authority to arrest, detain and appraise international criminal offenders. As for the case of the bride of this order is included in international crime, because according to the fact that it turns out that the mode of the bride of this order has the potential for the occurrence of Trafficking in Persons (TPPO) or trafficking. This trafficking is included in one form of international crime.

The complexity of the case of ordered brides requires a comprehensive handler. Handling this is very important to break the chain of bride order cases through central and regional coordination. The crime of TPPO or ordered brides is a structured and systematic crime. That is, this crime has been very structured and systematic. The case of a bride or an order marriage is not an ordinary marriage case, but there is a Criminal Act of Trafficking in Persons (TPPO).

The Criminal Act of Trafficking in Persons (TPPO) due to the order marriage mode is also influenced by poverty, and there is one victim who did not receive an education so he could not read and write. In addition to economic factors, the case of mail order brides is also seen from the socio-cultural aspect. Indonesian citizens who wish to have marriages with other citizens need to be careful not to become a victim of matchmaking agents who are only looking for profit. Indonesian women must recognize their potential partners well and understand various administrative procedures for interstate marriages, and follow all requirements both in Indonesia and in the countries of origin of their potential partners. The Indonesian government has also cooperated with the Chinese government to handle the case of ordered brides. The TPPO case involving the bride order has included extraordinary crime, which is transnational crime, so that the handling needs cross-country coordination. The number of victims of trafficking in persons who use the bride order continues to grow in West Kalimantan, Indonesia.

E. CONCLUSION

Based on the description above, it can be concluded that: the steps to prevent TPPO in the form of mail order brides must be undertaken by the Indonesian government and the Chinese government by conducting a careful assessment of marriage requests between Indonesian citizens and Chinese citizens. The commitment of law enforcement towards matchmaking agents on both the Indonesian and Chinese sides involved in trafficking in persons also needs to be upheld as stipulated in Law No. 21 of 2007 concerning TPPO. Weakem weaknesses in both immigration and the Population and Civil Registry Office need to be corrected immediately to prevent the TPPO under the guise of ordered brides. The weakness of the data collection system can result in cases of counterfeiting (mark up) of age so that there are a number of underage women who are victims of mail order brides.

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LOCAL WISDOM OF DAYAK SIMPAKNG IN THE SETTLEMENT OF UNLICENSED GOLD MINING CASE IN KETAPANG DISTRICT

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ABSTRACT

Beside the positive impacts, mining activities also have negative impacts. Where mining activities are always synonymous with environmental damage and other problems. The mining problem does not only arise from the existence of mining activities that are official, but also touches on mining activities that are informal (do not have licenses / illegal) or commonly called illegal mining. The existence of illegal mining activities certainly has implications for legal issues, especially with criminal problems and this has been regulated in Law Number 4 of 2009 concerning Mineral and Coal Mining.One of the unlicensed gold mining activities was in Kualan Hulu Village, Simpakng Hulu District, Ketapang Regency. Where the Dayak simpakng people still apply the customary law they have in solving problems, including settlement if gold mining is found without permission. In this case the Dayak simpakng community believes that through the application of the Dayak simpakng customary law it can better fulfill the sense of justice and is more effective.This study is a normative juridical research, where the data used in this study is secondary data in the form of books, legislation, documents and other writings relating to the problems under investigation. Based on this study revealed that the application of the Dayak simpakng customary sanctions can be used as a restorative justice against gold mining perpetrators without permission, where the settlement of the case is felt by the community more fulfilling a sense of justice and is believed to be able to restore the balance of nature, as well as by The imposition of sanctions is considered effective in providing a deterrent effect for the perpetrators.

Keywords: Traditional Sanction, Unlicensed Gold Mining.

BACKGROUND

Indonesia is an archipelago that has 17,508 islands, with a very large area of this course is also directly proportional to the natural wealth of natural resources that can be renewed (renewable) or that cannot be updated (unrenewable). One of Indonesia's natural resources is the presence of minerals in the form of mineral deposits of nature as a gift from God Almighty and an irreplaceable asset for the Indonesian people, therefore its control is controlled by the state and used as much as possible the prosperity of the people, which is clearly and expressly stated in the 1945 Constitution Article 33 paragraph (3), that:
"The earth, water, and natural resources contained therein are controlled by the state and used for the people prosperity."

This affirmation reflects that the importance of any management or exploitation can only be done with the permission of the state (government). One of the results of Indonesia's natural wealth is the precious metal in the form of gold, which as a natural resource that is non-renewable and has a limited amount of course makes the mineral commodity has a very high economic value. The existence of high economic value is the main factor in the mining of mining materials into a mining industry both government-owned (as well as from private parties (domestic and foreign investors).

Beside the positive impacts, mining activities also have negative impacts. Where mining activities are always synonymous with environmental damage and other problems. The mining problem does not only arise from the existence of mining activities that are official, but also touches on mining activities that are informal (do not have licenses / illegal)

or commonly called illegal mining. The existence of illegal mining activities certainly has implications for legal issues, especially with criminal problems and this has been regulated in Law Number 4 of 2009 concerning Mineral and Coal Mining.

One of the unlicensed gold mining activities was in Kualan Hulu Village, Simpakng Hulu District, Ketapang Regency. Where the Dayak simpakng people still apply the customary law they have in solving problems, including settlement if gold mining is found without permission. In this case the Dayak simpakng community believes that through the application of the Dayak simpakng customary law it can better fulfill the sense of justice and is more effective.

A. PROBLEM FORMULATION

The problem formulation in this study is : How is the implementation of local wisdom of dayak simpakng in the settlement of unlicensed gold mining case in ketapang district as restorative justice ?

B. RESEARCH METHOD

This study is normative, because it uses secondary data, or often called the research literature. Normative legal research is legal research laying down the law as a system of building norms. Norm system in question is about the principles, norms, rules of legislation, court decisions, agreements and doctrines.[1] Secondary data used in this study include legislation relating to unlicensed gold mining, documents and writings relating to the cases studied.

Methods of data analysis used in this research is descriptive qualitative, meaning authors will present and explain the data obtained from the study of literature, which is manifested in a logical and systematic description. Once the ingredients necessary legal collected, the next step was made an analysis to clarify the settlement of the problem, then the conclusions drawn deductively, from things that are common to the things that are special. At this stage the legal material worked on and utilized in such a way to successfully conclude the truth of which can be used to address the issues raised in the study.

C. DISCUSSION

Illegal gold mining is a gold exploration activity carried out by a person or group of people without obtaining permission from the authorities.[2] Furthermore, according to Joseph F. Castrilli states that the mining laws, is :

"The basis for implementing environmental protection in relation to mining activities, which includes exploration, construction, reclamation and rehabilitation activities".[3]

Based on law in Indonesia, if mining occurs without a license, then the act is a criminal offense that regulated in Article 158 of Law Number 4 on 2009 concerning Mineral and Coal Mining which reads:

"Every person who conducts mining business without IUP, IPR or IUPK as referred to in Article 37, Article 40 paragraph (3), Article 48, Article 67 paragraph (1), Article 74 paragraph (1) or (5) is convicted with a maximum of 10 years imprisonment and a maximum fine of Rp 10,000,000,000.00 (ten billion rupiah) ".

However, in practice, despite sanctions against gold mining without permits using these rules, illegal gold mining continues to be carried out with economic factors as the main factor that driving this activity. Furthermore, the factors that influence law enforcement are as follows:

1. The legal factor itself, in this case limited to the Act.
2. Law enforcement factors, namely those who form and apply the law.
3. Factors of facilities that support law enforcement.
4. Community factors, namely the environment in which the law applies or applied.
5. Cultural factors, namely as a result of works, inventions, and tastes based on human initiative in the association of life. [4]

The phenomenon of unlicensed gold mining also occurs in Kualan Hulu Village, Simpakng Hulu District, Ketapang Regency. Where customary sanctions according to

customary law of the Dayak simpakng against someone who has been mining gold without permission is subject to traditional sanctions "pengocek torun", in the form of:

1. Funding all traditional rituals as a sign of apology to God, for the destruction of the forest due to human activity.
2. Paying for 20 reals with a nominal of 2,000,000 and 20 flowers carved plates.
3. The customary head confiscates the tools used for gold mining activities.
4. Replace all forest damage with gold mining area.
5. Returns all gold results obtained at the time of gold mining takes place, in one day the mining is subject to 7 grams of gold.

The effectiveness of the simpakng customary sanctions application by providing a deterrent effect on gold mining actors without the permit, can be seen in the table below[5]:

Table
Efektifitas of simpakng customary sanction

No.	Alternative Answers	Amount of Respondent	Percentage
1	effective	3	100%
2	Very effective	-	-
3	Not effective	-	-
4	less effective	-	-

Furthermore, based on the results of an interview with Rajut Kukun who is a Customary administrator in Kualan Hulu Village, Simpakng Hulu District, Ketapang Regency which states that sanctions for gold mining without permission are traditional sanctions of “pengocek torun”, where these sanctions are quite effective if implemented and have been proven in other villages in the Simpankng Hulu District. [6]

Settlement of cases according to customary law is commonly known as a restorative approach (restorative justice), namely justice that seeks to restore the condition to its original condition, benefit and win all parties and is not confined to rigid and procedural law. Through restorative justice, it is possible to resolve criminal cases through mechanisms such as mediation between the perpetrator and the victim or the injured community.

Furthermore, according to Bagir Manam, the meaning of restorative justice is:

1. How to prevent the offender from going to jail, because the fact revealed prison is not a very successful place to solve their problems. In fact, many of the prisoners to commit criminal acts again when they got freedom.
2. How to do it, even if he can free from prison, the perpetrators are still responsible for his actions.[7]

In connection with this, if the values that live in the community recognize and provide high values in the resolution of customary criminal law cases, then in this case the judge can actually use these values in deciding criminal cases.

D. CONCLUSION

Based on the discussion above, it can be seen that the application of the Dayak simpakng customary sanctions can be used as a restorative justice against gold mining perpetrators without permission, where the settlement of the case is felt by the community more fulfilling a sense of justice and is believed to be able to restore the balance of nature, as well as by The imposition of sanctions is considered effective in providing a deterrent effect for the perpetrators.

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[6] *Ibid*, p. 54.
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LEGAL AID ROLE IN RIGHTS GRANTING TO GET LEGAL ASSISTANCE FOR POOR SOCIETY IN PONTIANAK CITY

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ABSTRACT

The presence of legal aid providers to the poor as accommodated in Law Number 16 on 2011 concerning Legal Aid is the implementation of the State's obligation in fulfilling the right to justice for the community. The spirit of providing free legal assistance to the poor is carried out by legal aid organizations that accredited by the National Legal Development Agency. Thus the role of legal aid organizations is very strategic in the implementation of providing legal aid. The problem in this research is how legal aid organizations have played a role in fulfilling the right to justice for the poor in obtaining legal assistance. This study is socio legal research, based on this research revealed that the Legal Aid Organization has not maximally played its role in the implementation of providing free legal aid to the poor in Pontianak City. This fact is influenced by several factors, including the fact that the existence of legal aid organizations is not known to the public, especially the poor, other factors are also due to the limited legal funding, so that not all poor people can access legal aid.

Keywords : Poor People, Legal Aid, Legal Aid Organizations.

Background

Indonesia is a state by rule of law, this is stated explicitly in verse (3) article 1 Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. One of principles of the rule of law is equality before the law, no exception for the poor which is so far not yet reached by justice.

Legal problems that currently ensnare many of the poor increasingly complex so it demands governments and local governments immediately pay attention and arrange it in a planned, systematic, sustainable and manage it professionally.

In the rule of law, public welfare in the broadest sense must be accompanied by improvement, treatment and legal protection so that equality before the law also legal and justice access will be obtained by the poor.

Equality before the law will only be meaningful and enjoyable if there is an equal opportunity to obtain justice. Equality before the law must be accompanied with ease and equal opportunity to obtain justice for the poor too. Can be stated simply, that what is mean by the poor is individual people or a group of people who have socioeconomic condition below the average income to get a decent life.

Access to justice has become the main theme in reformation, both domestically and internationally. This is because ordinary people should be able to lead their own lives without unnecessary involvement and interference, should be able to get justice when life necessities continue to increase. There are so many obstacles to achieve this goal, but one of the most important thing faced by the public with legal issues is just how to get good and right advice. In fact, this problem is very common in many countries and many legal systems. Legal awareness enhancement basically is an important element to increase access to justice. The public have the right to get direct and accurate information about their legal issues. This is especially aimed at the poor and marginalized communities, who usually face various kinds

of problems but always experiences a lack of ways and limited capacity to solve the problems. [1]

In the legal assistance discussion is not only about plea in the proceedings before the court (litigation), but also in providing legal assistance outside the court (non-litigation), or providing legal assistance in the broadest sense.

Nowadays providing legal assistance in the broadest sense known as structural legal aid. Because only with structural legal aid we will able to understand legal aid as a human right issue and broadening the horizon of legal aid in political, economic, social and cultural context. [2]

In sociology literatures, structural interpreted as relationships pattern which underlies social life in society. Therefore, a view of legal aid leaders about the need to develop the idea of structural legal aid is a new awareness in the world of legal aid movement. If legal assistance only given passively as it has been done, then efforts to meet the legal needs of the poor will be difficult to achieve. Equitable justice is only dream, will never trickle down to the lowest level of society. The importance and urgency of developing structural legal aid must be seen in context that injustice that are often witnessed in society are not solely caused by the individual behavior that deviate from applicable norms or law, but also sourced from an unbalanced relationship pattern that underlie social life. This kind of relationship pattern cause a situation where some people become poor and suffer. [3]

In conjunction with this structural legal assistance quoting opinions expressed by Schuyt, a Dutch legal sociologist in a 1973 speech, that the fairness in the law implementation and application, which mean the same for everyone and runs according to regulations and legal principles depends on fair social structure. That is a society structure which have a characteristic there is no big difference in power and not organized by law in various forms and variations.[4]

Departing from that, then in UUD RI 1945 has been regulated the provisions of one's position in law and the protections of human rights, as can be found in verse (1) Article 27: All citizens shall be equal before the law and the government and shall be required to respect the law and the government, with no exceptions. Verse (1) Article 28D: Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law. Verse (2) Article 28H: Every person shall have the right to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness. Verse (4) Article 28I: The protection, advancement, upholding and fulfilment of human rights are the responsibility of the state, especially the government, and verse (5) Article 28I: For the purpose of upholding and protecting human rights in accordance with the principle of a democratic and law-based state, the implementation of human rights shall be guaranteed, regulated and set forth in laws and regulations.

In a sarcastic tone, quoting an English scholar named Oliver Goldsmith which suggested that "*Laws grind the poor and rich men rule the law*". This expression, arise because the rich with their tick pocket can be accompanied by lawyer to defend their rights and interest. But the little one who is weak and poor, struggles alone without anyone to accompany them.

The law hit the poor, but the rich rule and control the law. Law and justice for poor people is something that is still "lux", because they are difficult to reach and get it. In fact, tragedy can occur because of poverty and ignorance used by those who are not responsible as a new "commodity".

However, anomalies sometimes occur where it is very difficult to understand constitutionally if the poor cannot obtain the recognition rights, guarantees, protection and fair legal certainty and equality before the law. They are not given access to justice either

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1 Stewart Fenwick, in *Panduan Bantuan Hukum Di Indonesia*, Published in collaboration with YLBHI and PSHK, 2006 edition, Jakarta, page. vii.

2 Nasroen Yasabari, *Puspa Ragam Hukum dan Masyarakat*, Publisher Alumni, Bandung, 1980, page 79.

3 *Ibid*, page. 81

4 *Ibid*, page. 81

through court institutions or outside the court process. As for the rich, access to legal assistance is not a difficult thing, almost no obstacles.

The presence of legal aid providers is the implementation of state obligations to assist the state in the task of providing legal assistance to the poor. The state is believed can contribute in the creation of people's welfare, especially in recognition rights and legal guarantees.

In granting rights to legal aid providers in carrying out their legal aid duties not receive compensation between legal aid providers and people who cannot afford legal assistance. Therefore, is a state's obligation to provide the budget for the purpose of providing legal assistance carried out by legal aid providers. Because it is very unlikely, providing legal aid activities in carrying out legal assistance task are running well and optimal if they don't get support especially from the state budget.

Without losing the spirit of providing legal assistance by legal aid providers to the poor for free (prodeo), the purpose of giving a reward must be interpreted as a unity that cannot be separated in the context of fair and proper treatment for doing legal assistance as a legal aid provider. Rewards are not the same as honorariums received by advocates from their clients, but rather the funds needed by legal aid providers in providing legal assistance.

In order to accommodate the provision of legal assistance to the poor, these are further elaborated by the State within UU Nomor 16 Tahun 2011 tentang Bantuan Hukum, especially for the poor. Undang-Undang Nomor 16 Tahun 2011 as the main door for the enforcement of the rights guarantee of everyone who cannot afford to get access to justice through the provision of legal assistance from legal aid providers, which is at the same time a constitutional basis for the presence of legal aid providers to get special arrangements, bearing in mind their very strategic position, tasks and functions, namely carrying out constitutional mandate, especially the fulfillment of the right to justice for the poor in obtaining legal assistance in Pontianak City.

A. Problems

1) How does the existence of an accredited Legal Aid Organization play a role in realizing the fulfillment of the right to justice for the poor?
2) How is the implementation of the accessibility of the poor in getting free legal assistance?

B. Purpose and Use of Research

1. Purpose
   a. To obtain information and data and find out the existence of an accredited Legal Aid Organization in Pontianak City and its role in providing legal assistance.
   b. To obtain information and data, and to uncover inhibiting factors in the implementation of the accessibility of the poor in obtaining free legal assistance, as well as formulating a solution.
2. Research Use
   a. This research activity is expected to be useful as a communication medium to provide knowledge and understanding to the public regarding Undang-Undang Nomor 16 Tahun 2011 tentang Bantuan Hukum.
   b. This research activity is expected to encourage existing Legal Aid Organizations to increase their existence to become an accredited Legal Aid Organization in providing free legal assistance to the poor, and to be able to support the government in carrying out its obligations to fulfill the right to justice for the poor in obtaining legal assistance in a free.

C. Research Methods

1. Types of Research
   This legal research uses the sociological method (socio-legal research)[6] with a qualitative approach. A qualitative (naturalistic) approach is essentially observing

[6] Ronny Hanitijo Soemitro argues that the socio-legal research approach is intended to study and examine the interrelationships between law and other social institutions. Here, law is not conceptualized as an autonomous

people in their environment, interacting with them, trying to understand their language and interpretation of the world around them.[7]

Bogdan and Taylor provide a definition that qualitative research methodology is a research procedure that produces descriptive data in the form of written or oral words from people and observable behavior. This approach is directed towards the background and the individual holistically. So in this case it is not allowed to isolate individuals or organizations into variables, but need to see it as part of a wholeness, because in qualitative research the emphasis is on naturalistic aspects, but that does not mean anti-quantitative.[8]

2. Research Specifications
   The research specifications used are descriptive, which means that in giving a description of an existing phenomenon, it is carried out in accordance with the research method. The facts are illustrated by an interpretation of the emic and etic perspective one after another and continuing.
3. Data Sources and Data Collection Techniques
   a. Primary data collection, carried out using interviews and focused discussion.
      In this research, researchers chose the unstructured interview method that is questions are asked more freely without being bound by the arrangement of questions prepared in advance. With the aim that the direction is more open and can be obtained broader information, and interviews can take place in a flexible manner.
      Focus Group Discussion (FGD) with various stakeholders and policy makers within the Government, Non-Governmental Organizations and experts who specifically explore the problem of implementing corporate environmental and social responsibility. that is data research through library research on the legislation, documents or notes, literature, and research results related to this research.
   b. Secondary data collection, carried out through library research that is data research through library research on the legislation, documents or notes, literature, and research results related to this research.
4. Population and Research Samples
   The population in this research is the related apparatus in the formulation of regional policies regarding the implementation of legal aid for the poor, institutions that carry out guidance and supervision of the legal aid implementation for the poor, legal aid organizations and the poor who are dealing with the law.

   The sampling method used was purposive sampling, because the sample needed in this research must have certain characteristics in accordance with what the research objectives.

D. Discussion

1. Analysis

The legal aid concept itself is used as a translation of two different foreign terms, that is legal aid and legal assistance. The legal aid term is used to indicate the meaning in the narrow sense in the form of providing legal services to someone involved in a case in free of charge for those who cannot afford it. The main motivation in the legal aid concept is to uphold the law by defending the interests and human rights of the poor.

The paradigm development regarding law that is the relationship of law with other things outside the law, now also known as advocacy. The advocacy concept includes a

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normative phenomenon, but as a social institution that is associated in real terms with other social variables. Empirical law is a symptom of society, on the one hand it can be studied as a cause variable (independent variable) which causes effects on various aspects of social life (Ronny Hanitijo Soemitro, ***Metodologi Penelitian Hukum dan Jurimetri,*** Ghalia Indonesia, 1988, page 34-38)

[7] S. Nasution, ***Metode Penelitian Naturalistik-Kualitatif,*** Tarsito, Bandung, 1988, page 5

[8] Lexy J.Moleong, ***Metodologi Penelitian Kualitatif,*** Remaja Rodakarya, Bandung, 2001, page.3

broader understanding of the two concepts above. In advocacy concept, includes activities that influence the authorities on issues involving the people, especially those who have been marginalized and excluded from the political process. The concept of advocacy also includes activities that have political aims. Law is seen as a social phenomenon that is inseparable from other social phenomena like politic and economy.

The background of the formation UU no. 16 Tahun 2011 based on the idea that, the state guarantees the constitutional rights of everyone to get recognition, guarantees, protection and fair legal certainty and equality before the law as a human rights protection facilities. The state is responsible for providing legal assistance to the poor as an embodiment of access to justice. Regulations regarding legal aid organized by the state must be oriented towards the realization of social justice change.

In the general explanation of UU no. 16 Tahun 2011 affirmed that the right to legal assistance has been universally accepted as guaranteed in the International Covenant on Civil and Political Rights. Article 16 and Article 26 ICCPR guarantee that all people are entitled to legal protection and must be avoided from all forms of discrimination.

2. Legal Aid Reality

Empirical facts can be revealed, that legal assistance to the poor in West Kalimantan in general has not run optimally. The results of research in the field show in the period 2017-2018 only a few poor people access legal assistance, as contained in the following data:

Table 1 Legal Aid to Poor Communities Handled by Legal Aid Organizations, 2017-2018 in West Kalimantan (Litigation)

No	**Legal Aid Organizations**	**Amount of Legal Aid provided**	
		2017	**2018**
1	Posbakummadin Pontianak Kalimantan Barat (Kal-Bar)	43	22
2	LBH Galaherang Mempawah	12	41
3	BKBH UNTAN	23	0
4	LBH Gema Bersatu Ketapang	16	29
5	LBH-PEKA Singkawang	18	52
6	LKKBH FH UPB	19	10
Total		**131**	**154**

Data source: Regional Office of Kemenkumham West Kalimantan processed

Based on the data presented above, legal assistance (litigation) provided in 2017 and 2018 has indeed seen an increase. The increase is arguably insignificant, only at 23 (twenty-three). Besides that, we also need to look at data related to budget absorption by legal aid organizations, as presented below:

Table 2 Legal Aid to the Poor Handled by Legal Aid Organizations, 2018 in West Kalimantan (Non Litigation)

No	Legal Aid Organizations	Allocation	Realization	%	Number of activities
1	Posbakummadin Pontianak Kalimantan Barat (Kal-Bar)	0	0	-	0
2	LBH Galaherang Mempawah	0	0	-	0
3	BKBH UNTAN	0	0	-	0
4	LBH Gema Bersatu Ketapang	0	0	-	0
5	LKBH-PEKA	Rp.74,690,000	Rp.3,690,000	99	29
6	LKKBH FH UPB	Rp.64,020,000	Rp.53,140,000	83	17
Total		**Rp.138,710,000**	**Rp.126,830,000**	**91**	**46**

Data source: Regional Office of Kemenkumham West Kalimantan processed

Based on the data presented above, from 6 (six) accredited legal aid organizations, only 2 (two) legal aid organizations carry out non-litigation legal aid programs, with a total budget allocation of Rp 138,710,000 and budget absorption from the total budget allocation is Rp 126,830,000, or 91%, with a total of 46 (forty-six) activities.

From the data mentioned above, then the question arises: "What about the accessibility of the poor in getting free legal assistance in Pontianak?"

Accessibility of the poor in obtaining free legal assistance in Pontianak City has also not been maximally implemented. Based on data, some (50%) of the total six accredited Legal Aid Organization in the Regional Office of Kemenkumham West Kalimantan are domiciled in Pontianak City. However, there is no guarantee that the accessibility of the poor to get services in the form of legal assistance (litigation and non-litigation) in Pontianak City is high. This is caused by several factors, among them are socialization and understanding of law from community related to Undang-Undang Nomor 16 Tahun 2011 tentang Bantuan Hukum is minimal.

Communication media to provide knowledge and understanding to the public regarding legal understanding, especially Undang-Undang Nomor 16 Tahun 2011 tentang Bantuan Hukum is indispensable. The communication media can be a legal socialization and research. Many people are still unfamiliar with legal aid, so they only realized that there was a free legal aid service when they were involved in legal issues.

The task of legal aid organizations is not only to provide services in the form of legal aid. However, far more than that is to form a wider community to be aware of the law.

E. Conclusion

Based on what has been explained in the previous chapter, then the conclusion drawn from the discussion is:

- The right to legal assistance is universally accepted as guaranteed in the International Covenant on Civil and Political Rights which emphasizes that "All people are entitled to legal protection and must be avoided from all forms of discrimination".
- Organizing the Legal Assistance to citizens is an effort to fulfill and at the same time as the implementation of the rule of law, which is recognizes and protects and guarantees citizen's rights to access to justice and equality before the law.
- Empirical facts show that the provision of Legal Assistance has not touched many people or groups of the poor, so they have difficulty accessing justice because it is hampered by their inability to realize their constitutional rights.

- The lack of legal aid for the poor by legal aid organizations is due to several factors, among others is due to the lack of socialization and low legal awareness of the community.

Regarding the low accessibility of the poor to legal aid services is:

- Continual, periodic and extensive socialization to the public, especially the poor, specifically related Undang-Undang Nomor 16 Tahun 2011 tentang Bantuan Hukum.
- Synergy between the government and legal aid organizations related to socialization, budget support and other administration is needed.

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LAW ENFORCEMENT OF CRIMINAL ACTS OF ILLEGAL FISHING THROUGH THE MECHANISM OF SINKING SHIPS IN INDONESIA

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ABSTRACT

One form of law enforcement for fisheries is sinking foreign vessels. Authorized parties namely Fisheries Civil Servant Investigators, Indonesian Navy National Army Officer Investigators (TNI AL), and / or Republic of Indonesia National Police Investigators. As stated in Article 69 paragraph (4) of the Fisheries Law, actions can be taken in the form of burning and sinking foreign vessels in *forced major conditions* , such as resistance from the skipper or crew of foreign ships which can endanger the safety of the ship. Fisheries supervisor. The sinking and burning of foreign-flagged vessels can be carried out through 2 (two) ways, namely direct sinking in the sea based on Article 69 paragraph (4) of the Fisheries Act and a collective agreement between the Directorate General, National Police PSDKP, Indonesian Navy and National Police and through court approval (Article 76 A Fisheries Law) and court decisions that have legal powers *(incraht)*.

Keywords: Law Enforcement, Illegal Fishing, Ship Sinking.

A. BACKGROUND

Basically, the Indonesian state is not merely an agricultural country, but as a maritime country because the country of Indonesia has a wider sea area than the land area. [1] Even though it has a wide sea, the potential of marine resources has not been managed properly and maximally, especially in the field of fisheries, so that there are many cases of *illegal fishing* carried out by foreign-flagged vessels which are generally from several neighboring countries*(neighboring countries)* such as Thailand, Vietnam, China and the Philippines. [2] As a result, the state is estimated to suffer losses of Rp.101 trillion per year. [3]

The rampant illegal fishing carried out by foreign-flagged vessels in Indonesian territorial waters is very detrimental to the fishermen who in fact are dominated by small-scale fishermen, become less competitive, and potentially urge the livelihoods of small fishing communities. Other losses that cannot be judged materially but are highly related to national pride, are negative images of the Indonesian people in the international community because they are considered unable to manage marine and fisheries resources properly.

In supporting the implementation of fisheries management, an adequate rule or law is needed. This is in line with the concept of the Indonesian state as a legal state *(rechstaat)* as stated in Article 1 Paragraph (3) of the 4th Amendment to the 1945 Constitution. Until now, the Indonesian government has issued 3 (three) legal regulations concerning fisheries, namely:

1. Law No. 9 of 1985 concerning Fisheries.
2. Law No.31 of 2004 on fisheries; and
3. Law No. 45 of 2009 concerning Amendments to Law Number 31 Year 2004 concerning Fisheries.

One form of law enforcement in the fisheries sector is the sinking of foreign-flagged vessels carrying out fisheries in Indonesian waters, as stipulated in Article 69 Paragraph (4) of the Fisheries Act which states that in carrying out the functions referred to in paragraph (1)

investigators and / or fisheries supervisors can take special measures in the form of burning and / or sinking foreign-flagged fishing vessels based on sufficient initial evidence.

B. DISCUSSION

1. Cases of Crime of Theft of Illegal Fish in Indonesian Waters

Illegal, unregulated and unreported fishing practices (IUU fishing) have become one of the concerns of many countries, including Indonesia. Throughout 2013, at least 39 foreign vessels entered Indonesian waters and illegally caught fish. The KIARA Data and Information Center (June 2013) found the ships were from Malaysia, China, the Philippines, Korea, Thailand, Vietnam and Myanmar. This practice clearly harms the state in maintaining the sustainability of marine ecosystems and the sustainability of fisheries food sources.

The practice of illegal fishing in Indonesian waters year after year is increasing. During 2001 - 2013, there were 6,215 cases of fishing theft (see Table 1). Of that amount, 60 percent more or 3,782 cases occurred until November 2012. Ironically, the Minister of Maritime Affairs and Fisheries actually ratifies the rules that allow transhipment. This is stated in Article 69 paragraph 3 of the Minister of Maritime Affairs and Fisheries Regulation Number 30 of 2012 concerning Capture Fisheries, "(3) In the implementation of transhipment, compulsory fish must be landed at base ports in accordance with SIPI or SIKPI and not taken abroad, except for ships fish catchers who use purse seine fishing equipment measuring above 1000 (one thousand) GT are operated singly ".

Based on this, the level of illegal fishing in Indonesian waters is still quite high. The illegal fishing action is contrary to the Law No. 31 of 2004 inconjunction with Law No. 45 of 2009 concerning Fisheries, this rule is contrary to the Decree of the Minister of Marine and Fisheries of the Republic of Indonesia Number KEP.50/MEN/2012 concerning National Action Plans for Prevention and Control Illegal, Unreported, and Unregulated Fishing Year 2012-2016, namely: (1) transfer of catches in the middle of the sea or sea transhipment without data / report to the competent authorities; (2) the perpetrators do not report the results of their catches, to avoid payment of levies for efforts made; (3) fishing vessels and fish transport vessels do not report at the base port of the ship according to the permit granted; and (4) fishing vessels directly from the sea carrying captured fish abroad. These four modes underline (how) the counter-productive transhipment clause is an effort to eradicate the practice of theft at sea.

2. Investigators in *Illegal Fishing* Law Enforcement through the Mechanism In the form of sinking in Indonesian waters

Among the many illegal economic problems, the practice of illegal fishing or IUU (Illegal, Unregulated and Unreported fishing practices) by fishermen using foreign-flagged vessels is the most detrimental to the country. The real impact is overfishing and overcapacity which threatens the sustainability of fish resources. At present most of the sea area and Indonesian ZEE are already on the red level (overfishing don overcapacity). IUU fishing also causes the fisheries business climate not conducive, weakening the competitiveness of companies, and marginalizing small-scale fishermen. Another disadvantage is the emergence of negative images that greatly affect the nation's self-esteem, because Indonesia is considered unable to manage marine and fisheries resources properly.

The amount of loss based on the estimates of the Food and Agriculture Organization (FAO) is Rp. 30 trillion / year, while based on research carried out by experts in 2009, specifically in the Arafura Sea the losses reached Rp. 11.3 trillion / year. These losses can be far greater if we take into account the losses from aspects of environmental degradation in fisheries and fisheries that are overloaded as well as losses from the socio-economic aspects of fishing communities that are directly disadvantaged by the practice of IUU Fishing.

The illegal fishing activities by foreign fishermen also damage the sustainability of Indonesian marine fish stocks, because they usually catch fish with technology that is not

environmentally friendly. The most important thing to consider is if it continues to allow it to happen *illegal fishing* , then regional sovereignty can be undermined, therefore, there must be a strategic and significant effort in order to overcome illegal fishing activities in the territorial waters of the Republic of Indonesia.

Law enforcement is one of the factors that greatly determines the upholding of the rule of law. In the process of law enforcement, investigators play a very important role, because it is a legal apparatus that drives the criminal justice system mechanism. According to Satjipto Raharjo, law enforcement is essentially an enforcement of ideas or concepts about justice, truth, social benefits, and so on. So law enforcement is an attempt to realize these ideas and concepts into reality. Satjipto Rahardjo distinguishes the term *law enforcement* from *the use of law*. Law enforcement and the use of law are two different things. People can enforce the law to provide justice, but people can also enforce the law to be used for achieving other goals or interests. Enforcing the law is not exactly the same as using law. [4]

The implementation of law enforcement in the field of fisheries is very important and strategic in order to support the development of fisheries in a controlled manner and in accordance with the principles of fisheries management, so that fisheries development can run sustainably. Therefore, the existence of legal certainty is a condition that is absolutely necessary. In the Fisheries Law provides more clarity and legal certainty towards law enforcement for criminal acts in the fisheries sector, which includes investigations, prosecutions and examinations in court proceedings.

In relation to the enforcement of fisheries business law, to support law enforcement in the related fisheries sector, a judicial institution needs to be established. In Article 71 of Law No. 31 of 2004 stated that with this Law a fishery court was formed which has the authority to examine, hear and decide criminal acts in the fisheries sector (Paragraph (1)). The fishery court as referred to in paragraph (1) is in the general court environment (Paragraph (2)). For the first time the fishery court as referred to in paragraph (1) is formed in the North Jakarta District Court, Medan, Pontianak, Bitung, and Tual (Paragraph (3)). The legal area of the fishery court as referred to in Paragraph (3) is in accordance with the legal area of the relevant district court (Paragraph (4)). Fisheries Court as referred to in Paragraph (3) no later than 2 (two) years from the date this Law comes into force, has carried out its duties and functions (Paragraph (5)). The establishment of a fishery court as referred to in Paragraph (1) shall be carried out in stages in accordance with the requirements stipulated by a Presidential Decree (Paragraph (6)).

For the purpose of investigation, investigators can detain suspects at most 20 (twenty) days (paragraph (2)). The period as referred to in paragraph (2), if needed for the purpose of an inspection that has not been completed, can be extended by the public prosecutor no later than 10 (ten) days (paragraph (3)).Provisions as referred to in paragraph (2) and paragraph (3) do not rule out the possibility of the suspect being expelled from detention before the time of detention ends, if the interest of the examination has been fulfilled (paragraph (4)). After 30 (thirty) days, the investigator must have released the suspect from prison for the sake of law (paragraph (5)). The Investigator referred to in Article 73A submits the results of the investigation to the public prosecutor no later than 30 (thirty) days from the notification of the commencement of investigation (paragraph (6)).

To realize law enforcement in the fisheries sector which has been properly regulated in the laws and regulations, and is more efficient, the Minister issues Regulation No. Per.13 / Men / 2005 concerning the coordination forum for handling criminal acts in the fisheries sector which is an implementation regulation of Article 73 paragraph (3) of Law No. 31 of 2004. In Article 1 of the Minister of Maritime Affairs and Fisheries No. Per. 13/Men/2005 is specifically regulated regarding the position, duties, and functions of coordinating forum institutions, that in order to support the smooth implementation of the duties of investigators and to facilitate communication and exchange of data, information, and other matters needed in the framework of effectiveness and efficiency of handling and / or settlement of criminal

acts in the fisheries sector in an integrated manner, a Coordination Forum for Crime Management in the Field of Fisheries was formed (paragraph (1)).

In order to carry out its duties properly, this forum is equipped with functions as stipulated in Article 4 of the Maritime and Fisheries Ministerial Regulation No. Per.13/Men/2005 that in carrying out the tasks as what is meant in Article 3, the Fisheries Crime Handling Coordination Forum has the following functions:

(a) Coordination investigation of criminal acts in the field of fisheries;
(b) Identification of types, modus operandi, volume, and dissemination of criminal acts in the field of fisheries;
(c) Determination of the type of crime in the field of fisheries which is prioritized to be processed in stages;
(d) Counseling and guidance to the community to prevent criminal acts in the fisheries sector;
(e) Periodic analysis, identification and measurement of the significance of criminal acts in the fisheries sector;
(f) Designing forms of coordination of activities to eradicate criminal acts in the fisheries sector;
(g) Formulating and updating strategies for combating crime in the fisheries sector;
(h) Monitoring and presenting reports on the implementation of eradication of criminal acts in the fisheries sector;
(i) Assessment and evaluation of the effectiveness of the strategy to eradicate criminal acts in the fisheries sector in a sustainable manner (paragraph (4)).

In the legal process in fisheries cases in Indonesia , currently there are still many obstacles such as the lack of fisheries courts, and there are still many technical considerations that need to be prepared in advance, for example supporting facilities and infrastructure, and human resources that move them, especially judges who are truly really understand the problem of fisheries and coastal areas well.

As previously explained that in the Fisheries Law there are 3 (three) agencies authorized to enforce fisheries law, namely Fisheries Civil Servant Investigators , Indonesian Navy National Army (TNI AL), and the Indonesian National Police (POLRI) . The three agencies are equally authorized to handle the same case, meaning that both can carry out investigations, filing the Examination Report (BAP) and submit it to the Public Prosecutor without any system integration in its implementation. So that in reality on the ground there is often a conflict of authority in the enforcement of fisheries law. This authority conflict can be negative but it can also be a positive authority conflict (both authorities). The authority conflict that occurs is very unfavorable and must be immediately resolved legally.

In the world of law, there are three sources of authority, namely the authority of attribution, delegation and mandate. Associated with this, the authority to enforce fisheries law by the three fisheries law enforcement agencies comes from the Fisheries Law, so that the authority is the authority of attribution. Legally, the three fisheries law enforcement agencies are equally authorized to make regulatory laws that are in exercising their authority to enforce fisheries law. The establishment of these regulations must be based on Law No. 11 of 2011 concerning the Establishment of Legislation, because it is realized that all acts of government in the field of law enforcement must be based on the principle of legality (based on clear legal rules).

The resolution of these conflicts of authority needs to be done with a legal approach. A coordination forum needs to be established as specified in Article 73 paragraph (5) of Law No. 45 of 2009 concerning Fisheries. Even though in reality the regulation of the Minister of Marine and Fisheries No.PER.13 / MEN / 2005 has been issued concerning the Fisheries Crime Handling Coordination Forum, it has not been able to resolve authority conflicts in the enforcement of fisheries law. Judging from the clear institutional authority, the Coordination Forum does not have institutional authority, meaning that if one of the three fisheries law enforcement agencies does not coordinate, there is no legal effect. And the

reality in the field of enforcement of fisheries law is carried out without coordination and on its own (sectoral) without any system integration. This can lead to acts of abuse of authority (opening the door to Collusion and Nepotism Corruption) and arbitrary actions by the three fisheries law enforcement agencies. Besides that there is also no supervisory institution that controls and monitors him. Therefore the need for fisheries law enforcement oversight agencies as well as the need for integration of the system *(Integrated System)* implementation.The integration of the system is for example the *Online Integrated System* . For example, if one of the fisheries law enforcement agencies arrests a ship that is carrying out *illegal fishing* , other agencies can also monitor that action. Even the Prosecutor's Office and the Fisheries Court can also monitor. So that automatically there will also be an oversight of the three fisheries law enforcement agencies. If by the way *This online integrated system* can not be implemented yet, so it is necessary to think of forming an independent supervisory institution formed with the Act and its accountability report directly to the DPR.

Most of the vessel sinking mechanisms carried out are based on court decisions. The implementation of Article 69 Paragraph (4) of the Fisheries Act is carried out if foreign fishing vessels carrying out IUU *fishing* take actions or maneuvers that endanger the safety of law enforcement officers. This is also explained in the Charter of the Collective Agreement between the Ministry of Maritime Affairs and Fisheries and the Indonesian National Police and Indonesian Navy (KKP-Polri-TNI AL), that the ship sinking policy can be carried out in the event of a dangerous maneuver and ABK acts of violence can be taken as self-defense in the form of sinking the ship or in *forced major* conditions as well as if the skipper or crew of a foreign vessel resisting that endangers the safety of the Indonesian Navy or fisheries supervisors, can sink.

Before carrying out the burning and / or sinking action, action can be taken:

a. Save as much as possible all ship crews;
b. Inventory all equipment and equipment on the ship by mentioning the condition in full and in detail;
c. Document both using digital cameras / cameras and audio visual / video;
d. Some of the fish caught by the ship are set aside for evidence;
e. Make a Minutes of burning and / or sinking the ship, to be included in the news of the seafaring agency concerned;

Furthermore, for Indonesian flag fishing vessels, the following actions are taken:

a. The examining officer informs the captain that a fishery crime has occurred and that the ship will be taken to the specified base / port / service.
b. Ask the Master to give a signature on the map of the position of the picture of the situation of chasing and stopping; and
c. The Fisheries Supervisor / Polri / KRI / KAL Commander Commander issues a warrant to bring the ship and crew to the designated base / service / port.

After completing the action as described above, other things that must be done by the captain / commander of the fishery supervisor / police ship / KRI / KAL are to make a written statement and be signed by the ship's captain who explains that during the inspection it runs in an orderly manner and does not occur violence, damage or loss. Next make a written statement and signed by the ship captain explaining the results of the examination of documents / documents mentioning the place, position and time and recording in the vessel journal book that was examined.

Furthermore, based on the *standard operating procedure* (SOP) itself to sink the ship still refers to applicable law, such as KUHAP Article 48, [5] Article 49, [6] and KUHP 51. [7] The act of drowning a ship which is carried out as an objective of law enforcement based on the laws ordered by investigators in this case is not a form of violation as stated in Article 51 of the Criminal Code.

It was also explained in the regular procedure of law enforcement and security in the national territorial jurisdiction issued by the Indonesian Navy that vessel arrest and

investigation can be carried out if there is an initial suspicion of a foreign-flagged vessel committing a criminal offense in Indonesian waters, the first procedure that is:

Termination of the ship, if the ship is suspected of committing a crime based on sufficient initial evidence, termination is carried out for the following reasons:

1. In Archipelagic and Territorial Seas, committing criminal acts regulated in Indonesian law.
2. In the Additional Zone, carry out criminal acts related to customs, immigration, fiscal and quarantine.
3. On the EEZ and the Indonesian Continental Land:

a) Conduct unauthorized marine scientific research.
b) Exploring / exploiting resources in the EEZ / Continental Shelf without permission from the Republic of Indonesia.
c) Laying / unpacking the seabed / pipeline cable without permission.
d) Build and use artificial islands, installations and buildings without permission.
e) Pollution.
f) Conduct other activities that are contrary to national and international law.

2. On the high seas, ships carry out activities that are contrary to international law. Example: Piracy, dark broadcasting, etc.

Termination procedure, basically the termination of the ship is carried out if there is sufficient suspicion that a violation of law has occurred and or to prevent a violation of law. When KRI / KAL will carry out the termination of a ship, carry out the role of inspection and search which is preceded by the role of combat of surface hazards. It starts by giving a signal to communicate by:

1. Fly a flag: "K" (on visible weather limits).
2. Optical "KKK" lights (on visible weather limits).
3. Semaphore, letter "K" (on visible weather limits).
4. Radio channel 16 communication.

If communication fails, the stop command can be carried out by raising the Upen "L" flag (on the visible weather limit) and megaphone (at the audible boundary) or by the Gauk Sign.

If a request to communicate and an order to stop according to the above methods is not ordered, then a shot warning is given by using a bullet type ammunition or sharp upward. If this warning is not heeded, carry out a shot towards the sea around the ship where the spark can be seen by a suspected vessel.

If the warning does not stop the ship, action can be taken in accordance with Article 5 paragraph (1) letter a number 4 in conjunction with article 7 paragraph (1) letter j of the Criminal Procedure Code in order to conduct other actions in accordance with the law by shooting towards the ship's body in the place where it is estimated that there are no crew members and do help if needed.

In the event that the ship carries out a dangerous maneuver and / or the crew does a violent act, then self-defense can be taken. In terminating foreign vessels, they must pay attention to the rights of the vessel during the crossing of the Islands and Territorial Seas in accordance with the provisions of the 1982 Sea Law Convention.

Based on the SOP, the shooting of foreign vessels is justified in Indonesian law, but it can only be done if the fishing thieves fight when they are about to be arrested, in addition if the shooting is carried out as an effort to defend themselves. Nonetheless, there are still weaknesses in law enforcement in the fisheries sector because Indonesia's territorial waters are very vast, while the supervisors' and technology's ability to detect foreign vessels in Indonesia's perarian region is very limited, so what needs to be done to overcome the problem of fishing law enforcement by increasing the budget.

In connection with law enforcement d i the field of fisheries, the d natural discharging its functions investigator and / or supervisory fishery authorized toperform specific actions such as burning and / or the sinking of the fishing vessel with a foreign flag based on

preliminary evidence is sufficient, but it is contrary to human rights because it confiscated someone else's property. An object or item that can be destroyed by the state should have gone through the criminal justice system process to prove its fault. If proven guilty and included in a prohibited object, it can be confiscated to be destroyed or utilized for the benefit of the state.

Handling of foreign vessels must follow legal proceedings, pending court decisions, whether confiscated, auctioned, destroyed or returned to their owners. The problem of shipbuilding also has the potential to cause a reaction among neighboring countries. One of them is Malaysia which questioned the Indonesian government's policies. This is because both countries, Indonesia and Malaysia, have signed an MoU (Memorandum of Undersanding) on January 27, 2012.

In the explanation of Article 69 paragraph (4) it is stated that the intended initial evidence is the initial evidence to suspect the existence of a criminal offense in the fishery sector by foreign-flagged fishing vessels, for example foreign-flag fishing vessels do not have SIPI and SIKPI, and obviously catch and / or transport fish when entering the territory of the Republic of Indonesia fisheries management. In practice in the field, SIPI and SIKPI have never been issued for foreign-flagged vessels, so it is very difficult for investigators to prove sufficient initial evidence of foreign-flagged vessels suspected of committing a criminal offense in the fishery sector, unless the fishermen investigator or supervisor is convinced that the vessel Foreign-flagged fisheries actually commit criminal acts in the fisheries sector and there are already bilateral agreements between Indonesia and foreign ship flags, so that they can sink or burn in order to provide a deterrent effect to the perpetrators of illegal fishing in the increasing number of Indonesia.

However, the author argues that regarding foreign vessels carrying out theft in the territory of the Indonesian Exclusive Economic Zone (ZEEI), sinking efforts cannot be carried out, because Indonesia only has the authority to exploit natural resources within the ZEEI region. According to the 1982 UNCLOS there are clear provisions regarding this matter, in accordance with the laws that apply to each zone or region. In Article 73, for example, UNCLOS contains rules regarding the enforcement of coastal laws.

The aim of creating a deterrent effect by sinking foreign fishing vessels is quite bold because it reflects the firmness of the government's attitude in realizing *sustainable fisheries* and *responsible fisheries.* In handling cases like this, a careful attitude is needed from the government before making a plan to sink foreign vessels suspected of committing illegal fishing in Indonesian waters, because there are international legal principles that apply in dealing with lawbreakers in territorial waters ZEEI. Therefore, efforts to regulate ship sinking must be studied more thoroughly and wisely. For this reason, the formulation of this regulation needs to involve international legal experts, especially those who study international marine law.

This meaning that the legal consequences of law enforcement in the fisheries sector through the mechanism of sinking foreign vessels that carry out fisheries crimes in Indonesian waters when linked to UNCLOS 1982, so far there have been no negative consequences experienced by Indonesia due to such decisive actions, this is because internationally IUU *fishing* has become a common enemy and the decisive action to sink the ship is the implementation of the legal sovereignty of the Republic of Indonesia.

3. Legal Effects of Law Enforcement Through the Sinking of Foreign Vessel Mekansime Who Committed Crime in Indonesian Water Fisheries Associated with UNCLOS 1982

The sinking of foreign ships that carry out illegal fishing in Indonesian waters is part of law enforcement in the fisheries sector. After going through several changes, the Fisheries Law has authorized investigators to carry out acts of sinking foreign-flagged vessels if there is sufficient initial evidence or there is a belief that fisheries investigators / supervisors have actually carried out fishing crimes.

The sinking of foreign-flagged vessels certainly has legal implications for the perpetrators. Actors in fisheries criminal acts can be divided into 2 (two), namely judicial ABK actors such as Masters and Machine Room Heads, while other crew members besides Master and Machine Room Heads include non-Judicial crews. Thus, the party that can be asked for criminal liability for alleged fisheries is the Master and the Head of the Machine Room, while the non-Judiciary crews can be sent back to their home country through the local immigration office after being given a proper security deposit or other form of guarantee.

Another implication of sinking foreign-flagged vessels suspected of committing fisheries in Indonesian waters, there is a gap for Indonesia to be sued by foreign ship owners, if it turns out that the ship's owners are not necessarily involved in the practice of illegal fishing. This means that the ship used to illegally fish in Indonesian waters does not necessarily belong to the perpetrator, it could be a rented vessel.

As previously explained, fisheries crime is divided into two, namely crime and violation. In relation to sinking foreign-flagged vessels carrying out illegal fishing activities in the Indonesian territory when referring to the provisions of the Fisheries Act, this can be justified in accordance with Article 69 paragraph (4).According to the KKP, this form of sinking foreign ships can be done to protect natural resources in the ZEEI region.

However, the author argues that regarding foreign vessels carrying out theft in the territory of the Indonesian Exclusive Economic Zone (ZEEI), sinking efforts cannot be carried out, because Indonesia only has the authority to exploit natural resources within the ZEEI region. According to the 1982 UNCLOS there are clear provisions regarding this matter, in accordance with the laws that apply to each zone or region. In Article 73, for example, UNCLOS contains rules regarding the enforcement of coastal laws.

There are at least four things that must be considered by every *coastal state* in carrying out law enforcement as stated in Article 73 UNCLOS:

1. Coastal countries can, in exercising their sovereign rights to carry out exploration, exploitation, conservation and management of biological resources in exclusive economic zones, take such actions, including boarding ships, examining, arresting and carrying out judicial processes, as needed to guarantee compliance with laws and regulations. stipulated in accordance with the provisions of this Convention.
2. Captured ships and their crew must be released immediately after being given a proper security deposit or other form of guarantee.
3. Coastal State penalties imposed on violations of fisheries legislation in exclusive economic zones may not include confinement, if there is no reverse agreement between the States concerned, or any other form of corporal punishment.
   In the case of the capture or detention of a foreign coastal State vessel, it must immediately notify the flag State, through the appropriate channel, regarding the actions taken and regarding each sentence which is then dropped.

The aim of creating a deterrent effect by sinking foreign fishing vessels is quite bold because it reflects the firmness of the government's attitude in realizing *sustainable fisheries* and *responsible fisheries*. In handling cases like this, a careful attitude is needed from the government before making a plan to sink foreign vessels suspected of committing illegal fishing in Indonesian waters, because there are international legal principles that apply in dealing with lawbreakers in territorial waters ZEEI. Therefore, efforts to regulate ship sinking must be studied more thoroughly and wisely. For this reason, the formulation of this regulation needs to involve international legal experts, especially those who are concerned with international marine law.

According to explanation above that law consequence of law enforcement in the field of fisheries through the mechanism sinking of foreigners who committed the crime of fisheries in the waters of Indonesia if linked to UNCLOS in 1982, so far there is no negative consequences experienced by Indonesia as a result of affirmative action are, this is because Internationally, IUU *fishing* has become a common enemy and the decisive action to sink the ship is the implementation of the rule of law of the Republic of Indonesia.

C. CONCLUSION

Based on the descriptions in the previous chapters, the following conclusions are obtained:

1. Investigator can perform law enforcement in the field of fisheries through the mechanism of sinking through two (2) ways , namely the drowning directly in the middle of the sea pursuant to Article 69 paragraph (4) of the Law of Fisheries and charter joint agreement between DG, Police PSDKP, the Navy and the Police when the ship conduct dangerous maneuvers and / or skipper / ABK to fight violence and through court approval efforts (Article 76 A of the Fisheries Act) and court decisions that have legal powers *(incraht)*. Law enforcement of fisheries crime has not run optimally because there has been no community participation involved in supporting the eradication of IUU *Fishing* and there are still differences of views in terms of sinking ships and burning foreign vessels between PSDKP, National Police and the Navy related to sufficient initial evidence . This is not in line with Lawrence M. Friedman's theory, which emphasizes that law enforcement depends on the substance of the law, legal structure / legal institutions and legal culture.
2. So far there have been no negative consequences experienced by Indonesia due to such decisive actions, this is because internationally IUU *fishing* has become a common enemy and the decisive action to sink the ship is the implementation of the rule of law of the Republic of Indonesia.

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IMPROVING THE ROLE OF FAMILY WELFARE EMPOWERMENT ASSOCIATION IN DEVELOPING COMMUNITY AWARENESS MAKE A REQUIREMENT FOR MARRIAGE RECORDING

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ABSTRACT

Legal awareness is the awareness to act and behave in accordance with the provisions of the law. Community legal awareness is a kind of bridge that connects legal regulations with the legal behavior of community members. This paper explores building community legal awareness in orderly marriage registration with a focus on discussing strategic issues and what efforts can be done in building community legal awareness in realizing orderly marriage registration by involving the role of Family Welfare Empowerment Association (PKK). Through a qualitative approach with socio legal methods research results obtained, that fostering community legal awareness in fulfilling marriage registration can be done by fostering law-aware family groups within the PKK to change the shape of community behavior based on the thought of the importance of marriage registration to provide legal certainty and justice. Strategies that need to be carried out in developing the legal awareness of the community through legal counseling with persuasive and motivational methods, as well as participatory methods, through the formation of cadarkum groups in the PKK.

Keywords: *Public legal awareness, marriage registration, PKK*

INTRODUCTION

The law essentially functions as a guide to people's lives, so that the laws in force in the community can be effective. Zudan Arif Fakrulloh, revealed that the use of law is actually a process of maximizing the ability of law to bring results and benefits in accordance with the stated objectives. Thus, effective law is a law that has the ability to carry out their duties properly. Utilization of law also means an effort to function optimally "facilities" that have been legitimized in the regulations / laws. Thus, the use of law is an effort carried out by the bureau and the people subject to the law to jointly function the law optimally (Fakrulloh, 2004).

In order to better understand issues relating to law, the law should be seen as a system. Understanding of law as a system, suggests that the legal problems faced are very complex. On the one hand, the law is seen as a system of values which is entirely covered by a basic norm *(grundnorm)*, where the basic norm is used as a basis as well as guiding law enforcement. While from another perspective, law is part of the social environment. Thus, law is one of the subsystems among other social subsystems, such as social, cultural, political and economic. That means, the law cannot be separated from the community as the basis of its work. Here it appears that law is between the world of values or the world of ideas and the world of everyday reality.

Ubi societes, ibi ius, which means "where there is a community, there is a law" The phrase might be explained that in society there are always rules governing, human relations with each other in order to meet the interests or needs his life.(Setiawati, 2019)

Society and order are two things that are very closely related, it can even be said as two sides of one coin. It is difficult to say that there is a society without order, regardless of quality. Order in society is jointly created by various institutions together, such as law and tradition. Therefore, in society there are also various kinds of norms, each of which contributes to creating that order.

Today, people's views on the law are very alarming. The impact of principled society is better to avoid the law than to enter the circle of the process of solving legal problems. There is a negative stigma from the community towards the implementation of the law, which often creates dissatisfaction, even further choosing shortcuts by breaking the law. This condition is caused by none other than the unfavorable operation of the law in the community, due to the high deviations, abuse of authority and the presence of conflict of interest in legal development. The law, which should work to uphold justice, has shifted into a tool of legitimacy for various power interest groups. In effect, the image and understanding received by the community about law, is not authoritative law, but rather a weak legal reality, which is unable to do much in upholding justice and defending the interests of society.

Responding to this reality, it is necessary to build efforts to increase public legal awareness through building attitudes of community legal culture. Lawrence M. Friedman explained, that according to anthropologists, culture does not merely mean a collection of forms of behavior and thought that are independent of each other but culture is interpreted as a category of values so that it includes all social values related to law, the following attitudes that affect its work law but which is not the result of deduction from substance and structure. So that includes respect or disrespect for the law, the willingness of people to use the court or not use the court for choosing informal ways to resolve a dispute. Thus what is meant by legal culture is human attitude towards law and the legal system of beliefs, values, thoughts and expectations.

To act or behave in accordance with the provisions of the law, it is necessary to have legal awareness from the community, because this factor is a bridge that connects legal regulations with the behavior of community members. Law society's awareness, by Lawrence M. Friedman, is closely related to the problem of legal culture. What is meant by legal culture here is in the form of the values, views and attitudes that influence the working of the law.(Setiawati, 2019)

As is the case with community legal awareness in obeying the importance of marriage registration. Marriage registration is an urgent matter, even an administrative requirement that must be done. The aim is that the marriage is clear and becomes evidence that the marriage has taken place, both for the person concerned, the families of both parties, others, and for the community because the marriage event can be read in an official letter and in a deliberately prepared list for that, so that at any time can be used, especially as authentic written evidence. With the existence of the evidence, then legally it can be prevented from occurring another act. Thus, it can be said that although the provisions of marriage registration are only administrative requirements, these provisions have a considerable influence on other administrative provisions, particularly those relating to legal events and actions.(Mustika, 2003)

As for the legal consequences that arise if a marriage is not recorded by an authorized official, then it is considered that no legal event has ever been called a marriage. Children born in marriages that are not registered only have a civil relationship with the mother who gave birth to her and her family while the civil relationship with her father does not exist, as mentioned in Articles 42 and 43 of Law No. 1 of 1974 that a legitimate child is a child born in or as a result of a legal marriage, and children born outside of marriage only have a civil relationship with his mother and his mother's family. A further consequence of unregistered marriages is that neither the wife nor children born of the marriage have the right to claim a living or inheritance from their father. As a result of a marriage that is not registered will give the position of a woman (wife) increasingly weak, where the wife and children born are not getting legal certainty and the loss of rights arising in the marriage (Medaline, 2017)

However, in reality, there are still communities, especially married couples who have been married according to their religion and or beliefs, but have not recorded their marriages as required by the Marriage Law or the Law governing Population Administration, so strategic efforts are needed to build community legal awareness about the meaning the importance of marriage registration.

A. THE PROBLEM

The problem discussed in this study is what strategies and efforts can be made through involving the role of Family Welfare Empowerment Association (PKK) in building community legal awareness in order to realize orderly marriage registration?

B. METHOD

This research was written using the sociological method *(socio-legal research)* with a qualitative approach. The research specifications used are descriptive. meaning in providing a description of the phenomena that are carried out in accordance with the research method. The facts are illustrated with an interpretation from an *emic* and *ethic* perspective one after another and continuing.

Data collected in the form of primary data, which is done using interviews and secondary data, which is done through library research *(library research)* of legislation, documents or notes, literature, and research results relating to this research

The sampling method used was *purposive sampling*, namely the purpose of sampling, because the samples needed in this study must have certain characteristics in accordance with the objectives of the study. Based on the *sampling* technique above, the most urgent sample selection system to use is *Snow ball sampling*, which is selecting (determining) one of the samples as initial informants and then rolling. Like a snowball to follow-up and new samples will end up in a sample / informant that does not bring up new variants, and in this study, each 1 (one) initial informant is chosen. The focus of the study was conducted in Malikian Village, Mempawah Hilir District, Mempawah District, West Kalimantan.

D. DISCUSSION AND ANALYSIS

D.1. Fostering Culture and Public Law Awareness

Fostering legal awareness is a demand for social reform that is currently a concern of the government and promoted in various development efforts. Thus, the establishment of a

new legal regulation will become a reality if it is supported by the existence of legal awareness from all citizens. Awareness of the application of the law is the basis of the implementation of the law itself

Legal awareness here is the awareness to act in accordance with legal provisions. Community legal awareness is a kind of bridge that connects legal regulations with the legal behavior of community members. L.M.Friedman, in Achmad Ali's book, Legal Deterioration in Indonesia said that it is more inclined to call it part of "legal culture", namely values, attitudes that influence the operation of law(As, 2018).

Paul Scholten said that legal awareness is an awareness or values contained in human beings about the laws that exist in humans or about the law that is expected to exist. Actually what is emphasized are values about the function of law and not a legal evaluation of concrete events in the society concerned (Kuncorowati, 2009)

Legal awareness is an abstract conception in human beings, about harmony between order and order as desired or appropriate. Legal awareness is often associated with legal compliance, legal formation, and legal effectiveness. Legal awareness is an awareness of the values found in humans about existing law. Legal awareness is related to legal compliance, the thing that distinguishes it is that in legal compliance there is a fear of sanctions.(Rosana, 2014)

Sudikno Mertokusumo also has an opinion on Legal Awareness, which means awareness about what we should do or do or which we should not do or do especially with others. This means awareness of our respective legal obligations towards others.(Rosana, 2014)

Community Law Awareness is a value that lives in the community in the form of community understanding and obedience or compliance with applicable legal norms and regulations. Community legal awareness is also an output from the process of legal counseling activities that is characterized by a sense of respect for the law, through practice in the field, only ways or techniques of legal counseling that are communicative and able to touch the conscience of the community to respect the law, which can run effectively to cause legal awareness of the community. The choice of people to behave and act according to what the law wants is strongly influenced by the morals and character of the community, because the law is never separated from its social environment.(Puslitbang Hukum, BPHN, 2018)

In the process of working the law every member of the community is seen as a legal *adresat.* , Chamblis and Seidman, said that the legal *adresat* is a *"role occupant"*, and as a role holder he is expected by law to meet certain expectations as stated in the legislation. As such, community members are expected to fulfill the written role in the regulations. (For example, members of the community who are going to get married for example, he is expected to fulfill certain actions, such as that his marriage is legally registered)(As, 2018)

In fact, the growth of public legal awareness is strongly influenced by the workings of various factors and forces. In this case, that the action that will be carried out by citizens in response to legal regulations is very dependent on the contents of the legal norms themselves, the sanctions, the activities of law enforcers as well as all estra-juridical factors working on him.

Therefore, there is a need for efforts towards fostering legal awareness in the community. The formation should be oriented towards efforts to instill, promote and institutionalize the values that underlie the rule of law. For this reason, it is necessary to pay attention to the issue of legal communication, along with the dissemination of legislation so that members of the community can be known as targets of the legal regulation. And the said legal communication effort can be carried out through Legal Education

D.2. Legal Education as a Means to Increase Community Legal Awareness

Legal education is essentially a policy to develop a legal culture in all walks of life to create legal awareness and compliance in the context of the rule of law and the establishment of the rule of law.

The implementation of legal education is an inseparable element of the application of the principle of legal fiction which states that "everyone is considered to know the law". The application of the principle of legal fiction without the support of good legal socialization can result in the protection of the community itself because the community can be trapped in violations that may not know and will.(Puslitbang Hukum, BPHN, 2018)

Legal counseling activities are carried out in various forms, including Lectures, Discussions; Legal Conscious Gathering; Exhibition; Simulation; Law-aware Family Competition; Legal Consultation; Interactive Dialogue; Radio interview; Stage Performance; Theatrical; Soap opera; Fragment; Film; Banner; Brochure Poster; Leaflet; Booklet; Billboards; Newspaper; Magazines and other forms.

Legal outreach or dissemination (either by state institutions, the government or the public) can be a good and effective effort to respond to the legal culture among the people. Public participation is mostly driven by legal awareness to do legal or illegal, obey the law or not obey the law. The first gate to enter the joints of public participation depends on the acquisition of information and the acquisition of information depends one of which is legal counseling. Understanding the law which says that ignorance in law *(legal fictie)* is not a justification reason cannot be applied just like that in the context of public legal knowledge education.

Legal socialization that focuses on the values contained in a rule of law is far more effective in shaping the legal culture and community adherence to the law itself. Government policies in the matter of having to register marriages for example, are carried out by providing an illustration that the registration of marriages is intended to provide legal certainty and protection related to the legality of marriages according to the law as well as recognition of the legal relationship between the parties bound in the marital cords, not merely describing fines will be imposed on violators if they do not register the marriage. *Personal approach* will hit better than the *material approach*.

Prioritizing sanctions that are often used in a legal counseling activity is the same as the way of occupation with aspects of scaring the people and it is not effective. Fear of sanctions allows people to obey the law, but not necessarily people will obey the law as a form of legal awareness. Thus, legal counseling must be carried out by carrying out the purpose and at the same time its character, namely the law provides benefits to individuals on the central issue of law, namely justice. Even if the dimension of justice is to be raised as a central issue, propriety as a value in society must take precedence.

D.3. Empirical Facts The Implementation of Marriage Registration in Malikian Village, Mempawah Hilir District of Mempawah Regency

Malikian Village is one of the villages in Mempawah Hilir sub-district, Mempawah Regency, West Kalimantan, Indonesia with a total area of 1,396.01 Ha. with a total of 8 hamlets, and the border of the northern boundary region with semudun village, turmeric river district, the southern border with the village of Sengkubang, the subdistrict downstream to the east, and the intoxicated village, Sadaniang district, the western border with the Natuna Sea. The total population is 3235 people, namely 1606 men, 1629 women, and there are 896 households.

The reality found in the community in Malikian Village, Mempawah Hilir Subdistrict Mempawah District there are still many married couples who have not yet registered their marriage, even each of them has been blessed with children. At the time of the study, no definitive data was found on how many people in the village had not registered their marriage. However, information obtained from the Management Board of the Family Empowerment Empowerment Team (TP-PKK) of West Kalimantan Province who had conducted training related to population administration, including data collection on residents who are married but have not yet registered marriage in 2016, recorded a number of 92 families of married couples.

The fact that there are still people who have not registered their marriages shows the fact that compliance and legal compliance are still low in realizing orderly population administration. Factors influencing this matter were revealed, among others, in essence the community knew about the legal provisions for registering their marriage, but this was not done due to the disorderly population administration, such as when they were going to marry there were spouses who did not have an Identity Card and / or other administration, so they just married in a religious manner, and in the end did not want to deal with the population administration mechanism. Such reality shows that legal compliance has not been applied in the case of marriage registration which is influenced by the permissive attitude of the legal culture of society.

According to Lawrence M. Friedman, for the purposes of analysis, the legal system that operates can be regarded as something that contains three components. The first component is the structural component, which is the parts that move in a mechanism. The second component is the substance, that is, the actual results issued by the legal system. The structure and substance is actually what is generally called the legal system. The third component is in the form of legal culture which is the attitude of humans towards law and the legal-belief system, the value of their thoughts and expectations. In other words, the legal culture of the mind social and social forces that determine how law is used, avoided or abused. Without legal culture, the legal system itself is helpless, like dead fish lying in a basket, and not like living fish swimming in the sea. Thus the so-called legal culture is the whole factors that determine how the legal system obtains an appropriate and acceptable place within the cultural framework of society (As, 2017)

Legal culture according to Satjipto Rahardjo is the values and attitudes of the community that can influence the operation of law. This discussion of the attitudes and values of the community is the most difficult issue. Its abstract nature is a distinguishing characteristic of structure and substance. Efforts to understand the law of a nation in full are not only made through observations of the formal system, but also to the legal culture. Legal culture according to Satjipto Rahardjo is a kind of force that drives the operation of law(As, 2017)

D.4. Strategies and Efforts to Build Public Law Awareness in Marriage Registration through the Family Welfare Empowerment Association Movement

Soerjono Soekanto explores the attainment of the objective of the law, namely to create harmony between order and peace, which will be achieved, among others, if there is a strong tendency and the fact that the law is obeyed by the majority of citizens and their leaders. High and low degrees of compliance with positive written law, among others determined by the level of legal awareness based on the following factors(Soekanto, n.d.) :

1. Knowledge of regulations;
2. Knowledge of the contents of the regulations;
3. Attitudes towards regulations;
4. Actions that comply with regulations

Further explanation of Soerjono Soekanto's opinion above can be explained that legal awareness in the community is not a one-time process, but rather a series of processes that occur step by step as follows (Rosana, 2014):
1. Stage of legal knowledge In this case, it is a person's knowledge regarding certain behaviorsregulated by written law, namely what is prohibited or what is permitted
2. The stage of understanding the law What is meant is that a number of information a person has about the contents of the legal rules (written), namely regarding the contents, objectives, and benefits of the regulation.
3. Stage of legal attitude (legal attitude) Is a tendency to accept or reject the law because of the appreciation or conviction that the law is beneficial or not beneficial to human life. In this case there is already an element of appreciation for the rule of law.
4. Stage of Legal Behavior Pattern What is meant is about whether or not a rule of law applies in society. If a rule of law applies, the extent to which it applies and the extent to which the community complies.

Related to the fact that there are still people in Malikian Village, Mempawah Hilir District, Mempawah District and other broader communities who have not complied with registering their marriages are more influenced by the low understanding of the importance of the registration of marriage in the eyes of the law, so that attitudes and patterns of legal behavior also affect the tendency to disobey the rules the law referred to, then of course strategic steps are needed and efforts to encourage the orderly realization of the registration of the marriage.

One of the efforts in developing and creating a legal culture in society as described above is through legal education in general to all levels of society in the form of legal counseling.

Actually, the influence of legal education on increasing public legal awareness is only one component, meaning that many factors determine the level of legal awareness in the community. Related to the influence of legal education on increasing public legal awareness, there are many factors that can influence it, because community legal awareness is the process of mental maturity (psychic process) of a person psychologically, so the community must be constantly reminded of someone's rights and obligations towards the law. Legal counseling will be able to increase public legal awareness if the frequency is continuously improved by involving legal counselers whose task is to disseminate legal information and be supported by adequate facilities and facilities supported by community participation and involvement.(Puslitbang Hukum, BPHN, 2018)

The influence of legal education on community legal awareness can be seen by increasing understanding / knowledge of the community's law on the law so that legal counseling can change attitudes / behavior and create legal awareness for the community. Other influences from legal counseling activities to the community are with legal knowledge, the community can avoid things that are in conflict with existing rules, can know the rights and obligations in the nation and society, understand sanctions for violating the law, understand things that can be done in Public. Finally, the community will never deal with legal issues

The strategic step of the legal counseling activity referred to can be done through increasing the role of Family Welfare Empowerment Association (PKK). Family Welfare Empowerment Association (PKK) as a social organization which is a national movement for family development, based on Pancasila and the 1945 Constitution and devoted to God Almighty, carrying out continuous and continuous activities to gather, move and foster the community by implementing the 10 Basic Programs (PKK) with the target of the family as the smallest unit in society to create a prosperous family that always lives in an atmosphere of peace, order, peace, prosperity and prosperity in the ties of the Unitary Republic of Indonesia(Anshar, 2017)

Empowerment of Family Welfare is Community-based education is an embodiment of the democratization of education through the expansion of educational services for the benefit of the community. Empowerment is the concept we use most often in better direction regulation, efforts to understand a concept well are the first step in a development program that well.(Anshar, 2017)

PKK that recruits members to the lower levels of society is expected to be able to bring a prosperous family condition, namely a family that is able to meet basic human needs both materially, socially, mentally and spiritually as well as a empowered family that is a family that lives prosperously, progressively and independently.(Handayani, n.d.) Likewise, in terms of fostering community legal awareness, enhancing the role of the PKK through the development of a legal awareness family group formed through its cadres is very strategic to disseminate and provide legal education to the community up to the village of the importance of marriage registration that can provide legal protection and certainty for the community, until finally the administration of marriage registration is realized.

Through the development of law-aware family groups formed by the PKK starting from the village PKK to the PKK Regency / City, it is expected that the importance of marriage registration can be known and understood by all levels of society, to form attitudes and behavior according to the law, because through cadarkum groups formed in these villages can be carried out by conducting routine legal counseling through motivational, persuasive and participatory legal counseling methods.

The motivational counseling method, is a counseling method by providing understanding and invitations and messages, based on the awareness of the importance of marriage registration to provide legal certainty and legal protection for husbands and wives who will bind themselves in the marriage rope. While the method of persuasive counseling, is where there is always a strong relationship based on mutual understanding and mutual assistance and support between extension workers and target communities. And participatory extension methods, can be done by always placing the target community as active subjects / actors.

C. CLOSING

That the reality is that there are still people who have not recorded their marriages, so the population administration has not been effective. In order to streamline the orderly registration of marriages in question it is necessary to make efforts and strategic steps to build legal awareness of the people.

Building community legal awareness is very important to be done in order to form legal knowledge, legal understanding and community attitudes and behavior in accordance with the law. Strategic steps to build community legal awareness can be done through increasing the role of Family Welfare Empowerment Association (PKK), which are social organizations ranging from the central level to the village and family. The effort is through the development of law-aware family groups formed from village PKK cadres, then given a gradual and ongoing coaching through legal awareness meetings and legal counseling with counseling methods in a motivational, persuasive and participatory legal counseling method.

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LEGAL PROTECTION OF CORAK INSANG MOTIF FABRIC AS A TRADITIONAL CULTURAL HERITAGE IN PONTIANAK CITY

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ABSTRACT

Traditional cultural expressions held by the state were regulated in Law Number 28 on 2014 considering Copyright. This regulation states that state is obliged to inventory, preserve, and maintain traditional cultural expressions by paying attention to the values that live in society. One form of traditional cultural expression protected by the state is corak insang motif fabric which until now can still maintain its existence in society. The problem in this research is how the efforts of Pontianak City Government in maintaining corak insang motif fabric in order to continue exist in the Pontianak City community. This study is a normative juridical research, where the data used in this study is secondary data in the form of books, legislation, documents and other writings relating to the problems under investigation. Based on the results of the study revealed that Songket weaving crafts as part of the current traditional knowledge that holds and controls is the state according to Copyright Law. However, the protection given from the legislation of Intellectual Property Rights has not been able to fully provide such protection because Intellectual Property Rights are only able to protect their economic rights, unable to protect the moral rights of the owner or creator of the work and the role of the government in protecting the craft of "Corak Insang" woven fabric, how the government currently involves relevant stakeholders such as the Office of Culture, Tourism, Industry, Social Institutions and socializing in the form of programs that can be felt by the community.

Keywords: *Intellectual Property Rights, Corak Insang.*

A. Background

Cultural diversity is a certainty in Indonesia. Cultural diversity in Indonesia is something that cannot be denied of its existence, and historically Indonesia departed from cultural diversity. In the context of understanding plural society, in addition to the culture of ethnic groups, Indonesia also consists of a variety of regional cultures that are territorial which is a meeting of the various cultures of ethnic groups in the area. One of Indonesia's cultural heritage is the diversity of traditional woven fabrics. Traditional weaving crafts have existed since prehistoric times, especially in rural areas of Kalimantan and Sulawesi. Traditional weaving began to develop after the entry of traders from India and Arabia who brought woven fabrics to Indonesia, especially coastal communities, one of which is Pontianak City, the capital of West Kalimantan province, and also known as the Equatorial City because it is crossed by the equator. The people of Pontianak City are known as Malay people who are full of wealth and culture. One element of Malay culture is weaving which has so far been in line with human needs for clothing and other needs. Various patterns and motifs, one of which is the typical fabric of Pontianak City "Corak Insang". The history of the development of Pontianak Malay weaving known as the “Corak Insang” Weaving Fabric, goes hand in hand with the greatness and glory of the Sultanate of Kadriyah or the glory of the Pontianak Malay Kingdom.

During the Pontianak kingdom or Kadriah kingdom which began from 1771 until 1950. During those times, the greatness and glory of the Malay weaving activities in Malay society took place with lively. And until now, there are many types of high-quality fabric motifs. This old motif has been known since the reign of Sultan Syarif Abdurrahman Alkadri.

In West Kalimantan itself, in general the Pontianak Malay community has its own characteristics in the field of weaving compared to other Malay communities, the Pontianak Malay community has a weaving craft known as the Weaving Fabric "Corak Insang". This type of weaving generally does not use gold thread raw material. This woven model actually has similarities with Cual Weaving from Sambas, where the difference lies in its motives only.

Weaving Fabric Patterns Insang is an intellectual property produced by the Malay community from Pontianak City. Weaving Fabric "Corak Insang" is an intellectual property produced by the Malay community from Pontianak City. So that the "Corak Insang" fabric can be said to be a mandatory copyright or must be protected in the art of motifs, but this is not yet optimal because not all "Corak Insang" motifs have been made or have been protected by the government especially the Pontianak City Government. Based on the description above, the writer is interested in conducting research and discussing the problem in the form of scientific writing, title: ***"LEGAL PROTECTION OF CORAK INSANG MOTIF FABRIC AS A TRADITIONAL CULTURAL HERITAGE IN PONTIANAK CITY"***

B. Problem Formulation

Based on the background of the above research, the problems in this study are as follows : How is the effort of the Pontianak city government to protect the "Corak Insang" woven fabric craft to keep the existence in the Pontianak city community?

C. Research Method

This study is normative, because it uses secondary data, or often called the research literature. Normative legal research is legal research laying down the law as a system of building norms. Norm system in question is about the principles, norms, rules of legislation, court decisions, agreements and doctrines.[2] Secondary data used in this study include legislation relating to copyright law, documents and writings relating to the cases studied.

Methods of data analysis used in this research is descriptive qualitative, meaning authors will present and explain the data obtained from the study of literature, which is manifested in a logical and systematic description. Once the ingredients necessary legal collected, the next step was made an analysis to clarify the settlement of the problem, then the conclusions drawn deductively, from things that are common to the things that are special. At this stage the legal material worked on and utilized in such a way to successfully conclude the truth of which can be used to address the issues raised in the study.

D. Discussion

1. Legal Protection of "Corak Insang" Weaving Patterns According to Indonesian Intellectual Property Rights Law

"Corak Insang" woven fabric in the city of Pontianak is a form of traditional knowledge that is still preserved until now that should have received clear protection from a legal perspective. According to Setiono, legal protection is an act or effort to protect the community from arbitrary acts by the authorities that are not in accordance with the rule of law, to realize orderliness so as to enable humans to enjoy their dignity as human beings.[1] According to Peter Mahmud Marzuki, stated legal protection can be divided into two, namely[2]:

a. Preventive protection is protection provided by the government with the aim to prevent before the occurrence of violations and repressive legal protection. Repressive legal protection is the final protection in the form of sanctions such as fines, imprisonment, and additional punishment given if a dispute or violation has occurred.

[1] Setiono, Rule of Law, Surakarta: Magister Ilmu Hukum Program, Pasca Sarjana Universitas Sebelas Maret, 2004, page 3.
[2] Peter Mahmud Maezuki, Pengantar Ilmu Hukum, (Jakarta: Kencana Prenda Media Grup, 2009). Page 157.

b. Legal protection of traditional knowledge is very important as an effort to be able to protect and maintain while at the same time giving appreciation to the people who continue to preserve culture so that it can be passed on to the next generation. One of the aims of protecting traditional knowledge is to ensure the benefit sharing of knowledge owners.

Sasmini stated that the importance of traditional knowledge and traditional cultural expression is protected. Because in traditional knowledge and traditional cultural expression it has characteristics and uniqueness, so it needs to be developed.[3]

Protection of traditional knowledge is to provide justice, conservation, preservation of cultural and traditional practices, prevention of seizure by parties who are not entitled to the components of traditional knowledge and the development of the use of the interests of traditional knowledge.[4]

Therefore, "Corak Insang" woven fabric craft as traditional knowledge of Pontianak people is very necessary to get protection to spur people to further improve themselves in terms of preserving and maintaining cultural heritage that is passed down from generation to generation so that no arbitrary acts are carried out by other parties.

Traditional knowledge is defined as knowledge based on the teaching or experience of previous societies which is passed down from generation to generation. According to Mutia Septarina from the Faculty of Law at the Islamic University of Kalimantan, an issue that is currently being interesting and is developing within the scope of Intellectual Property Rights studies is legal protection of intellectual property generated by indigenous or traditional communities. Which is one of the results of the intellectual property of indigenous peoples or traditional community traditions is the traditional knowledge system.[5]

According to Muhammad Djumhana, there are three important issue positions regarding the relationship between traditional knowledge and Intellectual Property Rights law, first, The Public Domain Position which states that traditional knowledge must be a public property that can be enjoyed by all residents of the world. This position is against businesses that want to make traditional knowledge a commodity.[6]

Therefore, they do not agree that the creation of Intellectual Property Rights is more concerned with protecting the rights of individuals so that it is a way that will damage institutions with traditional structures in Traditional Knowledge.[7] Second, Appropriation Position which supports the exclusive ownership of traditional knowledge by an institution or agency to be able to determine its use for commercial and other uses. In other words, they assume that traditional knowledge must be made into a commodity and make Intellectual Property Rights an important matter.[8] Third, The Moral Right Position which states that traditional knowledge rights holders must be protected and given rights in the form of full ownership and can prevent or oppose the claims of beneficiaries or users of traditional knowledge holders can be generated but only by the right holders.[9]

Furthermore, according to Yeni Eta, the most elegant way out in optimizing the protection of cultural products from foreign parties is to seek legal protection in accordance with sui generis, outside the conventionally applicable Intellectual Property Rights system. Protection of Intellectual Property Rights that are individualized is indeed not fully applicable and generalized to intellectual property rights that are communal.

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[3] Sasmini, Traditional Knowledge dan Upaya Perlindungannya di Indonesia, Artikel Umum, Previous Post, 2015, page 45.
[4] Ibid.
[5] Muthia Septarina, Perlindungan Hukum Pengetahuan Tradisional Dalam Konsep Hukum Kekayaan Intelektual, Jurnal, Fakultas Hukum Universitas Islam Kalimantan, 2016, Page 46.
[6] Muhammad Djumhana, Pekembangan Doktrin dan Teori Perlindungan Hak Kekayaan Intelektual, Bandung, PT Citra Aditya Bakti, 2006, page 56.
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*

The distribution of profits and the distribution of benefits to IPRs communally are less likely to be applied in protecting IPs individually. However, it is very important to analyze more deeply whether the rules of traditional knowledge laws that are sui generis in the Draft Law on Traditional Knowledge and Traditional Cultural Expressions later when applicable and applied. So, later when enacted and implemented it is expected to be better at providing legal protection and economic, social and cultural benefits for traditional communities in particular and the Indonesian people in general.[10]

Furthermore, according to Rohani, there is a different concept between traditional knowledge and other intellectual works, namely that traditional knowledge is a form of intellectual work that grows and develops from within a communal society. The concept in IPR is individual ownership rights. Although Article 10 paragraphs (1) and (2) of the Constitution stipulate that:

1. The State holds the Copyright for prehistoric relics, history, and other national cultural objects.
2. The state holds the copyrights over folklore and the products of the people's culture which are shared property such as saga stories, fairy tales, legends, chronicles, songs, handicrafts, choreography, dances, calligraphy, and other works of art.[11] Traditional cultural expressions held by the state are regulated in Law No. 28 of 2014 concerning Copyright. This regulation states that the state is obliged to inventory, preserve, and maintain the expression of traditional culture by paying attention to the values that live and develop in society, one of which is the expression of traditional culture protected by the state is a “Corak Insang” pattern fabric which until now can still maintain its existence in society.

2. The Role of Pontianak City Government in Protecting Corak Insang Weaving Fabric Crafts According to Indonesian Intellectual Property Rights Law

According to Bayangsari Wedhatami and Budi Santoso stated that in the era of regional autonomy, the role of regional governments in managing traditional culture as regional intellectual assets became open in line with the enactment of Law Number 32 of 2004 concerning regional government article 13 paragraph (1). Law Number 32 of 2004 concerning Regional Government states that:

"Obligatory affairs which are the authority of the provincial regional government are affairs on a provincial scale that includes planning and control of development and other mandatory functions mandated by laws and regulations."

This also applies to the City Regency Government as regulated in Article 14 paragraph (1). From these provisions, it can be concluded that the local government has an important role in managing the potential expression of traditional culture in the area, and it is hoped that the management can have a positive impact on improving the welfare of the people in the area concerned.[12] Based on the description above, it is clear that the government or regional government has an active role in protecting traditional knowledge and how the Regency and City Governments should cooperate more in the field of government affairs so that the knowledge held by each region can be the basis for the welfare of the community at large. Furthermore according to Bayangsari Wedhatami and Budi Santoso stated.

In Government Regulation No. 38/2007 concerning the Sharing of Government Affairs between the Government, Provincial Governments and Regency / City Governments, which is the implementing regulation of Law No. 32/2004 in article 2 paragraph (4) letter Q, state that government affairs provincial and district / city areas covering the fields of cultural and tourism affairs. Furthermore, in Article 7 paragraph (2) letter W states that the mandatory functions that must be carried out by the provincial and regency/city administrations relating

[10] *Ibid,* page 5.
[11] Rohani, Op Cit, page 45.
[12] Bayangsari Wedhatami, Budi Santoso, Upaya Perlindungan Ekspresi Budaya Tradisional Dengan Pembentukan Peraturan Daerah, Jurnal, Page 40-41.

to basic services one of which is culture. Appendix Government Regulation No. 38/2007 distinguishes the division of government affairs in the field of culture and tourism, especially for the cultural sub-sector into three functions, namely Government affairs, Provincial and Regency / City Government affairs. The affairs of the cultural sector which are the affairs of the central government in number 2 are the protection of Intellectual Property Rights in the field of culture. The provincial government has affairs in terms of implementing national policies and establishing provincial policies regarding the protection of intellectual property rights in the cultural field. Whereas for district/city governments, they have affairs in terms of implementing national/provincial policies and determining district/city policies regarding the protection of cultural property rights.[13]

In this case, the Pontianak City Government in protecting the “Corak Insang” woven fabric crafts which involve several Offices and Social Society Institutions such as the Culture Office, the Tourism Office, the Industry and Trade Office, and institutions related to the gills woven fabric copyright by recording. In law number 28 of 2014 concerning Copyright in article 66 paragraph (1), the procedure for recording copyright is:

1. The recording of the work and related product is submitted by request in writing in the Indonesian language by the creator, the copyright holder, the owner of the relevant right, or his proxy to the Minister.
2. The application referred to in paragraph 1 is made electronically and / or electronically by:
   a. Stating examples of product creation related matters or substitutes.
   b. Attach a statement of copyright ownership and related rights.
   c. Pay the fee.

In this case, Pontianak City Government has registered and recorded by related parties. This determination is carried out to protect and encourage the community to preserve traditional fabrics. The preservation of traditional cloth is not only the responsibility of the government, especially the Ministry of Education and Culture but is a shared responsibility. In an effort to protect these cultural heritages, the Ministry of Education and Culture encourages the involvement of various parties including the Ministry of Law and Human Rights, Regional Governments and especially the cultural owner community because the Ministry of Education and Culture works closely with the Ministry of Law and Human Rights to protect Intellectual Property Rights, then the Ministry of environment and forests must ensure the availability of materials standard and rights to customary territories. While in the downstream region, the preservation of traditional fabrics involves the Ministry of Trade and the ministry of tourism setting up the market, the Ministry of Industry, Bekraf, and the Ministry of Cooperatives and SMEs can help to develop Pontianak typical gill woven fabric. Plus there is a promotion from Pontianak City Dekranasda that continues to improve the quality of the gill pattern fabric so that it is not inferior to fabric products from other traditional regions as well as fabrics from abroad. In the 2017 Kriyanusa Exhibition at the Jakarta Convention Center, the “Corak Insang” pattern fabric was also exhibited not only in the form of clothing but also in the pattern bag that has been recognized as a product with creative ideas and received 10 national creative product awards in Surabaya in 2017.

This proves the concern of the Pontianak City Government in protecting the woven fabric of the "Corak Insang" pattern as a local product and the cultural heritage that lives and develops in the Pontianak community as the cultural heritage and the typical fabric of Pontianak. In this case, the Pontianak City community also strives to be able to continue to protect the "Corak Insang" woven craft by continuing to maintain the arts and culture of weaving "Corak Insang" woven cloth with the aim of how the weaving craft is maintained and preserved with local wisdom values handed down from generation to generation so that thus the promotional activities of the "Corak Insang" woven fabric provide awareness and concern for the community about the importance of preserving a culture that has potential in one area.

[13] *Ibid.*

E. Conclusion

Based on the discussion above shows that the role of the government in protecting the craft of "Corak Insang" woven fabric, how the government currently involves relevant stakeholders such as the Office of Culture, Tourism, Industry, Social Institutions and socializing in the form of programs that can be felt by the community

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NON PENAL POLICIES TO OVERCOME VIOLENCE IN THE WORLD OF EDUCATION: A STUDY OF JUSTICE PERSPECTIVE IN TEACHER PROTECTION

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ABSTRACT

Violence in education world, both towards the teachers and by the teachers were only a little bit of some real moral degradation pictures, it occured due to era and techonology were increasingly growing these days. This condition was an important issue considering the teacher's figure in the role of student development, both intelligent moral and intelligent science. The study revealed non-essential policies importance to overcome violence in education world neither against or by the teachers in order to realize the teacher protection. Thorugh a transdiciplinary approach, because to solve these problem will be examined from sociological, empirical and juridicial aspects. The results proved that one of the important strategic steps to be taken in minimizing violence against the teachers in carrying out their profession in order to realize the development of teacher professionalism, including through non-penal policies, namely forming a forum that can provide protection to teachers, which is called the Unit Pelayanan Hukum dan Perlindungan Guru/Legal Services and Teacher Protection Unit (UPHPG).

Keywords: *Violence against teachers, non penal policy*

A. INTRODUCTION

Education was a conscious and planned effort to create an atmosphere of learning process so students actively could develop their potential to have spiritual strength, self-control, personality, intelligence, noble character, and the skills needed by themselves, society, nation and state. In an effort to improve education itself, there was used to a change in the concept of education wherein the change in the concept of education was adjusted to the demands of changing times.

In the implementation of the educational process, the school could be said as a second home for students, so the figure of the teacher in the school could be said to be a parent figure for the students in the school environment. The teacher as a parent figure for students had the responsibility to give affection to each student by giving good and warm treatment to students like parents and children.

Teacher as one of the school elements in educational activities in addition aims to provide knowledge in order to create students who had competence in the fields of science, also had a responsibility in the formation of the students who had good character. The teacher was a very vital profession in the education world. The teacher was the executor of the course of education and learning. Without a teacher, both the learning objectives and the educational process will be very difficult to achieve. Being a teacher was indeed not an easy job. Not only in the field of education, in relation to social relations, teachers played an important role.

The teacher could shape the character of his students so that it also influences student activities in the environment he is in. The teaching profession was also seen as a very good and noble work. Society hope for the existence of teacher (Komara, 2016).

Teachers, from their functions, roles and positions in strategic positions in national development in the field of education, so they should be developed as a dignified,

professional profession in the main task of educating, teaching, guiding, directing, training, evaluating, and evaluating students (Harun, 2016).

Teachers as professional educators in carrying out their duties would intersect with subjects named students, parents of students, community observers. The subject when the teacher performs professional tasks was possible there will be different interpretations between professional teachers and other parties, professional organizations as soon as possible played a professional role, because it was not uncommon for professional teachers to be responsible beyond what was professionally responsible (Harun, 2016).

Bearing in mind the weight and complexity of building education, it was very important to make efforts to encourage and empower educators to become more professional. This was nothing but intended to make efforts to build a solid education, and be able to continuously make improvements towards a higher quality (Mustofa, 2012).

School as one of the environments could shape the students character, of course it was hoped that the students could be taught and form to have good character. However, the school as an environment had the ability in students formation character, there were still many shortcomings which the teacher as someone who become role models who have the ability to guide and educate students to have good character not infrequently there were some cases in which teachers rated less able to carry out their responsibilities. As was the case in several cities in Pontianak and Ketapang Regency, a teacher commits obscene acts against his students, and there were even teachers who have to undergo legal proceedings for allegedly committing violence against their students.

But behind the fact that there was also the reality on the contrary where teacher also received criminalization treatment of their parents/families in terms of teacher running an education process to the students. For example, teachers who had developed the treatment of violence from or parents/families of students, because it did not accept the attitude teachers who had committed acts or punishments against their students, and considered to have acted beyond the limits of teachers and led to violence.

This phenomenon of violence in schools or in the world of education deserved attention in order to explore the idea that law enforcement was not solely as a solution in its handling, but it was necessary to develop a policy concept with a non-penal approach as an effort to handle more comprehensively through the approach of realizing just teacher protection, because teachers played an important role in addressing violence in education world, so the teachers attitude are responsive to the implementation of more professional education is formed.

B. PROBLEM

The research problem based on the description above would be discussed was: any non penal policy or what concept could be built in a more comprehensive handling for realization teacher protection in their profession with justice?

C. METHOD

Research study was a socio-juridicial, intended to understand the relationships or linkages between the phenomenon of law with society. Because, basically the law was not only seen as something intensity normative that indepentdently, but instead as part of the real of social system that was associated with the variable social, cultural and other as so on. Through this method, expected the hidden meanings were studied to be found, so it could reveal through collect the information in a state appropiately, systematic work, targeted and could be accounted for. Not only record the appear things, but should dive in the occur phenomenon.

Research focus conducted in Pontianak City and Ketapang District, West Kalimantan with data collection techniques carried out through interviews and focused discussions with several samples selected through the principle of purposive sampling, namely the Teachers,

School Organizers, Teacher Proffesional Organization/PGRI management, the Department of Education and Culture, the Legal Department Regional Secretariat of Ketapang Regency and Pontianak City, Local House of Representative Ketapang Regency/Dewan Perwakilan Rakyat Daerah (DPRD) Ketapang Regency and Pontianak City and Police Officers.

D. DISCUSSION AND ANALYSIS

1. Empirical Facts of Violence in Education World

Violence in education constitutes behavior beyond the limits of ethical codes and rules in education, both in physical form and in the harassment of one's rights. Perpetrator can be anyone: school leader, teacher, staff, student, parent or guardian of student, even the community (Muis, 2017).

The reality of violence in the world of education, especially in the teaching and learning process is more common where the perpetrators are teachers with the perception of taking disciplinary action against their students, and vice versa parents/families of students react otherwise by engaging in acts of violence or intimidation and threats against teachers.

In essence, teachers should realize that discipline is not synonymous with violence. Discipline requires firmness, not violence. Teachers also need to develop themselves through various seminars or training so that teachers have new horizons and leave the old paradigm that identifies discipline with violence (Muis, 2017).

In the empirical level in Ketapang District, it shows that violence against or by the teachers still occurs, even though the data on violence has not been comprehensively recorded, because in reality when there is violence there are various forms in its handling. so quantitatively there has never been a data collection of cases of violence either committed by teachers or violence against teachers in carrying out their professional duties. As revealed the data handling cases of violence committed by teachers against their students in the following table:

Table 1: Data on Case of Suspected Teachers/Teachers in Ketapang Regional Police Station 2013-2018

NO	CRIMINAL ACT REGISTERING NUMBER	OPERATIONAL MODE	CHRONOLOGICAL EVENT	IDENTITY ACTOR	VICTIM IDENTITY
01	2013	Nothing	Nothing	Nothing	Nothing
02	2014	Nothing	Nothing	Nothing	Nothing
03	2015	Nothing	Nothing	Nothing	Nothing
04	2016	Nothing	Nothing	Nothing	Nothing
05	2017	Nothing	Nothing	Nothing	Nothing
06	LP/126-B/III/2018	The reported party hit bamboo to the victim's leg	On 05-03-2018 around 09.00 WIB Reporting child under the name of	A (21) years old, male The	R. F (11) Year Male Address

			RAIHAN FATUR RAHMAN who was 11 years old was beaten by the Victim teacher in the Islamic boarding school where the reporting child went to school using bamboo and the victim suffered a bruise on the thigh	teacher (Honor) at the Ketapang Islamic boarding school addresses Sui Melayu Kecamatan Tumbang Titi Ketapang Regency	Jl.Mulia Kel. Sampit kec. Delta Pawan Ketapang

Source: Ketapang Regional Police

Agus Gandara revealed that violence occurs against children by teachers seems difficult to uncover because it is covered by the assumption that violence is carried out so that children become disciplined and obedient to teachers so that it appears very reasonable when teachers commit violence the aim is to instill discipline towards students as long as it does not go too far even though any abusive treatment and violence against children cannot be justified.

On the other hand the existence of educators is often confronted with realities that do not support the implementation of professional tasks. Call it, there are complaints from parents and the community against violence by educators when carrying out their duties at school (نکویی،زهره.صادقی،معصومه, 1394)

While in Pontianak there are data on teacher cases handled by Pontianak Police in the following table:

Table 2 . Data of Violence by Teachers Against Their Students Handled by Pontianak District Police 2010-2018

No	Time of Incident	Description of Event	Executant	Victim	Description
1	March 17, 2010	The teacher at SUPM did a beating on students, causing bruises on the right cheek and left cheek and bleeding on the left ear because the students cleaned the catfish nursery pond so that the catfish seeds in the pool spilled and caused the catfish seeds to die because they were scattered on the ground	Teacher	Student	Child abuse

2	February 25, 2011	The SD Brother teacher received a report from a class 3B student that the student (victim) had ripped out a Mathematics textbook, then the teacher took the victim out of the classroom by holding the victim's hand but the victim thrashed and wanted to drop herself and then the suspect pulled the collar of the victim's shirt resulting in a neck wound victims, and victims who fell on the floor pulled their feet by the teacher out of the class. After outside the class the victim who was still lying on the floor kicked the teacher's leg and was rewarded by the teacher by kicking the victim's right foot, and the victim who had stood beating his teacher was then pushed over by his teacher with his hand so that it struck the victim's face	Teacher	Student	Child abuse
3	January 30, 2015	The incident at Pontianak High School where there was a beating of the victim by the teacher because the victim was found to bring liquor into the Pontianak N 2 High School, where the victim was initially asked by the teacher as the Principal did not answer honestly and then later admitted that he had brought liquor to school so that makes the teacher emotional and hit the victim	Teacher	Student	Child abuse
4	November 19, 2015	The teacher is teaching, coming the children of other classes enter the class making fun of his friend who is learning, then the teacher tells him to come out while kicking slowly and waving his	Teacher	Student	Child abuse

		hand and on the lips of one of the children so they must be taken to the Clinic			
5	January 11, 2016	Elementary teacher hits the victim because when the teacher is teaching a lesson in the class the victim jokes with the victim's friend so it makes the classroom atmosphere noisy, so the teacher gives the punishment of beating the victim using a wooden ruler and about the hand and palm of the victim (student)	Teacher	Student	Child abuse
6	February 5, 2016	Middle school teachers beat their students for not doing the assignments that were given five weeks earlier by the teacher so that the students suffered cuts on both cheeks and bruises on the right ear due to being pinched	Teacher	Student	Child abuse
7	March 7, 2018	Starting from the victim as a student reprimanded his teacher who was playing a cellphone during study hours because he did not receive it then the teacher hit one chair towards the victim's head and threw the cellphone towards the victim's head, causing pain to the victim's head	Teacher	Student	Child abuse
8	August 8, 2018	The teacher hits, punches, grips and punches the victim (the student), resulting in injuries to the left shoulder and bruises on the victim's back and legs	Teacher	Student	Child abuse

Source: Pontianak City Ressort Police

The facts in the table above shows that there are still teachers who do not understand their professionalism as teachers to carry out education, with the fact that there are still teachers who commit violence against their students even if they are based on the behavior of children who are still problematic or naughty, so they must be resolved through legal channels.

Thus the reality in handling teacher problems has not yet found a clear mechanism, as revealed from the results of research conducted on teachers, school administrators as well as PGRI Management in Ketapang Regency and Pontianak City, there are several actions taken

when dealing with cases of violence against or by teachers as illustrated in the following table:

Table 3 : **Actions Taken in Resolving Violent Cases Towards or By Teachers in Pontianak City and Ketapang Regency**

No	Action	Ketapang Regency		Pontianak City	
		Quantity	%	uantity	%
1	Completed by deliberation (peaceful at school)	12	48	17	48.57
2	Solved by giving compensation	1	4	1	2.86
3	Completed by the Teacher Proffesional Organization (PGRI)	5	20	6	17,14
4	Completed through related agencies	5	20	5	14.29
5	Resolved through a legal process	1	4	2	5.71
6	Etc	1	4	4	11.43
	Amount	N = 25	100	N = 35	100

Source: Processed Field Research

The data in the table above revealed that the majority of respondents in Ketapang District were 12 (48%) stated that when faced with problems between teachers and students, they were resolved by deliberation at school. While there are also 5 (20%) stated that it was completed by the Teacher Professional Organization (PGRI) and through the Education and Culture Office. Besides that, there were 1 (4%) respondents who each stated that they had been resolved through compensation, and due process, and there was 1 (4%) of respondents stated others, which were distributed through social media. While in Pontianak City a total of 17 (48.57%) resolved their problems by deliberation, and there were 6 (17.14%) respondents who stated they were resolved through the PGRI organization and there were also 5 (14.29%) respondents delegated to the Office of Education and Culture to solve the problem, while there were 4 (11.43%) stated others, including resolved privately or through social media, and there were also 2 (5.71%) respondents who resolved the problem through legal channels.

When the fieldwork was conducted through a focused discussion forum even though the problem was mostly resolved amicably, at 48% in Ketapang District and 48.57% in Pontianak City, the school revealed the need for the Government to accommodate the formation of a unit that could be a vehicle for resolving problems against teacher, which involved various parties involved in handling it. Because reality is found even though it is resolved peacefully, but peace here is interpreted as not being processed legally, but the parents of students still demand that teachers be given administrative sanctions in various forms by the school on the basis that the teacher has committed violence against their students, while the teacher believes that the violence was carried out in the framework of the educational process of their students. These conditions the school hopes the need for the formation of units or institutions that can be a container to solve the problem and of course can provide protection for both teachers and children.

2. Non Penal Policy as an Effort to Manage Violence in the World Education to Achieve Teacher Protection that is Equitable

Several hypotheses can be proposed to explain the phenomenon of violence that occurs in the world of education. First, violence in education can arise as a result of violations

accompanied by punishment, especially physical. Second, violence in education can be caused by poor education systems and policies. Third, violence in education may also be influenced by the community environment and mass media impressions. Fourth, violence can be a reflection and development of people's lives that experience rapid shifts, thus necessitating the emergence of an *instant solution* and shortcuts. And, fifth, violence may also be influenced by the socio-economic background of the perpetrators. (Muis, 2017)

The facts and factors that influence the occurrence of violence in the world of education above certainly require comprehensive treatment, where legal action or prosecution is expected to be only a last resort, but the most important thing in addressing the problem is through non-penal policies.

According to Barda Nawawi Arief, the use of non-penal means has advantages. Viewed from the perspective of criminal politics, the most strategic policy is through non-penal means, because it is more preventive. It means that non-penal means have the prospect and tendency to prevent violence . The handling of non-familiar violence is fundamental and vital because it focuses on the preventive aspects, where the main goal is to deal with factors that are conducive to Korupsi, 2016).

Based on the above opinion, the expected non-penal policy in handling violence in the world of education is a policy that is more directed towards preventive efforts to prevent the occurrence of violence referred to and persuasive, that is handling by establishing communication and prioritizing the interests of child/student protection and the importance of providing teacher protection with justice.

Justice, in the literature is often interpreted as an attitude and character. Attitudes and characters that make people do deeds and hope for justice are justice, while attitudes and characters that make people act and expect injustice is injustice. In general it is said that an unjust person is a person who is not law-abiding (un-lawful) and an un-fair person, so a fair person is someone who is law- abiding and fair. Because the act of fulfilling/obeying the law is fair, all legislative lawmaking actions in accordance with existing regulations are ad il. The purpose of making law is to achieve the progress of people's happiness. Thus, all actions that tend to produce and maintain community happiness are fair (Dwisvimiar, 2011).

Aristotle argued that justice must be understood in terms of similarity. This opinion is in accordance with social justice for all Indonesian people. It can be concluded that all Indonesian people get the same treatment in obtaining justice. But Aristotle made an important distinction between numerical similarity and proportional similarity. Numerical similarities equate every human being as one unit with the same rights and obligations. This equation means that the same rights for all people in obtaining justice for their rights. For example, the right to life, the right to freedom, the right to express opinions and others. Whereas proportional similarity gives each person what is his right according to his ability and achievement (Febriansyah, 2017).

Hart said that the general principle of justice in law is equality and inequality. This means that for the same thing treated in a similar way, while for different things treated in a different way. This view gives the perception that equality towards individuals must be treated the same as other individuals, becoming rela- tive if equality is different from what is done in the way it is treated, as well as the treatment of similar things in the same way (Hayat, 2015).

Justice according to Thomas Aqu Inas determines how people deal with people other than in the case of iustum, namely regarding what is appropriate for others according to a proportional similarity (*aliquod opus adaequatum alteri secundum aliquem aliquem aequalitatis modum)* (Dwisvimiar, 2011).

In the modern century, one of those who was considered to have an important role in developing the concept of justice was John Borden Rawls. Rawls, argues that justice can only be upheld if the state enforces the principle of freedom , in the form of every person should not have the same right to obtain *basic liberties* ; and social and economic differences should be distorted in such a way as to provide great benefits for those with

the most unprofitable positions, and to be related to the positions and positions open to all people based on equal opportunities (Dwisvimiar, 2011).

Underpinning thoughts on non-penal policies in order to realize equitable teacher protection, the idea that is built on the need for a regional policy in dealing with violence in the world of education is in the form of the importance of establishing a unit/institution under the Regional Work Unit in charge of Education and Culture. The formation of the unit/institution is regulated in a Regional Regulation that mandates its formation, and the researcher gives the idea that the unit/institution is called the Law Services and Teacher Protection Unit (abbreviated as UPHPG) which has not yet been established.

UPHPG can be said as a form/container organization that can be used as a model of a policy of non penal in giving law protection against teachers in addressing violence in the world of education and also promote the protection of children, where the container/organization that consists of representatives from local governments, both from the Department of the handle Education and Culture as well as the Office that handles Child Protection, Professional Teacher Organizations, Education Units, Police Officers, Academics and Community Organizations engaged in the field of legal aid.

UPHPG is an institution coordinating which can be given the task and role of non penal among others m engkoordinasikan prevention and response to acts of violence, threats, discriminatory treatment, intimidation or unfair treatment on the part of students, parents of students, public, government, or other parties towards teachers, as well as acts of violence from teachers against their students; and persuasive efforts in the form of providing legal consulting services to teachers; provide legal assistance services both inside and outside the court to teachers; and monitoring the progress of implementing legal protection for teachers; and carry out reporting and evaluation.

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F. CONCLUSION

That the reality of violence in the world of education is still going on with the various forms of both dilaku ka n by teachers or violence against teachers. Violence in the world of education requires strategic steps in its handling, including through non-penal policies in the form of efforts to prevent and overcome them. Efforts or concepts of non-penal policies that need to be built in more comprehensive handling and in order to realize the protection of teachers who are just in carrying out their profession are the importance of local policy regulation by securing the formation of an institution or unit under the auspices of the Department of Education and Culture in the Regency/City under the supervision by researchers in the form of the Law Services and Teacher Protection Unit (UPHPG).

UPHPG in an institution coordinating which can be given the task and the role of non-penal among others coordinate prevention and treatment. How can the scope of work, process and mechanism of running a non penal policy that further research is needed to download gedepankan teachers realize equitable protection.

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LEGAL PROTECTION FOR FINANCIAL TECHNOLOGY LOAN CONSUMERS IN INDONESIA: A REVIEW OF REGULATION OF FINANCIAL SERVICES AUTHORITY

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ABSTRACT

This study discusses the legal protection efforts of loan recipients as consumers of financial technology in Indonesia in terms of financial services authority regulations. The formulation of the problem of this research is: how is the legal protection for financial technology loan recipients, what efforts can be done by the recipients of financial technology loans in the event of a loss with the lender. This normative research uses a statutory and conceptual approach. The results of this study indicate that legal protection for loan recipients is clearly regulated and not detrimental to The main element of the implementation of the transaction is the existence of a standard clause in the form of the agreement agreed by both of them in the electronic document. The agreement is made electronically in writing following the laws and regulations. Lenders as fintech operators are prohibited from transferring responsibilities or obligations to the recipient, users must comply with new, additional and advanced rules and are prohibited from making changes unilaterally by the organizer within the period the user utilizes the service. Fintech lenders are obliged to provide transparency, fair treatment, reliability, confidentiality and security of consumer data / information, and handling complaints and settling consumer disputes in a simple, fast, and affordable cost. The Financial Services Authority (OJK) has a central role in regulating and overseeing the implementation of financial technology companies, including providing protection for fintech loan recipients. Fintech consumers can make complaints due to losses from fintech providers, submit the complaint to the board of commissioners in the field of education and consumer protection. Providing facilities in resolving complaints of fintech cases by consumers.

Keywords: *Protection, Consumer, Financial Technology, Financial Services Authority*

Introduction

The rapid technology has made it easier for people to meet their needs with a quick and easy system, due to changes in modern life style that ultimately led to the emergence of new innovations based on financial technology (financial technology / fintech). Finteh is the latest breakthrough created by humans by providing positive benefits for all transactions that are carried out quickly and efficiently, has eliminated the manual system that is deemed incompatible with the needs of millennial society. As you well know, the development of information technology is currently busy in the development of the financial technology (fintech) financial industry in Indonesia. The fintech service does not provide a cash loan system, but online loans where transactions are carried out using an electronic system. Loans are the easiest way for users of credit transactions by using fintech to get funds quickly without a complicated process. The development of the financial technology industry in Indonesia is supported by more and more internet users. Around one hundred thirty-two point seven million internet users or around fifty one point five percent of Indonesia's total population is based on research conducted by APLI / Association of Internet Service Providers. Of the total internet users, around sixty three point one million or around forty seven, six percent of users use mobile devices (smartphones). With the availability of these conveniences, the internet and smartphones are important for the people of Indonesia and

ultimately affect consumer behavior in conducting transactions for products and services, including financial services.

At present, the average Indonesian people aged 20-40 years have made transactions of products and services online. Fintech is a part of internet and smartphone users, because it makes communication easier. The times and technological advancements, related to the protection of debtors, credit agreements continue to emerge. The presence of fintech is a problem and a challenge that must be faced by OJK in the midst of dynamic digital-based financial services sector innovation.The implementation of fintech conducted by the parties must pay attention to good faith, the principle of prudence, transparency, accountability, and justice. The existence of fintech in Indonesia raises problems that need to be resolved by fintech recipients and recipients. The illegal practice of fintech is in the spotlight of today's society. As data from the Jakarta Legal Aid Institute as of June 2019, there are around 4500 complaints about fintech. One of the fintech modes is accessing the contact on the borrower's cellphone, spreading photo ID cards, also spreading the borrower's personal photo. (Kompas, 2019).Legal protection, of course, is providing protection for human rights / human rights that have been harmed by other parties and legal protection is also given to citizens so that these rights can be enjoyed by those who have been given by law, meaning that legal protection is a variety of legal efforts which is carried out by law enforcement must naturally have an element of security to the community, both spiritually and physically from various disturbances and threats. There is a need for equality of protection between entrepreneurs and consumers to reveal the legal function as established by Rescoe Pound as a means of controlling social life by balancing the interests that exist in society or in other words as a means of social control (Bodenheimer, 1962). Equality of legal protection is not only for businesses but also consumers are inseparable from the regulation of legal relations that occur between parties. Bellfroid also stated that legal relations both public and privacy are based on the principles or principles of freedom, equality, and solidarity.This study uses normative law that discusses the legal issues of legal protection for financial technology loan recipients as Indonesian consumers based on a review of POJK / financial services authority regulations. The primary legal material of this study was taken from POJK

/ financial services authority regulations, both consumer protection in the financial services sector and the services of borrowing and borrowing money using information technology. Then the secondary law that will be used as the source of this research is in the form of text books that are relevant to the legal protection of recipients of financial technology loans, scientific journals on the internet. Then primary and secondary, both of them are analyzed to look for linkages and conformity with the problem formulation. While the approach uses statute or statute approach by examining the rules of law that have relevance to this research and conceptual or known as the conceptual approach taken from the views and doctrines developed in the science of law (Marzuki, 2011).

Legal Protection of Financial Technology Consumer

Legal protection will not be realized if justice has not been upheld. Justice is formed by right thinking, done fairly and honestly and responsibility for the actions taken. A sense of justice and law must be upheld based on positive law, to uphold justice in the law in accordance with the reality of the people who want to achieve a safe and peaceful society. Justice must be built in accordance with the ideals of law (Rechtidee) in the rule of law (Rechtsstaat), not the state of power (Machtsstaat). The law functions as a protection of human interests, law enforcement must pay attention to 4 elements:

1. Legal certainty (Rechtssicherkeit).
2. Legal Benefit (Zeweckmassigkeit).
3. Legal justice (Gerechtigkeit).
4. Legal guarantees (Doelmatigkeit) (Ishaq, 2009).

Disparities in the market sector that result in producers or service providers having greater information about products or services than consumers require government intervention and regulation in the context of consumer protection. Strategies for consumer protection generally consist of increasing transparency and awareness of goods and services, promoting market competition, preventing fraud, educating consumers, and combating. Unfair practices (Ardic, Ibrahim, & Mylenko, 2011).The development of Indonesian consumer protection is inseparable from the influence of globalization of every country in the world including Indonesia. The problem of consumer protection is not solely an individual problem, but is actually a shared problem and a national problem because basically everyone is a consumer. Therefore, protecting consumers is protecting everyone. Thus, the issue of consumer law protection is a matter of national law.Talking about consumer financial technology is closely related to transactions in the economic system that involve the parties both lenders and recipients of financial technology (fintech) loans. The legal protection of fintech consumers is very important in the implementation of economic activities to be safe and fair. Consumer protection is a term that is often used to describe the legal protection of consumers in their business activities to meet all kinds of needs that cause consumers to lose money. The issue of fintech consumer protection in Indonesia can not be separated from the element of transparency, ensuring the confidentiality and security of consumer data/information. This is regulated in article 2 of the regulation of financial services authority Number 1/POJK.07/2013 governing transparency, fair treatment, reliability, confidentiality and security of consumer data / information, and handling complaints and settling consumer disputes in a simple, fast, and affordable manner. The Financial Services Authority (OJK) has the task of regulating and overseeing the rapidly growing fintech business in Indonesia, so the OJK has issued regulations regarding the implementation of fintech lending and borrowing, including the fintech consumer legal protection specifically POJK No77 / POJK.01 / 2016. Even Bank Indonesia (abbreviated BI) also issued BI regulation No. 18/40/PBI /2016 for processing payment transactions. The phenomenon fintech deliver financial products and services through an engaging platform (flat form) technology and innovative business models. Financial innovation is not limited to existing institutions. OJK Institution pays attention to aspects of consumer protection in financial services by issuing POJK No.1/POJK.07/ 2013. To carry out legal objectives in the form of certainty and justice, the state issues UUPK No. 8/1999 which explains consumer rights. There are 3 rights that can be used as a basic principle of consumer rights to avoid loss of consumers and property, get goods or services at reasonable prices, solve problems that should be solved by consumers (Miru & Yodo, 2014).Specifically, OJK has regulated article 19 and article 20 concerning agreements in providing fintech (information technology-based) loan services with lenders as outlined in electronic documents containing the sequence of agreement numbers, date of agreement, parties' identities, rights and obligations, amount loans, interest rates on loans, commission amounts, time limits, cost details, penalties (if any), dispute resolution mechanisms, settlement mechanisms in the event that the organizer stops its operational activities. Lenders are also required to provide access to information to loan recipients of the loan position received.

Fintech consumer legal protection is also regulated regarding the complete confidentiality of data on loan recipients, the availability of personal data, transaction data, and financial data which are regulated from the time the data was discovered until the data was destroyed. Ensure data authentication, verification, validation processes that support access, process and execution of loan recipient data, transaction data and managed financial data. Lenders must also guarantee the acquisition, use and utilization of loan recipient data. Lenders are also required to provide communication media in the fintech money lending system directly in the form of e-mail, call center service complaints / call centers, or other communication media.Electronic documents in fintech certainly require an understanding of the users of this fintech service, whereby every electronic data information is either created, forwarded, sent, then received, or even stored in a form of analog or digital form, and the like, which can be seen and heard through computer or electronic system but there are no restrictions on writing, sound, signs, numbers, and access codes / symbols or perforations that have meaning or meaning as intended in ITE Law number 11/2008.The case of fintech naturally results in losses suffered by consumers. Criminal cases of lending and borrowing transactions electronically need to be dealt with quickly by law

enforcement. In handling fraud, consumers immediately report the matter to the police, then the settlement of consumer disputes with employers can be resolved at the Consumer Dispute Resolution Agency / BPSK (Mantri, 2007).The case of illegal fintech is an interesting thing in Indonesia, it is proven that the case has not only moral but material losses. As data found from the OJK task force, until August 2019, 1230 entities had been blocked, with the most being handled last year were 404 platforms, and 826 entities in 2019, including 22% Indonesia, 15% from the United States, 42% unknown from where and the rest from various countries (Kontan, 2019). Not only the case of illegal fintech, legal fintech also harms consumers. Evidenced by the data found that online legal loans alone are cheating by taking advantage of consumers (Tribunnews, 2018).

Financial Technology Consumer Settlement Efforts

Many business agreements such as between retail and consumers, work contracts or financial and credit contracts are currently governed by laws that do not always conform to traditional principles of contract law. The increasing importance of codified legal restrictions, and the increasing importance of statutes, cannot be ignored (Beatson, 2001).KUHPerdata only gives a general meaning of the contract stipulated in article 1313 that an act is carried out by one or more people who bind an agreement to one or more people . However, the contract / agreement referred to in this study contains elements of acts against the law, in other words that the contents of the agreement have been a loss that resulted in one party losers namely consumers (Fuady, 2008). POJK number 77 of 2016 has provided specific protection regulated in chapter VII concerning education and consumer protection services for electronic money loans articles 29, 30, 31. Fintech lenders are required to apply the basic principles for protecting fintech consumers transparently, giving fair treatment , is reliable, keeps confidential and safe consumer data, and resolves consumer disputes easily, quickly, and at affordable prices. It was also stated that the lender was obliged to deliver the latest information regarding electronic money loan services accurately, honestly, clearly, and not misleading consumers. This information can be used as evidence in an effort to resolve fintech disputes in the future. Then, fintech lenders are also required to submit information to fintech loan recipients about accepting, delaying or refusing requests for electronic money loan services accompanied by reasons of delay or rejection unless the law regulates otherwise. Strictly speaking article 40 POJK number 1 of 2013, fintech consumers can make complaints due to losses from the fintech giver, submit the complaint to the commissioner board of education and consumer protection. Providing facilities in resolving complaints of fintech cases by consumers. Article 41 OJK facilitates the settlement of fintech consumers who are harmed by the negligence of fintech genders at a maximum of 500 million in the banking sector, capital market, pension funds, life insurance, financing, liens, or guarantees and 750 million general insurance fields. Complaints must also be accompanied by a written request along with supporting documents relating to the complaint and are only civil in nature, aka compensation stated in the facilitation agreement, containing an agreement to choose to settle the complaint given from the OJK. Agree to obey and comply with the facilitation rules set by OJK. (Article 44 POJK number 1 of 2013).

Conclusion

Consumer protection for financial technology (abbreviated as fintech) is something that needs to be protected by the state as outlined in a special regulation namely the OJK regulation (abbreviated POJK). The provisions stipulated in POJK relating to fintech consumer protection have provided details about the implementation of the contents of standard agreements, data transparency, confidentiality and security of consumer data and fair treatment. In addition, the OJK regulates the provision of education for consumers about fintech activities. Consumers can make complaints to the OJK and are also given a complaint dispute resolution facility by the OJK. Supervision of the implementation of fintech money lending activities is also carried out by OJK to provide safe protection to consumers when transacting online money loans to fintech lenders. OJK also provides strict sanctions to OJK lenders in the form of written warnings, fines, restricting business activities, frozen business activities, and revoking licenses for fintech activities if they are proven to have committed negligence which is detrimental to fintech consumers.

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LEGAL SYNCHRONIZATION OF PERSONAL DATA PROTECTION IN DEVELOPMENT OF FINTECH (FINANCIAL TECHNOLOGY) IN INDONESIA

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ABSTRACT

The impact of the rapid development of technology and the internet is marked by the presence of peer-to-peer (P2P) lending financial technology (fintech). Financial transactions through fintech platforms such as Doku, Go-Pay, E-Money, Tunaiku, and so on offer a variety of conveniences for customers, one of which is easy access to borrow money using only Identity Card, then loans can be immediately disbursed. This is what has then been misused by the fintech company platform in the form of customer data leakage. Financial transactions through fintech are currently only regulated through state regulation of the Financial Services Authority (OJK). Digital financial services or financial technology (fintech) are currently not regulated under a clear legal umbrella, and are spread into dozens of separate rules concerning the protection of personal data. This study aims as an urgency in synchronizing personal data protection laws under a single legal umbrella in the form of the Personal Data Protection Act in monitoring the development of fintech in Indonesia. The regulation and supervision of OJK has become very important in the form of protection of customers' personal data. The objective of regulation and supervision by OJK is to minimize risks and support sustainable and stable economic growth in the development of the fintech platform itself. This research was conducted by examining primary data in the field at the Solo Raya Legal Aid Institute (LBH Solo Raya) related to assisting dozens of illegal online loan victims who misused victims' personal data. This type of research used by the author in this research is descriptive research. In this study the writer took the location at LBH Solo Raya. Retrieval of this location with the consideration that the source of data at that location allows for research related to synchronizing the legal protection of personal data of illegal online loan victims in fintech practices, especially in the Surakarta region. Data presented from data sources which include primary data and secondary data. Primary data is data obtained in the form of facts or information on the results of research directly at the research location and the results of interviews with lawyers or legal advisors who accompany cases of illegal online loan practices and victim's defamation through the misuse of the victim's personal data whose information is stored on the victim's cellphone. The results of this study are the synchronization of the law with the establishment of the Personal Data Protection Act in dealing with misuse of customer data in the implementation of electronic-based financial transactions run by platforms of fintech companies that have registered in Indonesia. There are several important points in the draft law on personal data protection later including tight controls on the controller and processor, clarity of the relevance of the use of customer data as part of the application of E-KYC (Electronic-Know Your Customer), data storage deadline customers, and erasing customer personal data facilities.

Keyword (s): Fintech, Financial Technology, Personal Data Protection, Legal Synchronization

Introduction

One of the most important forms of globalization system in the beginning of 21st century is the financial digital globalization. The main reasons are the differences in the level of profitability and risks in individual countries, increased mobility of financial resources, as well as the development of the digital economy, which overcome the boundaries between countries and regions.(Korobov, 2017)The presence of globalization in the millennium era has brought a big impact in all sectors of human life, including one of them is technology and the internet. Technology and the internet have a very big role in supporting all activities of human life. The use of digital technology in Indonesia which is very large, of course, have an impact on several sectors, one of which is the business sector or business industry which then gave birth to online commerce or e-commerce. However, the impact of the rapid development of technology and the internet has not only penetrated the trade industry, but also on the Indonesian financial industry. This was marked by the presence of financial technology (fintech).(Santi, Budiharto, & Saptono, 2017).

Fintech comes from the term financial technology. As we know fintech is a term that can be used to refer to innovations in the field of financial services(Muzdalifa, Rahma, & Novalia, 2018).Online peer-to-peer (P2P) lending is a fintech platform forpeople to lend and borrow money online through their personal computer or mobile device. P2Plending has grown rapidly in recent years, especially in developing countries such as China.Currently, P2P lending is practiced in many countries, including the United States, the United Kingdom, Japan, Sweden, Canada, and Germany.(Wan, Chen, & Shi, 2016). Peer-to-peer lending has been developed from the concept of crowdsourcing. The basic idea of crowdfunding is to raise external finance from a large audience, named also a crowd, while each person – investor – provides a very small amount, this is done instead of soliciting a small group of sophisticated investors.(Gavurova et al., 2018). Peer-to-peer (P2P) lending is an emerging financial market. In recent years, more people are engaged in this financial platform. For example, the volume of business and the turnover of Prosper and Lending Club, the large-scale online P2P lending intermediary agents in the United States, are 50 million and nearly 100 million per month, respectively.(Zeng et al., 2017)

According to The National Digital Research Center (NDRC), in Dublin, Ireland, defining fintech as "innovation in financial services" or "innovation in financial services fintech" is an innovation in the financial sector that gets a touch of modern technology. Financial transactions through fintech include payments, investments, money lending, transfers, financial plans and comparisonsfinancial product. Currently there are 142 companies engaged in fintech that are identified as operating in Indonesia. Several fintech companies that have existed in Indonesia today, such as CekAja, UangTeman, Borrowing, CekPremi, Bareksa,Kejora, Doku, Veritrans, Kartuku.Digital financial services or financial technology (fintech) are carried out on a legal umbrella. This follows after the issuance of the Financial Services Authority Regulation (POJK) Number 77 / POJK.01 / 2016, concerning Information Technology-Based Money Lending and Borrowing Services (LPMUBTI). But many problems still exist with many various presence of ilegal fintech.

Business regulation and supervisionfintech in Indonesia is carried out by two institutions an independent country namely Bank Indonesia (BI)and the Financial Services Authority (OJK). BI on dutyregulate and oversee the service business "SystemPayment based on Financial Technology "which published the application "walletelectronic "or e-wallet. Electronic walletis a virtual payment facility that canused to store cash data,debit card, credit card and electronic money.OJK is taskedwith regulating and overseeing the businesstechnology outside the monetary and payment systems,such as a "Lending-Borrowing" service businessFinancial Technology ". Fintech service businesscarried out by the parties in the community(peer-to-peer lending) without involving partiesbanking or finance company(Hariyani, 2017).

In the regulation, OJK regulates various matters that must be complied with by the loan business provider from user to user, or commonly referred to as peer to peer lending (P2P lending). Peer-to-peer (P2P) lending is a new mode of alternative finance, allowing borrowers and lenders to transact through Internet platform without traditional intermediaries(Yin, 2017). Peer-to-peer lending began in 2005 when Zopa, a United Kingdom company became the first P2P lending platform. After that, Zopa business model was adopted in another country. Zopa's goal was matching borrowers and lenders directly. Borrowers in Zopa usually used the money for personal loan for wedding, car, and paying off the credit card. Zopa claimed that it could offer lower interest rate than bank. Borrowers in Zopa did not require collateral. For lender, Zopa also offered higher return than bank investment product. Another featured in Zopa was a diversified portfolio. It means that Zopa managed lender's money and distributed it to many borrowers to lower the risk(Sukmaningsih, 2018). So in the end this will protect the interests of consumers related to the security of funds and data, as well as national interests related to the prevention of money laundering and financing of terrorism, as well as financial system stability.IT-based loan service providers are given the opportunity by OJK for the next 6 months to register for membership to the OJK, with the conditions including, the organizer must provide an escrow account and virtual account in banks, and place a data center in the country. The lenders will later send loan funds to the virtual account, while the escrow account is used as a joint account, where the loan recipients have to send back the funds they borrowed to the account, to then be distributed to the lenders.

To conduct a P2P lending business, OJK also requires a minimum capital investment of Rp 1 billion at the time of registration. And after applying for a permit, the amount of capital must have increased to reach Rp 2.5 billion. In addition, in order to protect the interests of the stability of the national financial system, the number of loans is limited to a maximum of Rp 2 billion in rupiah. Regulations and supervision are very important for the sustainability of Fintech in Indonesia. This relates to the legality of the business being carried out because in its implementation the development of fintech has potential risks which are related to consumer protection, financial system stability, payment systems and economic stability. The purpose of regulation and supervision by OJK is to minimize these risks and support sustainable and stable economic growth.

Legal provisions related to the protection of privacy and personal data in Indonesia to date are still partial and sectoral. Indonesia has personal data protection rules that are spread in various regulations, for example Law Number 36 of 2009 concerning Health regulates the confidentiality of patients' personal conditions, while Law Number 10 of 1998 concerning Banking regulates personal data regarding depositing customers and the deposit. In addition, privacy and personal data protection arrangements are also contained in Act Number 36 of 1999 concerning Telecommunications, Act Number 39 of 1999 concerning Human Rights, Act Number 23 of 2006 concerning Population Administration (amended by Law No. 24 of 2013) and Act Number 11 of 2008 concerning Information and Electronic Transactions (amended by Act Number 19 of 2016), and Government Regulation No. 82 of 2012 concerning the Implementation of Electronic Transactions and Systems. Indonesia also has a Draft Law (RUU) on Protection of Personal Data that is currently being drafted in the DPR. The bill was made on the basis that existing arrangements regarding privacy and personal data are seen as not providing maximum protection with technological developments. The number of legal and illegal fintech problems has arisen, one of which is the personal data coverage of victims of fintech without the victim's knowledge. one of the cases of misuse of personal data of victims of fintech who was unable to repay loan money to one of the fintech platforms and dozens of other cases in Surakarta are now handled by legal aid institutions (LBH) Solo Raya). This makes it necessary to further study the urgency of making personal data protection laws.

Previous Research

There are several previous researchthat has relation with legal sychronization of personal data protection in the development of fintech in Indonesia. Those are:

1. Research entitled, "Online Peer-to-Peer Lending Decision Making: Model Development and Testing," by Qingyao Wan, Dongyu Chen, and Weihua Shi. This research studies about lenders decision-making processes in online peer-to-peer (P2P) lending by drawing on trust theory and the valence framework to develop an integrated decisionmaking model, which we then tested empirically using data from a survey conducted with 474 online lenders in China. The results showed that initial trust and perceived benefit determined willingness to lend, and that the fear of borrower opportunism did not have a significant impact on this willingness. Initial trust increased willingness to lend both directly and indirectly, increased it by increasing perceived benefit. We have identified the specific features of online P2P lending and provided valuable insights for borrowers, lenders, and intermediaries.(Wan et al., 2016)

2. Research entitled, "Determinants of Successful Loan Application At Peer-to-Peer Lending Market," by Beata Gavurova, Martin Dujcak, Viliam Kovac, Anna Kotaskova. This research studies about peer-to-peer lending as an alternative to classic bank loans, has become popular along the world. There are significant differences due to the factors, which can be affected by borrowers with the aim to get funded. The result of this study shows that there are 28 factors with a non-negative impact and 20 factors have a negative influence. Comparison of these findings to other studies enable us to describe the impacts of the social identity data and information about the loan for investors, within the peer-to-peer lending market environment.(Gavurova et al., 2018)

3. Research entitled, "A decision support model for investment on P2P lending platform," by Xiangxiang Zeng, Li Liu, Stephen L, Jiangze Du, Xun Wang, Tao Li. This research studies about peer-to-peer (P2P) lending, as a novel economic lending model, has triggered new challenges on making effective investment decisions. In a P2P lending platform, one lender can invest N loans and a loan may be accepted by M investors, thus forming a bipartite graph. Basing on the bipartite graph model, we built an iteration computation model to evaluate the unknown loans. The experimental results of the hybrid classification model demonstrate that the logistic classification model and our iteration computation model are complementary to each other. We conclude that the hybrid model (i.e., the integration of iterative computation model and Logistic classification model) is more efficient and stable than the individual model alone.(Zeng et al., 2017)

4. Research entitled, "Analysis Of Aspect And Consumer Protection Efforts FintechSyariah," by Basrowi. Based on the results of the in-depth analysis it was concluded that: first, the form of consumer protection in the use of fintech is in two ways, namely prevention and curative. Second, various preventive measures that can be taken so that the organizers of Fintech do not abuse their applications, are by giving them the obligation to report to the OJK. Third, the role of Bank of Indonesia (BI), financial servises Outority (OJK), and the Ministry of Communication and Information in providing learning to people not to become debtridden by providing counseling through the provision of public service advertisements through television, newspapers, radio and official sites, strengthening literacy and public insight.(Basrowi, 2019)

5. Research entitled, "Protection of Personal Data and Airline Passenger Privacy on The era of Big Data," by Ridha Aditya Nugraha. This article examines issues surrounding airline passenger data protection in the realms of big data phenomenon. The history of privacy, including two landmark cases, shall be elaborated from the beginning to provide a comprehensive discussion. How the airlines operate through utilizing personal data, also their compliance towards the enacted law shall be analyzed. Then the sentiments towards Passenger Name Record Agreement which speaks on behalf of flight security is also being explored. Finally, the article aims to provide some

recommendations towards the current drafting of the new Indonesian Data Protection Act draft by taking into account lessons learned from airlines.(Nugraha, 2018)

The Legal Concept Of Credit

Credit is one of the business activities of banks in channeling funds to the public, as an intermediary institution must be able to carry out its functions properly and optimally. Besides that, based on Article 4 of Law No. 7 of 1992 as amended by Law No. 10 of 1998 hereinafter referred to as the Banking Law, Indonesian banking aims to support the implementation of national development in order to improve equity, economic growth and national stability towards improving the welfare of the people at large. The provision of credit helps the community to develop, especially in the real sector which is endeavored by small entrepreneurs, and will create employment opportunities for the community so that people's welfare will improve(Mulyati, 2016).

The granting of credit from a bank to a debtor customer is based on a credit agreement, the credit agreement contains an agreement on the rights and obligations of each party between the bank and the debtor customer, which will become the law for the parties who made it. This principle establishes a contractual relationship and places rights and obligations on the parties in accordance with mutually agreed terms. In banking practice credit agreements are made in writing and in the form of standard agreements.In granting credit, there are several related elements contained therein. The elements contained in the granting of credit facilities are as follows: (a) Trust, trust is a creditor's belief that the credit given (in the form of money, goods, or services) will really be received again in the future; (b)Deal, the agreement between the lender and the credit recipient can be set forth in an agreement where each party signs their respective rights and obligations; (c) Period of time, every credit given has a certain period, this period includes the credit refund period that has been agreed upon; (d) Risk, the longer the credit period, the greater the risk and vice versa; (e)Remuneration; repayment is an advantage over providing a credit or service that we know as interest.(Maya A, Devi Farah, Dwiatmanto, (Fakultas Ilmu Administrasi, 2017)

Fintech Regulation

The National Digital ResearchThe Dublin Center defines about Financial Technology, that is ainnovation in financial services withtake advantage of developmentsinformation Technology. Whileaccording to International TradeAdministration, FinancialTechology is a"Revolution" of merging servicesfinance with information technologywhich has improved qualityfinancial services, and creatingfinancial stability. FinTech pointedon the use of technology forprovide financial solutions.Specifically,FinTech is defined as an applicationdigital technology for problemsfinancial intermediation(Lia Muhibatul Aliyah, 2019).

Fintech (financial technology) is an update in the field of financial services industry based on technology and information that has a legal umbrella or legal basis and has been supervised by the Indonesian government. The roles of fintech in Indonesia include the following: (a) Encouraging the ability of MSME exports which is currently still low; (b) Increase national financial inclusion; (c) Encouraging the distribution of national finance is still uneven in 17,000 islands; (d) Help fulfill the needs of domestic financing that is still very large; and (e) Encouraging equal distribution of the welfare level of the population.(Hadad, 2017).

Along with the development of fintech which continues to stretch until now, of course it must also be balanced with the presence of regulations and clear supervision of the business running. Based on Article 5 of Law Number 21 Year 2011 concerning the Financial Services Authority (OJK) which states that the OJK has the function of organizing an integrated regulation and supervision system for all activities in the financial services sector. Article 6 states more clearly that OJK

carries out regulatory and supervisory duties on: (a) financial service activities in the Banking sector; (b) financial service activities in the Capital Market sector; and (c) financial service activities in the Insurance sector, Pension Funds, Financing Institutions, and Other Financial Services Institutions. When referring to these two articles, OJK is an agency that conducts regulation and supervision of the growth and development of fintech. Fintech startup is part of the financial services sector, both the Bank Financial Industry (IKB) and the Non-Bank Financial Industry (IKNB) overseen by the OJK.

Regulations and supervision are very important for the sustainability of Fintech in Indonesia. This relates to the legality of the business being carried out because in its implementation the development of fintech has potential risks which are related to consumer protection, financial system stability, payment systems and economic stability. The purpose of regulation and supervision by OJK is to minimize these risks and support sustainable and stable economic growth.To respond to the current fintech issue, the OJK has formed the Digital Economy and Finance Innovation Development Task Force to oversee the fintech actors and at the end of 2016, precisely on December 29, 2016, the OJK finally issued a regulation regarding fintech namely OJK Regulation Number 77 / POJK.01 / 2016 concerning Information Technology Based Lending and Borrowing Services (LPMUBTI). The POJK contains rules regarding the provision, management and operation of Information Technology-Based Money Lending and Borrowing Services(Santi et al., 2017). In the year of2018 OJK issues new regulationsnamely POJK No. 13 / POJK.02 / 2018about DigitalFinancial Innovationin the Financial Services Sector. Regulationthese are provisionswho oversees surveillanceand the regulation of the technology industryfinance. The second difference is regulationThis is POJK No. 77 /POJK.01 / 2016 is a frameworklaw for financial technology which ismore specifically, the type of loanP2P online lending, while POJKNo. 13 / POJK.02 / 2018 regulatesfinancial technology startups withnew business innovations that haven'tgoverned by previousregulations.(Budiyanti, 2019).

Methodology

In this study the authors used an empirical approach. Empirical legal research is one type of legal research that analyzes and examines its work in society. This research was conducted by examining primary data in the field at the Solo Raya Legal Aid Institute (LBH Solo Raya) related to assisting dozens of illegal online loan victims who misused victims' personal data. This type of research used by the author in this research is descriptive research which is a problem solving procedure that is investigated by describing or describing the state of the subject or object of research at the present time based on the facts that appear. In this study the writer took the location at LBH Solo Raya. Retrieval of this location with the consideration that the source of data at that location allows for research related to synchronizing the legal protection of personal data of illegal online loan victims in fintech practices, especially in the Surakarta region. Data presented from data sources which include primary data and secondary data. Primary data is data obtained in the form of facts or information on the results of research directly at the research location and the results of interviews with lawyers or legal advisors who accompany cases of illegal online loan practices and victim's defamation through the misuse of the victim's personal data whose information is stored on the victim's cellphone . Literature data that is the data needed in this study is secondary data in the form of legal materials consisting of primary legal materials, namely binding legal material and secondary legal materials. Primary legal material is legal material that is authoritative, namely norms, basic rules and regulations. In this study, the primary legal material used is the Financial Services Authority Regulation (POJK) Number 77 / POJK.01 / 2016, concerning Information Technology Based Lending and Borrowing Services (LPMUBTI). While the secondary legal material in the form of literature and journals relating to the problem. This study uses a field study method using interview techniques with lawyers and legal advisers at LBH Solo Raya who assist victims of online loans directly in the police and literature study methods. Data analysis was carried out qualitatively in the form of data in the form of words or sentences. The method of data analysis

is done by using deductive logic, to draw conclusions from general matters into specific or individual cases.

Result and Discussion

1) The Problem of Financial Technology Implementation in Indonesia

Noted there are 227 companiesonline loan servicesviolating POJK No, 77 /POJK.01 / 2016 which obligesorganizer or companyonline loan services forregister to OJK. Of the amountthe majoritycame fromChinese developer. From a search engineGoogle, the platform can easily found onapplication on Play Store and App Store. Number of loan services online from China that goes toIndonesia is likely causedby the tightening of regulations in China itself. However, OJK can not confirm the companyin what field is it engagedand howmany totalits customers(Budiyanti, 2019).

Based on the research results obtained by the writer from the facts in the field about the problem of online loans in the Surakarta area which takes many victims. One of the victims was abused by the fintech agent after being unable to return the money he borrowed. Without the knowledge and consent of the victim, the fintech agent misused the victim's personal data to contact the victim's friends in order to embarrass the victim. That victim is a woman from Surakarta City with the initial YI (50), a mother of two children from Solo, Central Java, who is entangled in online loan debt through the Incash application, one of the illegal platform fintech. Because she does not pay off the debt, the borrower deflects the problem about herself. Information in the form of a meme containing the words: "I hereby declare that I am willing to be raped alternately for getting Rp1,054,000 to pay off my debts in the InCash application. Guaranteed to be satisfied, those interested are immediately contacted." This news is spread in the WhatsApp group. The group consists of 20 partners. She said, Incash tried to tap her cell phone, so she could find out the entire contents of her message.

The chronology begans after agreeing to all the fintechIncash loan terms, YI tried to request an online loan of Rp 1,000,000, but after spending administrative costs the amount of the loan received was around Rp680,000. The loan must be returned within one week to Rp1,054,000. It's just that the compilation is due, YI apparently can not pay off the loan. In fact, YI has spoken kindly to the Incash officer who collected it. After that few days later, Incash officer began to terrorize via text messages to the contact numbers on her phone. Knowing the posters that harassed her were distributed, YI also admitted that she was shocked. Then, she asked friends who belong to the whatsapp group to leave the group.Besides YI (51), from Solo, Central Java, there were six other victims of the online-based loan. The victims of online loans have now been handled by the Soloraya Legal Aid Institute (LBH) located on JalanIrSoekarno, Hamlet II, Madegondo, Grogol District, Sukoharjo, Central Java. A representative from LBH Soloraya, Made Ridha said, the victims of the Incash online loan he handled were mostly terrorized because they were late in paying the loans. FintechIncash is allegedly illegal. According to him, to ensnare his victims, fintechIncash provides loan promotion funds easily and quickly via text message (SMS). After the victim agrees with the loan, they are given a link with the intention of being downloaded. In addition to providing easy money loan promos, Made said the target of Incash online loan victims is from a low-income community.

Knowing the number of victims or consumers of online loan services who are late making payments which are then digitally persecuted. Therefore, the Financial Services Authority (OJK) urges the public to be careful and not to arbitrarily choose an online debt provider. OJK Board of Commissioners Chairman,WimbohSantoso explained, fintech products must be officially registered and join the fintech association that had been formed. Victim's Legal Counsel, GedeSukadenawa Putra explained that his client had taken legal action by reporting the case to the Solo District Police Station, Central Java. Because they had committed defamation and violations of the Law

(UU) Information and Electronic Transactions (ITE). He explained the beginning of the case when his client was billed twice by the fintech offender. But he has not been able to pay the bill, immediately judged by the fintech by creating a Whatsapp group whose members are colleagues, friends, and family.

The Police insisted that posters on social media online loan victims who said they were willing to take turns to pay off debts were a criminal offense. For this reason, the Police through the Cyber Directorate will explore this matter. According to him, the poster is an effort to suppress victims who have not been able to pay their debts by acting against the law, namely spreading the victim's identity by being given an explanation that violates the law. For this incident, the police asked the public not to easily believe the persuasion of online legal and illegal persuasion spread on social media. The former Central Kalimantan Deputy Police Chief asked that people are always alert and first read the rules if they want to make loans to an online application.

Based on the results of an interview conducted by the author with one of the advocates of LBH Solo Raya, Made Ridha, which based on his statement, the average online borrowing money came from the lower middle class. The total number of illegal finteh victims in Surakarta is already 35 persons. LBH Solo Raya said that the victim he accompanied, named YI, was still in the investigation stage and still there was no determination of the suspect from the police. According to the YI attorney, Made, the role in one online loan application is divided, so in an application there is a duty as a funder, there is a role as a marketing, IT expert, and also there is a dept collector. There is a lot of recognition that one of the funders came from China, then made his own servers here, and uploaded their application to the Play Store. From the victim's confession, the victim claimed to be terrorized by the agent after cant pay off the debt. The terror reaches the victims' friends and families. And in terms of interest offered even soared when she wanted to be returned, so the victims were overwhelmed in replacing the money borrowed.

Made, one of the advocates or legal counsel of LBH Solo Raya admitted, there were also cases which misusing personal data after the victims submitted to the holders of online applications in the form of submitting their identity card (KTP), then misused to terrorize other victims. So the perpetrators then tapped the victim's cellphone and spread the hoax through friends and the victim's families. According to Made, in cases handled by the police the handling must be clear from the trial to the verdict. One of the functions carried out by LBH Solo Raya for victims of online lending is to provide assistance, socialization, and explanation to the victims that the actions they have taken are not a violation of law or crime as said by fintech agents in the form of brainstorming terror in order to emerge a sense calm from the victim's side. According to Made, there has been a form of coordination with the OJK Solo that the OJK Solo should be able also to take a role in scanning illegal fintechs that are not registered and play a role in supervision so that legal finteh does not carry out the same procedures or commit terror in the billing process. According to Made, the state should not underestimate the illegal fintech cases which continue to harm the societyin many cases. Made also believes that there is urgency in the formation of a personal data protection law going forward and the idea should be to build an alliance between the legislative, OJK, academics, and LBH parties to build a forum for emphasizing the importance of establishing rules on protecting personal data.

According to KustantoArief, legal adviser in LBH Solo Raya, the chronology of the illegal online loan fintech cases that ended in terror began with SMS (short text messages) from the agents.So, the system is that the victim is offered directly with the requirements in registering for the application to enter personal data, such as identity card(KTP), family card (KK), selfie photos, and other personal data without using standard agreements. Then after the personal data is submitted, the money that is to be transferred is immediately disbursed and handed over to the borrower of the funds not in full but has been reduced. But some time after the funds were transferred then applications that have been uploaded on the Play Store are slowly being deleted without the

knowledge of the victims. And after the victim cannot return, then the victim's cell phone network is tapped and then terrorized through a new group whastapp account that includes the victims and their friends and then the victim is humiliated. Kustanto also considered the importance of establishing a personal data protection law as a preventive measure in preventing fintech cases from recurring.

Based on the results of research at OJK. There are many companies that have been registered and licensed in the OJK as of January 25, 2018 there are 34 companies, of which 10 are presented in the following table:

Platform Name	Website	Company Name	Listed Signature	Date
Danamas	http://p2p.danamas.co.id/	PT Pasar Dana Pinjaman	S-585/NB.111/2017	03 February 2017
DanaKita	http://www.danakita.com/	PT. Danakita Data Prima	S-1861/NB.111/2017	04 May 2017
Kolnworks	http://www.kolnworks.com/	PT Lunarta Annus Teknologi	S-1862/NB.111/2017	04 May 2017
Amartha	http://amartha.com/	PT. Amartha Mikro Fintek	S-2491/NB.111/2017	31 May 2017
Investree	http://www.investree.id/	PT. Investree Radhika Jaya	S-2492/NB.111/2017	31 May 2017

Modalku	http://modalku.co.id/	PT. Mitrausaha Indonesia Group	S-2493/NB.111/2017	31 May 2017
Danacepat	http://www.pendanaan.com/	PT. Pendanaan Teknologi Nusa	S-2537/NB.111/2017	02 June 2017
Awan Tunai	http://www.awantunai.com/	PT. Simplefi Teknologi Indonesia	S-2538/NB.111/2017	02 June 2017
Klik ACC	http://klikacc.com/	PT. Aman Cermat Cepat	S-2793/NB.111/2017	15 June 2017
CROWDO	http://crowdo.co.id /	PT. Mediator Komunitas Indonesia	S-2842/NB.111/2017	16 June 2017

Based on the data above, fintech companies can be classified as: a) information technology and software companies that support and facilitate financial sector companies or more so-called bank technology service providers and b) tech-startups or small innovative companies that replace ordinary financial intermediaries, with easy accessibility that can afford causing 'interference' for commercial banks and the banking system(Rusydiana, 2018).So in fact the process of fintech in granting credit is referred to as peer to peer lending based on POJK Number 77 is the Information Technology Based Money Lending and Borrowing Service is a financial service provider to bring together lenders with loan recipients in the context of entering into loan and loan agreements in rupiah directly through an electronic system using the internet network. This is the same as loan-based crowdfunding, in which the funds to be distributed in the form of debt and reductions will get compensation in the form of repayments on loans and interest.

The mechanism for filing company registration in accordance with POJK Number 77 / POJK. 01/2016 as follows:In accordance with the POJK, the company can register with OJK by submitting an application that has the requirements as stated in the POJK.General

requirements: (a) Legal entity in the form of Limited Liability Company and Cooperative; (b) Maximum foreign ownership of 85%;

Having HR with expertise and or background in IT; (d) DC and DRC in Indonesia; (e) Using an escrow account and virtual account in Indonesian banks. Registration: (a) Minimum capital of IDR 1 billion; (b) The platform is registered with the Ministry of Communication and Information; (c) General plan for resolving rights and obligations if the registered status is revoked or thepermit is not approved (d) Complementary supporting documents; which contains: (1) Deed of establishment of a legal entity; (2) Proof of identity of shareholders and management; (3) TIN (tax id number); (4) Certificate of domicile; (4) Proof of operational readiness; and (5) Proof of capital fulfillment.

So based on the requirements of the OJK mentioned above, the general requirements for companies wishing to register for fintech are limited-company (PT) and can also be in the form of cooperatives with maximum foreign ownership of 85%, meaning that not all shares may be controlled by foreigners, so that ownership of at least 25% comes from domestic , then the company has a good IT management base. Another important thing is to have an escrow account. Escrow account based on Bank Indonesia Regulation No. 3/11 / PBI / 2001 in the explanation of Article 4 A paragraph (1) is defined as an account that is opened specifically for a specific purpose that is used to collect funds entrusted to a bank or company based on certain conditions contained in a written agreement. Then the fintech company must also have a virtual account in the sense that the company's customer identification number is opened by the bank at the request of the company to be subsequently given by the company to its customers (both individuals and non-individuals) as the Receiving Purpose Account Number (Collection).Furthermore, in registering fintech companies must have a minimum capital of 1 billion with a platform that has been registered at the Ministry of Communication and Information by completing supporting documents such as deed of establishment, proof of identity of shareholders and management, tax id number, certificate of domicile, proof of capital fulfillment and readiness operational. OJK in registering registration also tightens fintech registration by always monitoring supervision and renewal of regulations issued specifically to regulate the running of fintech.

2) The Legal Synchronization of Personal Data Protection in Development of Fintech

Fintech with financial services such as crowdfunding, mobile payments, and money transfer services is causing a revolution in the startup business. With crowdfunding, you can get funds from all over the world easily, even from people you've never met even though.Fintech also allows money transfers globally or internationally(Muhammad Rizal, Erna Maulina, 2018).Fintech can also be assumed as Peer-to-Peer (P2P) lending that can be defined as a “financial exchange”that occurs directly between individuals without a directintermediation of a traditional financial institution.Peer-to-Peer lending involves the matching ofborrowers and investors via a web-based platform and the operatormanaging, as an agent for investors, the resulting repaymentobligations of borrowers.(A, 2018). Trust is a prime determinant of transaction for lenders. In the literature, trustis analyzed by the framework ofantecedents–trust–outcomes, trust is conceptualized as specific trustbeliefs and general trust beliefs. Specific trust beliefs are antecedents of general trust beliefs and behaviouralintention is the outcome of general trust beliefs. Many literatures investigate trust towards borrower and they find that lenders use both hard information and soft informationabout borrowers to create trust and thus make investing decisions.(Wang & Tu, 2017)

In general, between the organizer and the loan recipient, a legal relationship takes the form of an agreement. However, the agreement between the organizer and the recipient of the loan is in the form of an Information Technology lending user borrowing service. The agreement was born when the recipient of the loan has made an acceptance in connection with all the conditions of use set by the organizer and then submits a loan application based on conditions determined by the organizer.In a binding agreement between the organizer and the recipient of the loan is related to the loan process that will be obtained by the loan recipient from the lender through the mediator of the organizer as well as the mechanism of repayment or repayment of the loan. This agreement can be considered as the beginning of the loan agreement.Because at this stage the presence of loan recipients who need funds and then bind themselves to the organizer to be reunited with the lenders.Between the organizer and the lender a legal relationship occurs in the form of an agreement on the operation of the loan service for borrowing money based on Information Technology. The agreement was born because the lender committed itself to the organizer to provide loans / funding to loan offers from loan recipients submitted through the organizer. This implementation agreement is considered as the beginning of the loan agreement that will occur.

Because the loan agreement will only happen when the lender agrees to fund. However, the participation of the organizer in the agreement that will occur between the loan recipient and the loan recipient is only as an intermediary that brings the two parties together. The implementation agreement is strengthened by the confirmation of the organizer related to the agreement to fund the bids submitted. This confirmation is indicated by the sending of a funding form by the lender.The agreement of agreement will certainly give rise to rights and obligations for the organizer and the lender. One of the obligations of the organizer is obliged to provide access to information to lenders on the use of funds and information on loan recipients. Information on the use of funds provided by the organizer must contain at least: (a) the amount of funds lent to the loan recipient; (b) the purpose of the use of funds by the loan recipient; (c) loan interest rate; and (d) term of the loan.

Whereas one of the lenders' obligations is to conduct funding in accordance with a predetermined amount in the funding form that has been submitted to the organizer.Between lenders and loan recipients there is a legal relationship in the form of a loan agreement / loan agreement. Borrowing and lending according to Article 1754 of the Civil Code is an agreement with which one party gives the other party a certain amount of goods that are used up due to usage, on condition that the latter party will return the same amount ofthe same type and quality .The object in this loan agreement is money. The implementation of the loan agreement is also carried out online. The lending and borrowing money agreement begins with the filing of a loan application by the loan recipient through a form facility provided by the organizer. Then the application is analyzed and assessed by the organizer who acts as an intermediary / container (marketplace) to then be offered to the lender. When in this case the lender agrees to conduct funding, the lender provides confirmation through a form that has also been provided by the organizer. After this process, a loan agreement willtake place between the loan recipient and the lender.Based on each good relationship between the organizer, the lender and the recipient of the loan has been arranged in such a way regarding risk mitigation, so that in each relationship there has been a provision or agreement that takes into account including the provisions of the funds needed, the purpose of borrowing those funds, the amount loan interest and loan repayment period must all be clearly agreed upon, including collateral or collateral provided by the borrower of funds.In addressing the weaknesses that occur in the future, including if there is a failure to pay, or difficulties in billing payments, including misinformation or transaction errors, and also the network error in fintech is a part of risk mitigation that must always be built and reinforced by fintech itself.

Indonesia in general has legal regulations governing privacy policy in the online marketplace system, which is contained in Act Number 11 of 2008 concerning Electronic Information and Transactions (Act Number 18 of 2008 concerning ITE) and Government Regulation Number 28 of 2012 concerning Operation of the System and Electronic Transactions (PP No. 28 of 2012 concerning PSTE)(Indriyani, Andaria, & P, 2017). In the future, the projection of privacy data protection through the privacy policy mechanism in the online marketplace system continues to improve, because there are two legal regulations that specifically regulate privacy rights, namely the Draft Ministerial Regulation on Personal Data Protection which is the mandate of PP Number 82 of 2012 and the Draft Law - Regarding Personal Data Protection, the two legal regulations are encouraged by the government to answer the needs of the community related to the protection of consumer privacy.

Content material regulated in the personal data protection lawsmust originate from comparative studies of regulations relating to the protection of personal data in several countries that have more deeply regulated the protection of personal data. At present the provisions concerning the protection of personal data are regulated in legislation. So with the new law on the protection of personal data, it is also hoped that in the future transformation and harmonization will occur between regulations (which have previously governed privacy and data protection separately) if later this personal data protection lawswill be legally promulgated. Efforts to draft good laws and regulations regarding personal data protection lawsif they are successfully enacted will also directly provide success for legal experts to realize the protection of personal data in the fintech business era as a legal ideal (rechtsidee), so that later there will be no legal vacuum and increase legal certainty in the national legal order(Yuking, 2018).

A legal instrument for protecting privacy and personal data in the era of the digital economy must meet at least 3 criteria: (1) international character; and (2) are the glue elements of individuals and economic society. Characteristics First, the protection of privacy and personal data must also be supported by regulations that are cross-border in nature. Such rules include the rule that the transfer of privacy and personal data outside the national territory must require special approval, and can only be carried out to countries that have the same privacy and personal data protection. Second characteristic, in the context of the Digital Economy Era, protection of privacy and personal data must also include the protection of personal rights. In other words, besides having to be negative rights that require the state not to do something so that those rights are fulfilled, it must also be positive rights whose fulfillment of rights can only be done with the active role of the state. The era of the digital economy with all its special characteristics and rapid development cannot require the state to remain silent, but to do something more. Characteristics Third, protection of privacy and personal data can increase the confidence of individuals to participate in becoming a digital economy era society(Sinta Dewi Rosadi, 2018).

Based on the results of the above research, and the problems handled by LBH Solo Raya, the need for the urgency of establishing a personal data protection law is given the growing number of online loan cases followed by cases of intimidation and intimidation as well as cases of harassment of victims. Finteh agents intercepted and misused personal data through the victim's cellphone without the victim's permission which was then used to terrorize the victim. In the draft personal data protection law it is necessary to include special rules such as the most important one is the elimination of access to the victim's personal data.There are several important points in the draft law on personal data protection later including tight controls on the controller and processor, clarity of the relevance of the use of customer data as

part of the application of E-KYC (Electronic-Know Your Customer), data storage deadline customers, and erasing customer personal data facilities.

Conclusion

Based on the discussion above, it can be concluded as follows:

The state should not underestimate the illegal fintech cases which continue to harm the societyin many cases. There is urgency in the formation of a personal data protection law going forward and the idea should be to build an alliance between the legislative, OJK, academics, and LBH parties to build a forum for emphasizing the importance of establishing rules on protecting personal data.

Based on the results of the above research, and the problems handled by LBH Solo Raya, the need for the urgency of establishing a personal data protection law is given the growing number of online loan cases followed by cases of intimidation and intimidation as well as cases of harassment of victims. Finteh agents intercepted and misused personal data through the victim's cellphone without the victim's permission which was then used to terrorize the victim. In the draft personal data protection law it is necessary to include special rules such as the most important one is the elimination of access to the victim's personal data. There are several important points in the draft law on personal data protection later including tight controls on the controller and processor, clarity of the relevance of the use of customer data as part of the application of E-KYC (Electronic-Know Your Customer), data storage deadline customers, and erasing customer personal data facilities.

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THE INFLUENCE OF TRANSCENDENTAL VALUE IN ONLINE STORE TRANSACTION

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ABSTRACT

Purpose of the study: This paper evaluates buying and selling online as technological advancements indeed spoil many people in all fields. The rapid consumptive behavior of the community has made land for investors to invest their capital in the trade sector grow rapidly. The increasing demand for consumer goods has led to the rise of online stores that have experienced a significant increase, resulting in the emergence of hundreds of online stores that are official or that use social media. Anyone can be an online store owner, buyers ranging from parents, teens to children.

Methodology: This research paper was conducted using descriptive normative study methods. As a secondary legal material, this writing draws on literature, papers, journals and research related to this writing.

Main Findings: This paper will discuss about how the transcendental value in Islam can reduce the abuse of online stores to avoid fraud or sell incompatible goods, even the legal problem is fraud against buyers who have transferred money, but the goods are not come.

Application of this study: This research is expected to minimize the misuse of online store transactions regarding the number of dishonest sellers and to justify all means of cheating so that it is necessary to link religious aspects in online transaction activities so that it is expected to reduce the chance of harm to sellers and buyers.

Keywords: *Online shop, technological progress, religion*

INTRODUCTION

Al-Qur'an at Surah Al Baqoroh verse 275, Allah confirms that: "... Allah justifies the sale and prohibit usury ...". The interesting thing from this verse is the prohibition of usury which was preceded by the halting of buying and selling, with a record as long as it is done correctly in accordance with the guidance of Islamic teachings. Paragraph Al Baqoroh above is intended for offline transactions. Following the rapid development of technology, popping up online trading transactions through many online stores have sprung up.

An online store can be broadly interpreted as the sale and purchase of goods and services through electronic media via the internet or online. Like selling products / goods online as OLX, Zalora, Lazada, Tokopedia, Open Stalls, Blibli, Elevania, Shopee etc. . In this business, support and service to consumers uses certain sites or websites via laptops or computers; or applications that can be downloaded from gadgets or cellphones via Playstore. There are many more independent online stores which are virtual private stores, usually using social media as a means of offering merchandise and making transactions. Social media such as Facebook, Instagram, Blogspot or Kaskus are widely used for online transactions.

The ease of doing online transactions must still be accompanied by several rules of sale and purchase in Islam, because without these rules, these conveniences will reap controversy and some things that are worthy of doubt or even haram. For example, it contains elements of usury, gambling, or gharar. Therefore it needs a review of the course of the online shop's activities to be adjusted to the arguments of the Qur'an and the sunnah that is clearly halal.

RESEARCH METHOD

This study was conducted by using the method of descriptive philosophical normative study. As a secondary legal material, this paper garnered information from literature, papers, journals, and other related studies.

RESULT AND DISCUSSION

a. Online Store transaction

According to the Big Indonesian Dictionary, shop means a place or permanent building to sell goods (food, drinks, and so on). Whereas Online, whose Indonesian language translation is *dalam jaringan* or abbreviated as *daring*, has the meaning of being connected through computer networks, the internet, and so on. As for the term online shopping according to Wikipedia is the activity of purchasing goods and services through the Internet media. Through shopping via the Internet a buyer can see in advance the goods and services he wants to spend via the web promoted by the seller. This online / online shopping activity is a new form of communication that does not require direct face-to-face communication, but can be done separately from and to the rest of the world through the media of notebooks, computers, or mobile phones connected to the Internet access service.

Online shopping is a form of electronic commerce used for seller-to-seller or seller-to-consumer transactions. So departing from the two terms in the language above, we can interpret the online store as a place for trading or buying and selling goods that are connected to a network in this case the internet network.

In conducting electronic transactions in this case buying and selling online, there are advantages and disadvantages obtained by businesses and consumers. As for the advantages and disadvantages for business people and consumers in buying and selling online, namely:

The advantages of buying and selling online for businesses there are several advantages of buying and selling online for businesses, namely:

1) Can be used as land to create income that is difficult or cannot be obtained through conventional means, such as directly marketing products or services, selling information, advertising, and so on;

2) Buying and selling can be done without being bound to a certain place and time. Buying and selling online is a business that can be done anytime and anywhere, as long as there are facilities to access the internet;

3) The initial capital needed is relatively small. The capital required is internet access facilities and the ability to operate them. Many service providers offer promotional media, both paid and free

4) Buying and selling online can run automatically. Business people only do this buying and selling business for a few hours each day as needed. The rest can be used to do other activities.

5) Wider market access. With the wider market access, the potential to get many new customers is even greater.

6) Customers (consumers) more easily get information that is treated online. Communication between businesses and consumers will be easier, more practical, and saves time and money.

7) Improve time efficiency, especially distance and time in providing services to consumers as buyers.

8) Savings in various operational costs. Some cost components such as transportation, communication, rent, employee salaries and others will be more efficient. With the cost savings in various components, it will automatically increase profits.

9) Better service to consumers. Through the internet, customers can express their needs or complaints directly so that businesses can improve their services.

Some of the advantages of buying and selling online for consumers, namely:

1) Home shopping. Buyers can make transactions from home so they can save time, avoid traffic, and reach shops far from the location.
2) It's easy to do and doesn't need special training to be able to shop or make transactions via the internet.
3) Buyers have a very wide choice and can compare products and services that they want to buy. For example, consumers can look at photos of goods posted by business actors.
4) Not limited by time. Buyers can make transactions at any time for 24 hours per day. For example, consumers can be embarrassed at buying and selling transactions at any time without having to fear that businesses' shops will be closed;
5) Buyers can search for products that are not available or difficult to obtain at traditional outlets or markets.
In addition to the advantages gained by consumers in conducting online transactions, consumers also often face problems that are pleasing with their rights.
This can be said as a drawback when conducting online buying and selling transactions, such as:
1) Consumers cannot immediately identify, see, or touch the goods to be ordered. consumers only see photos of goods that are wanted through the posts of business actors;
2) Unclear information about the goods offered. For example, consumers cannot clearly know whether the goods are a or b quality because they only see photos of the goods;
3) Unclear status of the legal subject of the business actor. For example, the seller as a business actor does not provide a guarantee of certainty so that consumers do not feel disadvantaged;
4) There are no guarantees of transaction security and privacy, as well as an explanation of the risks associated with the system used, especially in the case of electronic payments, both with credit cards and electronic cash.
5) Imposing unbalanced risk, because in general the sale and purchase of the internet, the payment has been paid in advance by the consumer, while the goods will not necessarily be accepted or will follow later because the guarantee is the guarantee of delivery.

B. Transcendental value in online store transactions

Islam has clearly set the issue of buying and selling in the chapter muamalah, starting transactions, terms of buyers and sellers, classification of buying and selling with various opinions from the scholars. Islam also regulates human behavior in meeting their needs, namely in business activities that bring benefit. Based on that, Islam has offered some basic rules in transactions, agreements, or seeking wealth. Transcendental value contained in Islam is one of the offers that can reduce the disadvantages in online shop transactions.

Transcendental Laws are rules that always add spiritual aspects as part of the legal basis. In other words, there is always the "participation" of God in every law made by humans, namely the attempt to incorporate religious norms into law that ultimately shapes morality according to religious rules. Postmodernism began to take up things that are irrational (emotions, feelings, intuition, personal experience, speculation), moral, and spiritual as an integral part in understanding scientific studies / issues. Legal thinking which is considered unsatisfactory (critical and even rebellious) towards the paradigms of modern liberal and established law which is categorized as postmodernism thought.

Ibn Kathir in his interpretation explained that Allah SWT forbids His servants who believe in eating the property of others in a vanity way and ways to find profits that are not legal and violate the Shari'a such as usury, gambling, and the like of various kinds of deception. appear to be in accordance with Sharia law. Allah SWT excludes from this prohibition the search for property by means of commerce which is carried out on the basis of equal likes by both parties concerned.

In the interpretation of al-Maragi it is said that the basis of commerce is mutual respect. Where in this verse there are signs of some benefits, namely:

a) The legal basis for commerce is mutual respect between buyer and seller. Deception, lying and falsification are things that are forbidden;

b) Everything that exists in the world in the form of commerce and what is stored in its meaning such as sleaze, which is impermanent and impermanent, should not neglect reasonable people to prepare themselves for a better and eternal life hereafter;

c) It implies that most types of commerce mean eating wealth with vanity. Because limiting the value of something and making the price match its size based on a straight balance is almost impossible. Therefore, tolerance applies here if one of the two substitutes is greater than the other or the cause of the price increase is the skill of the merchant in decorating his merchandise and passing it on with beautiful words without forgery and fraud. Often a person buys something while he knows that he might buy it somewhere else at a cheaper price. This was born because of the cleverness of traders in trading. It includes commercial sleaze which results from mutual disbelief, hence the law is lawful.

Pillars and terms of sale and purchase can be said to be valid if it meets the pillars and conditions set by the syara '. Regarding the pillars and terms of sale and purchase, the scholars differed. In determining the buying and selling pillars there are differences of opinion among the Hanafi school of thought scholars and jumhur ulama. According to one Hanafi sect, there are only one trading group, namely the consent and the Kabul. According to them, the one who gets along well in trading is only the willingness (pleasure) of both parties to sell and buy. However, because the element of willingness is an element of the heart that is often invisible, it is necessary to show indicators of willingness from both parties. These indicators can be illustrated in consent and consent, or through mutual giving of goods and the price of goods. This is different from the opinion of jumhur ulamas who state that there are four pillars of sale and purchase, namely: a. A person in good faith (seller and buyer); b. Sighat (recitation of consent and Kabul); c. There are items purchased; d. There is a replacement exchange value of goods.

According to the Hanafi school of scholars, the person who has the intention, the goods purchased, and the exchange value of goods are included in the terms of sale and purchase, not in harmony. The terms of sale and purchase in accordance with the terms of sale and purchase stated by the decision of the ulama *(jumhur ulama)* are as follows: A person who has an Islamic Jurisprudence agreement agrees that the person making the sale and purchase agreement must fulfill the following conditions:

a) Sensible. Buying and selling that is carried out by small children who have no legal sense is invalid. As for small children who are already *mumayyiz*, according to the Hanafi school of thought, if the contract they carry brings benefits to them, such as receiving a gift, will, and alms, then the contract is valid. Conversely, if the contract is to bring harm to him, such as lending his property to others, giving, or giving it, then the legal action is not justified according to Islamic law. Transactions carried out by child *mumayyiz* which contain benefits and harms at the same time, such as buying and selling, leasing, and trade unions, are considered valid, according to the law with the provisions if the guardian permits after careful consideration. *Jumhur ulama* are of the opinion that those who carry out the sale and purchase agreement must be of legal age and understanding. If the person in the act is still *mumayyiz*, then the sale and purchase is not valid, even if he gets permission from his guardian.

b) The person who makes the contract, is a different person. That is, a person cannot act as a buyer and seller at the same time. 2) The requirements related to the consent of the ulama of fiqh scholars agree that the main element of the sale and purchase is the willingness of both parties. This willingness can be seen during the contract. Ijab and Kabul must be clearly disclosed in transactions that are binding on both parties, such as the sale and purchase and lease agreements, and marriage agreements.

Regarding transactions which are binding on one of the parties, such as wills, grants, and endowments, it does not need to be Kabul, because such a contract is enough with permission. Even according to Ibn Taymiyyah and other scholars, consent is not required in matters of *waqf*. If permission and consent have been pronounced in the sale and purchase agreement, ownership of goods and money has changed hands. The item that changes hands becomes the property of the buyer and the exchange rate or money changes hands becomes the property of the seller. Jurisprudence scholars state that the conditions of consent and consent are as follows: a) People who pronounce it have puberty and understanding or have reasoned, according to their differences in determining the conditions as stated above; b) Kabul is in accordance with the consent. For example, the seller says: I sell this bag for ten thousand, then the buyer replies: I buy for ten thousand;

c) Ijab and Kabul are conducted in one majlis. That is, the two parties who entered into the sale and purchase agreement were present and discussed the same problem. If the seller says consent, then the buyer leaves before saying Kabul or the buyer engages in other activities not related to buying and selling issues, then he says Kabul, then according to the agreement of fiqh scholars, the sale and purchase is invalid, even though they are of the opinion that the consent must not be answered directly with Kabul.

As for the sharia standards that have been mentioned, there are legal norms listed in the principles of agreement in Islamic law. The principle of agreement in Islamic law according to Prof. Syamsul Anwar namely:

a. Principle of Ibahah (Mabda ’al-ibahah)

Formulated in the adage "In principle everything can be done until there is an argument forbidding it"

b. Principle of Freedom of Intention (Mabda ’Hurriyyah at Ta’aqud)

Sellers in buying and selling online in particular can put any clause in the contract as long as it does not violate the limits of the Shari'a, namely eating wealth by way of vanity or not against public order and decency.

c. Principle of Consensualism (Mabda ’ar-Radha’iyyah)

The parties have agreed to exchange goods for money. The agreement was subsequently applied through the consent and qabul stages

d. The principle of promise is binding

In buying and selling online there is a slogan that reads, "Keep No Canceled". So, when a buyer has ordered an item, it means that the item has been bound and indirectly there is an appointment with the seller that he will buy the item. In the rules of fiqh proposal it is stated that, "the order shows in principle the obligation"

e. The Principle of Balance (Mabda 'at' Tawazun fi al-Mu’awadhah)

The principle of balance in buying and selling online is reflected in the risks borne by each party, namely the seller and buyer. When the buyer feels disadvantaged because the goods do not match the specifications laid out by the seller, then the goods can be exchanged on the basis of the seller's willingness.

f. Principle of Benefit (Not burdensome)

That the agreement made does not harm either party.

g. The Principle of Amanah

In Islamic agreement law, a mandate from the online seller is required to provide honest information to the buyers who do not know much about it. This is necessary to avoid gharar or possible risks.

h. Principle of Justice

In contemporary Islamic law a principle can be accepted that for the sake of justice, the conditions contained in my contract can be changed by the court if there is a reason for it.

With the regulation of the pillars and conditions of sale and purchase in Islam can be a reference and can be applied in online shop transactions, so that a legitimate sale and

purchase can be maintained according to the rules, does not cause harm and can make it unlawful because it does not comply with the terms and conditions. The rules in Islam are very flexible and can be adapted to the development of the times as long as they do not deviate from the rules that have been required. The steps we can take to make buying and selling online permissible, lawful, and legal according to Islamic law:

a. Halal Products. The obligation to maintain halal-haram law in the object of commerce remains in effect, including in online commerce, bearing in mind that Islam forbids the results of illicit goods or services, as confirmed in the hadith: "Indeed, if Allah has forbidden a people to eat something, surely He also forbid the results of sales. "(HR Ahmad, and others). It may be that when trading online, feeling reluctant or reluctant to others vanished or diminished. But you surely realize that Allah 'Azza wa Jalla still records your lawful or illegal trading.

b. Clarity of Status. Among the important points that you must pay attention to in every trade is the clarity of your status. Whether as the owner, or at least as a representative of the owner of the goods, so they are authorized to sell the goods. Or do you only offer goods procurement services, and for this service you require certain rewards. Or is it just a trader who does not have the goods but can bring the goods you offer.

c. Price Conformity with Quality of Goods. In buying and selling online, we often find many buyers feel disappointed after seeing the clothes that have been purchased online. Whether it's the quality of the fabric, or the size that turns out not to fit the body. Before this happens back to you, you should properly consider whether the price offered is in accordance with the quality of the item to be purchased. You should also request a real photo of the state of the item being sold.

d. Your honesty. Trading online, even though it has many advantages and conveniences, is not without problems. Problems can arise in online commerce. Especially issues relating to the level of trust of both parties. [1]

CONCLUSION

The ease of online shop transactions must be linked to several rules of sale and purchase in Islam, because without these rules, these conveniences will reap controversy and some things can be worthy of doubt or even haram, containing elements of usury, gambling, or gharar. Therefore, a review of the activities of the online store is needed to be adjusted to the arguments of the Qur'an and the sunnah clearly halal. It is expected that the existence of transcendental value in online store transactions can create benefits for sellers and buyer.

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PLANTING OF THE KNOWLEDGE OF CHILDREN'S RIGHTS FOR ELEMENTARY SCHOOL STUDENTS THROUGH THE SCOPE OF LEARNING MATERIALS IN THE REFERENCE BOOK

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ABSTRACT

This study aims to determine control of the rights of children in the learning materials in 2013 after students learn the curriculum. This study uses a qualitative method by means of interviews with teachers and provide questions to students in grade 4 elementary school curriculum as well as to analyze the reference book of 2013. The theory used in this research is the protection of children through education. The results of this study found that students' mastery of the material rights of children who studied in an integrated manner with other disciplines seen not maximized due to: load the material presented in the reference book more shows in deed child's everyday life than on the right, and teachers still lack training about child rights.

Keywords: *Children's Rights, Elementary School Students, Learning Materials.*

Introduction

The promulgation of Law Number 35 Year 2014 concerning Amendments to Law Number 23 Year 2002 concerning Child Protection is a manifestation of the seriousness of the state or government to provide protection for children. The presence of this law is used as a guideline and / or instructions for all parties to treat children as no exception only within their families and including their social life. Moreover, the rights of children are an integral part of human rights. (T. Riza Zarzani N: 2017: 46)

The existence of child protection laws does not mean that children are free from arbitrary behavior that leads to violence against children. Various facts based on data from the Indonesian Child Protection Commission noted that violence against children increased by 306 cases from 2017 to 4579 cases to 4885 cases in 2018. (TribunJabar, Friday, 18 January 2019 22: 16 WIT) Likewise in the Province North Sumatra based on data from the Center for the Study of Child Protection in 2017 there were 295 children who became victims of violence which increased 100 percent from the previous year in 2016 totaling 144 cases. (Republika Co.id., Monday, 1 Janury 2018 13.12 WIT) Despite the law the child protection law came into force, apparently based on data it was still found that there were various kinds of actions that were detrimental to the interests of children.

Recognizing such a situation, preventive efforts in overcoming the occurrence of violence against children can be through educational facilities by instilling knowledge of children's rights for elementary school students. One model is used through the application of the insertion of learning material methods in reference books for elementary schools. With insertion it is expected to provide an increase in student understanding after learning it.

The use of this method is based on the thought that children will eventually become adults. When they are still children, they are vulnerable to being victims of violence and as adults with inadequate knowledge of children's rights can be an actor who can harm their interests. For this reason, the inculcation of knowledge since elementary school is very much needed as a preventive effort in overcoming the emergence of acts that can harm the best interests of the child and even save the lives of children from acts of violence.

Research Methods

This research is a type of quantitative research that uses descriptive analysis method, with a view to systematically describing the object of research in order to assess the level of knowledge of elementary school students towards learning by using reference books that contain material children's rights. The 2013 Thematic Integrated Learning book used by elementary school students is examined to see how deep the study of children's rights material is inserted and or included. Next will be examined also the form of insertion of children's rights material in learning reference books. The data used in this study are primary data obtained from the field using questionnaires and observations of grade 4 elementary school students who have studied children's rights and existing books. In addition, secondary data is also used to examine the quality of the material inserted in the elementary school learning reference book.

Discussion

Content of the Rights of the Child on the Learning Book of Elementary School Reference.

Children are the nation's next generation who have limitations in understanding and protecting themselves from the various influences of the existing system. (Atikah Rahmi, Suci Putri Lubis: 2017: 263). Therefore Article 20 of Law Number 35 Year 2014 Regarding Child Protection requires that child protection be pursued by each member of the community in accordance with their abilities with a variety of businesses in certain situations and conditions. (Maidi Gultom: 2014: 46) One of the layers of society provided the role of participating in efforts to protect children in accordance with Article 72 paragraph (4) of Law Number 35 Year 2014, namely: educational institutions or schools. Schools are the most strategic institutions in the effort to actualize human rights principles and norms. "(Muhammad Nurkhoiron: 2018)

In accordance with research on 2 (two) elementary schools in different administrative districts / cities, namely: Public Elementary School Number 102019 Serdang Bedagai Regency and Muhammadiyah Private Elementary School Number 13 Medan City has taught children rights material for students in learning. Teaching children's rights is introduced from Class 1 to Class 4.

The introduction of children's rights is adapted to the needs and level of development of children which is a direct experience of things closest to their daily environment. Material on the content of children's rights which is the focus of studies in learning for elementary schools is adjusted to the themes that have been prepared in the national curriculum. The curriculum serves as a guide in the implementation of all educational activities, including teaching and learning activities in the classroom. (Kasiono: 2013: 47) Burhan Nurgyantoro said, "in the curriculum all things must be used as guidelines for the implementation of education".(Kasiono)

In accordance with the demands of the curriculum, the preparation of learning materials for children's rights refers to the principles of theme selection as set in the Thematic Elementary Integrated Learning Guidebook as follows:(2016:11)

a. Contextual, pay attention to the immediate environment of students.
b. Attracting interest and encouraging students' thinking processes.
c. From easy to difficult, concrete to abstract, simple to complex.
d. Paying attention to age, stages of development, abilities, needs, and interests of students.
e. Themes must consider authentic events that occur in the span of study time.
f. The theme chosen is in accordance with the applicable curriculum.
g. The theme is chosen according to the availability of learning resources.

In accordance with the principles of theme selection, the material rights of children compiled on the theme include: myself, my family, my experience, harmony, my daily duties, togetherness, safety at home and travel, my obligations and rights, the beauty of togetherness,

the beauty of diversity in my country, and the area where I live. (Ministry of Culture of the Republic of Indonesia: 2017)

Child rights material developed is still limited to introducing and using it in children's daily lives. Not to discuss how to protect, protect and defend the rights of children. This is in line with the direction of elementary school education which emphasizes greater character / personality education and literacy as stated in the Thematic Integrated Elementary Learning Guidebook. (2016: 4) Thomas Lickona mentions Character education is education to "shape someone's personality through character education, the results of which can be seen in one's actual actions, namely good behavior, honesty, responsibility, respect for the rights of others, hard work and so on (Edi Rohendi: 2011: 1)

In accordance with the direction of basic education for the introduction of children's rights in the 2013 Integrated Thematic Curriculum Book, the material included relates to: the types of rights children have, behavior in accordance with children's rights, the use of children's rights and efforts to defend children's rights. These materials shape the personality / character of students as expected according to the direction of the development of basic education through the implementation of the 2013 Curriculum.

Insertion of Child Rights Materials in Learning Reference Books for Elementary School Students.

Based on the results of research on the 2013 Integrated Thematic Book published by the Ministry of Education and Culture, it was found that learning materials for Elementary Schools were prepared using Themes and Sub-Themes. The theme is used as a benchmark in the development of learning materials in an integrated manner by looking at various perspectives from scientific disciplines. The theme is used as a unifying learning material from various disciplines or subjects.

One of several learning materials that is developed in accordance with the theme relating to children's rights. Children's rights material is made part of narration or reading text that is integrated with narratives of other subjects. The insertion of material on children's rights refers to the competence of each theme that has been set. The successful insertion of integrated child rights material like this requires the same understanding for all teachers so students can understand clearly. If it is not the same it is feared that students will find it difficult to understand.

Learning material on children's rights in integrated thematic books cannot be separated from the involvement of students, teachers and even parents. Students have an active role in the learning process to identify under the direction and guidance of the teacher. In the two elementary schools that were the object of research, the teacher was found to have a role in facilitating students in understanding what was the child's rights in accordance with the themes that had been determined by discussing the material together with students on narrative or reading texts and question questions. To increase students' understanding, the teacher designs additional material according to the theme being studied by utilizing the resources that are around him. The teacher designs rights material with a learning model in the form of identification and solution of a problem solution to be discussed together.

The insertion of children's rights material in integrated thematic books is also done by giving assignments to students by means of group assignments and assignments at home to identify what are the rights of children. Students are given a collaboration column with other students. Students are even given a learning activity column with parents to study children's rights. It is hoped that this method can help students understand what constitutes children's rights.

The results of the assignment activities are discussed together between students and teachers in the classroom. Each student presents the results of his assignment in front of the class together with other students under the guidance of the teacher. The teacher affirms the discussion so that students can better understand the material related to children's rights.

Knowledge of Elementary School Students After Studying Children's Rights Materials Using a Reference Book.

The success of students in mastering learning material refers to graduate competency standards which are one of the 8 (eight) national education standards. One component of the 3 (three) graduate competency standards that must be met in learning is the "components of knowledge" in addition to components of attitude and skills.

Based on the results of research on Class 4 Elementary School students shows that the students' knowledge about the material rights of children has not been distant. There are more grade 4 students in the 102019 Public Elementary School in Serdang Bedagai Regency who need guidance to learn children's rights by ± 72.2% compared to SD Muhammadiyah 13 Medan by ± 5.6%.

Likewise, seen from the written test in the form of multiple choice (multi-coise) and content (essay) showed that from 40 students there was a percentage of ± 15% having very good knowledge, a percentage of ± 17.5% good, a percentage of ± 25% was sufficient, and a percentage of ± 42.5% was still poor knowledge, so guidance is needed. The use of such assessments refers to the knowledge competency assessment standards as, as governed by the Minister of Education and Culture Regulation Number 66 Year 2013 concerning Education Assessment Standards.

Various questions on multiple choice questions done by 40 (forty) students, there are some children's rights that are unknown to students, among others: rights in the family as much as 62.5%, conflicts of violation of children's rights in the family as much as 60%, rights to citizenship as much as 67.5%; and Child Economic Exploitation as much as 55%.

The lack of maximum student knowledge of children's rights is due to the presentation of material in the 2013 curriculum reference book is still limited to the mention of rights in general so that students find it difficult to know what rights they should have. Children's rights that are presented sometimes are not explicitly mentioned as a right but rather are seen as an attitude of action or action that must be done in dealing with others both in the family, school and in the midst of society. Even the rights to the sub themes in the 2013 curriculum book are more emphasized on the obligations of rights.

The inclusion of rights in the 2013 curriculum book sub-theme explains more towards respecting and respecting others than introducing rights as possessions that must be obtained, respected, defended and protected. Although it is realized that rights and obligations cannot be separated from one another. As a result what is the substance of children's rights looks vague or unclear and even forgotten about their existence so that students find it difficult to identify it as a right.

Judging from the results of the analyzed answers, it was found that several questions could not be answered by many students with a percentage of ± 62.5%, it was difficult to distinguish what was the rights and obligations in the family, a percentage of ± 60% could not determine the form of acts of violation of children's rights in families, the percentage ± 45 is difficult to distinguish between rights and obligations for education and teaching, the percentage ± 47.5% in terms of distinguishing between rights and obligations in school, the percentage ± 67.5% lack understanding of the rights and obligations for citizenship, and ± 55% lack of understanding of the economic exploitation of children by finding money as an act that is not justified.

Likewise, based on the results of the analysis of the questions in the form of essays, it is also seen that students' mastery after learning about children's rights is only able to write / express the average between ≥ 2 (two) to ≤ 3 (three) kinds of rights child rights. As for the children's rights that can be raised by 4th grade elementary school students relating to the rights in the family which include: the right to love, the right to protection of parents, and the right to play, and the rights at school include: the right to education and rights are respected and treated well.

Being aware of the very general description of rights in the 2013 curriculum book sub-theme, is one of the obstacles for students in understanding the material on the subject matter of the 2013 curriculum book. Because the 2013 curriculum book in its application still requires supporting teaching materials to understand it. . While supporting materials to understand the 2013 curriculum book available at school are still limited. Moreover, it is also influenced by the delay in the distribution of 2013 curriculum books to schools.

Another factor based on the results of research in 2 (two) observed schools revealed that the teacher had never received training on specific material on children's rights. The teacher personally learns by looking for teaching materials according to the material rights of the child he needs from various sources based on the resources he has. Teachers as educators must be capable of implementing the curriculum. (Danny Abrianto, Hasrian Rudi Setiawan, Ahmad Fuadi: 2018; 286)

Moreover, teachers are required to master a number of integrated disciplines which are 2013 curriculum materials that have different scopes. Especially in learning contextual material such as children's rights, the competence of teachers with extensive knowledge is needed. Therefore teacher competence is one factor that can determine the success of mastery of students / students on the subject matter being studied.

Lambang Subagiyo and Safruddiannur stated: "In the implementation of the 2013 curriculum it cannot be separated from the teacher, especially the teacher's competence and the teacher's commitment to implement it in the teaching and learning process. Implementation of the 2013 curriculum requires complete pedagogical and professional competence. "(2014: 140) Teachers with the competencies they have are able to provide guidance and teaching for students in understanding what is the subject matter in the 2013 curriculum book specifically on sub-themes related to rights child rights.

Conclusion.

Children's rights have been used as learning material for elementary school students whose presentation is adjusted to a predetermined learning theme. Discussion of children's rights is still in general and does not mention as determined by Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection. As a result, it was found that the students' understanding of children's rights was not maximized. Moreover, the material described in the 2013 integrated thematic book emphasizes more on the activities or activities that children carry out daily than on children's rights. Likewise, the placement of discussions on child rights material is carried out together with other learning materials. Without guidance from teachers and parents, students are very difficult to understand.

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THE URGENCY OF ARRANGEMENTS ON REGISTRATION OF ONLINE SHOP TRADERS IN PREVENTING ONLINE BUSINESS FRAUD

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ABSTRACT

The presence of the internet has supported the effectiveness and efficiency of company operations, especially it's role as a means of communication, publication, promotion untill to the stage of trade transactions. But on the other hand it is there is a problems experienced by consumers who feel they have been cheated by traders of online shops, ranging from goods received that are not as expected, and the goods that are not received by consumers even though consumers have made payment. This study is a normative juridical research, where the data used in this study is secondary data in the form of books, legislation, documents and other writings relating to the problems under investigation. Based on the results of the study revealed that the e-commerce market in Indonesia has a huge potential, but on the other hand there are problems where there can still be found alleged fraud committed by online shop traders, so there are regulations governing registration obligations for online shop merchants who provide information related to online shop merchants data are efforts that can be taken in preventing fraud in online business transactions.

Keywords: *Online Shop, Cybercrime.*

A. Background

Technology and information development make it easy for people to interact and disseminate information to others. Communitty can easily be able to communicate without limits on distance, space and time. Along with the development of technology and information, people are also encouraged to be able to follow and adjust to developments that are happening. The development of communication technology today is not just for the sake of establishing communication and socializing. Information technology has opened the eyes of the world to a new world, new interactions, a new market place, and a world of unlimited business networks.

It's development can not be separated from the presence of the internet, which has changed the pattern of community interaction, one of which is in business interaction. The internet has made such a large contribution to society, companies / industries and the government. The presence of the internet has supported the effectiveness and efficiency of company operations, especially it's role as a means of communication, publication, promotion untill to the stage of trade transactions.

The community as consumers who previously had to go to stores to get products, is currently facilitated by the presence of an online shop, so that the consumers did not need to go to the store, but can choose and buy an item through a mobile phone. But on the other hand it is there is a problems experienced by consumers who feel they have been cheated by traders of online shops, ranging from goods received that are not as expected, and the goods that are not received by consumers even though consumers have made payment. As conveyed by the Chairperson of the Investment Alert Task Force, Tongam Lumban Tobing, to date the OJK has received 19,000 complaints of alleged fraud where goods that have been paid for by consumers have not been sent or received by consumers.[1]

Based on these description, researcher feel interested in conducting studies in the form of scientific papers with the title **"The Urgency of Arrangements On Registration of Online Shop Traders In Preventing Online Business Fraud"**.

B. Problem Formulation

The problem formulation in this study is : What is the basis of the urgency of the regulation of registration in preventing online shop business fraud?

C. Research Method

This study is normative, because it uses secondary data, or often called the research literature. Normative legal research is legal research laying down the law as a system of building norms. Norm system in question is about the principles, norms, rules of legislation, court decisions, agreements and doctrines.[2] Secondary data used in this study include legislation relating to e-commerce, documents and writings relating to the cases studied.

Methods of data analysis used in this research is descriptive qualitative, meaning authors will present and explain the data obtained from the study of literature, which is manifested in a logical and systematic description. Once the ingredients necessary legal collected, the next step was made an analysis to clarify the settlement of the problem, then the conclusions drawn deductively, from things that are common to the things that are special. At this stage the legal material worked on and utilized in such a way to successfully conclude the truth of which can be used to address the issues raised in the study.

D. Discussion

Cybercrime is form of crime that arise due to misuse of internet technology. The developments in the use of internet services has the potential of crime. By the increasing number of requests for internet access, crimes against the use of information technology are increasing following the development of the technology itself.

Before the enactment of Law Number 11 on 2008 corcerning Information and Electronic Transaction, law enforcement officials used the Criminal Code in handling cases of cyber world crime. The provisions contained in the Criminal Code concerning cybercrime. In connection with this Teguh Arifiady categorizes several things specifically regulated in the Criminal Code and arranged based on the level of intensity of the occurrence of the case namely [3] :

1. Provisions relating to theft of offenses in Article 362 of the Criminal Code;
2. Provisions relating to the destruction / destruction of goods contained in Article 406 of the Criminal Code;
3. The offense regarding pornography is contained in Article 282 of the Criminal Code;
4. An offense regarding fraud is contained in Article 378 of the Criminal Code;
5. Provisions relating to the act of entering or crossing another person's territory;
6. An offense regarding embezzlement is contained in Article 372 of the Criminal Code & 374 of the Criminal Code;
7. Crimes against public order are contained in Article 154 of the Criminal Code;
8. An offense regarding insult is contained in Article 311 of the Criminal Code;
9. An offense concerning the falsification of a letter is contained in Article 263 of the Criminal Code;
10. Provisions regarding confidential leakage are contained in Article 112 of the Criminal Code, article 113 of the Criminal Code, & article 114 of the Criminal Code;
11. An offense concerning gambling is contained in Article 303 of the Criminal Code.

The term of spread of lies and misleading information did not match for "fraud". Fraud can be motivated by self-interest or at the very least to harm others or even to benefit

themselves and harm others at the same time. With these motivations, the spread of lies and misleading information can be categorized as fraud.

As described above, in general the fraud has been regulated as a criminal offense by Article 378 of the Criminal Code. The intent of this article is still general, that is, it is intended for this real nature. Unlike the fraud on the internet regulated in the ITE Law. This fraud has a narrower space than the arrangement in the Criminal Code. In the ITE Law regulates lies and misleading information by the internet media can be likened to fraud stipulated in Article 378 of the Criminal Code. Article 28 paragraph (1), reads:
"Everyone intentionally and without the right to spread false and misleading news that results in consumer losses in electronic transactions."
With criminal sanctions by Article 45 paragraph (2) which determines:
"Every person who fulfills the elements referred to in Article 28 paragraph (1) or paragraph (2) shall be sentenced to a maximum imprisonment of 6 (six) years and or a maximum fine of Rp. 1,000,000,000.00 (one billion rupiah)."

Basically the process of e-commerce transactions is not much different from the process of buying and selling ordinary transactions in the real world. The electronic sale and purchase transactions are carried out in several stages, as follows [4] :

1. Offers made by sellers or business people through websites on the internet. The seller or business actor provides a storefront that contains a catalog of products and services that will be provided. People who enter the website of the business actor can look at the items offered by the seller. Bidding through the internet media can only occur if someone opens a site that displays an offer through the internet.
2. Acceptance, can be done depending on the offer that occurred. If the offer is made via e-mail address, then the acceptance is done via e-mail, because the offer is only intended for an e-mail address intended so that only the e-mail holder is addressed.
3. Payment, can be made directly or indirectly, for example through internet facilities, but still relies on the national financial system, which refers to the local financial system.
4. Shipping is a process carried out after payment of goods offered by the seller to the buyer, in this case the buyer has the right to receive the goods. in fact, the goods which are the object of the agreement are sent by the seller to the buyer at the shipping cost as agreed between the seller and the buyer.

In electronic transactions, the parties concerned include [5]:

1. The seller or merchant or entrepreneur who offers a product through the internet as a perpetrator.
2. Buyers or consumers are people who are not prohibited by law, who accept offers from sellers or business actors and wish to carry out trade transactions of products offered by sellers of business actors / merchants.
3. Banks as channeling funds from buyers or consumers to sellers or business actors / merchants, because in the sale and purchase transactions electronically, sellers and buyers do not deal directly, because they are in different locations so that payments can be made through intermediaries in this case bank.
4. Provider as a provider of internet access services.

Data from Bank Indonesia (BI) states, online shop transactions (e-commerce) in Indonesia on 2018 reached Rp 77.766 trillion. This figure increased 151% compared to the previous year which reached Rp. 30,942 trillion. The data details transactions based on products purchased from online stores as follows [6]:

Goods	Year	
	2017	2018
Gadget & accessories	Rp 8,018 trillion	Rp 16,823 trillion
Fashion	Rp 3,357 trillion	Rp 12,125 trillion
Computer & accessories	Rp 3,672 trillion	Rp 7,814 trillion
Personal care & cosmetic	Rp 2,695 trillion	Rp 7,443 trillion
Electronic	Rp 2,313 trillion	Rp 5,255 trillion
HH & Office Supplies	Rp 1,899 trillion	Rp 4,909 trillion
Automotive & Accessories	Rp 1,581 triliun	Rp 3,739 trillion
Food and beverages	Rp 2,289 trillion	Rp 2,289 trillion
Photography	Rp 1,409 trillion	Rp 2,49 trillion
Sport Apparel	Rp 1,409 trillion	Rp 2,49 trillion
Book & Stationary	Rp 227,4 billion	Rp 689,39 billion
Music and film	Rp 207,2 billion	Rp 453,32 billion
Others	Rp 3,846 rillion	Rp 11,377 rillion

Based on the data above, it can be seen that the e-commerce market in Indonesia has enormous economic potential, so it is necessary to have legal instruments that can guarantee the legal certainty of the parties in it, one of which is to provide protection to consumers by requiring online shop players to register themselves, and the information of the online shop sellers can be accessed by prospective customers so as to prevent the loss experienced by consumers caused by irresponsible online shop traders.

In connection with this, policies or efforts to tackle crime are essentially an integral part of efforts to protect society (social defense) and efforts to achieve social welfare.[7] It can be said that the ultimate goal to be achieved from efforts to tackle crime is to provide protection, security and welfare to the community. Crime countermeasures include preventing activities before they occur and correcting the perpetrators found guilty and sentenced in prison.[8]

This mitigation effort is in accordance with the opinion expressed by G.P. Hoefnagels quoted by Barda Nawawi Arief, where the efforts to tackle crime in general can be divided into two, namely [9]:

1. Penal Path
   Mitigation efforts through this penalty can also be referred to as efforts made through criminal law. This effort is an effort to overcome the emphasis more on the repressive nature, namely the actions taken after the crime occurred with law enforcement and sentencing of crimes that have been committed. In addition, through this penal effort, actions taken in the context of overcoming crime to the stage of coaching and rehabilitation.
2. Nonpenal Pathway
   Mitigation efforts through this nonpenal route can also be referred to as efforts made through channels outside criminal law. This effort is a response that focuses more on the nature of preventive measures, namely actions in the form of prevention before the crime. Through this non-familiar effort, the main goal is to deal with the conducive factors that cause crime, which include social problems or conditions that can directly or indirectly cause or foster crime.

E. Conclusion

Based on the discussion above, it can be seen that the e-commerce market in Indonesia has a huge potential, but on the other hand there are problems where there can still be found alleged fraud committed by online shop traders, so there are regulations governing registration obligations for online shop merchants who provide information related to online shop merchants data are efforts that can be taken in preventing fraud in online business transactions.

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URGENCY OF REFORMULATION LAW NUMBER 24 ON 2011 CONCERNING SOCIAL SECURITY ORGANIZING AGENCY AS AN EFFORT TO PROVIDE PROTECTION FOR LABOR

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ABSTRACT

The form of efforts to fulfill the protection regulated in the BPJS Law is through the obligation of the employer to register his workers as participants to BPJS, but according to the authors of this law there are gaps in the provisions, especially in providing sanctions against employers who do not register their workers only subject to administrative sanctions as stipulated in Article 17, whereas employers who do not pay BPJS participant contributions for their workers are subject to criminal sanctions provided for in Article 55 of this law. Whereas employers who did not pay BPJS participant contributions are subject to criminal sanctions, as provided for in Article 55. So according with the existence of this provision, it has the potential to be detrimental to the workforce, because employers who do not register their workers will only be subject to administrative sanctions. This study is a normative juridical research, where the data used in this study is secondary data in the form of books, legislation, documents and other writings relating to the problems under investigation. Based on the results of the study revealed that Provisions in the Law on BPJSdoes not fulfill a sense of justice, and does not encourage employers who have not registered themselves and their employees in the BPJS participant program, because the risk of the threat of sanctions if violating the obligation to register is lighter than the threat of criminal sanctions in arrears in contribution. So in this case it is necessary to make changes to this provision so that this BPJS law can play a role in encouraging progress in employment development in Indonesia

Keywords: *Law Reformulatin, Labor Protection, Law Concerning BPJS*

Background

Indonesia is a country with a large population where currently the population in Indonesia ranks number four in the world with a total of more than 250 million people. With the large number of population owned by Indonesia, it certainly provides a challenge to the government in the rank of fulfilling protection for all Indonesian people, one of which is the provision of protection for labor as a form of employment development in Indonesia. Labor development as an integral part of national development based on the 1945 Constitution of the Republic of Indonesia is carried out in the context of the development of Indonesian people as a whole and the development of Indonesian society as a whole to improve the dignity, dignity, and self-esteem of workers and to create a prosperous, fair, prosperous and equitable society both material and spiritual.[1]

In accordance with Law Number 40 of 2004 concerning the National Social Security System (SJSN) and Law Number 24 of 2011 concerning Social Security Organizing Bodies (BPJS), BPJS Employment is a non-profit legal entity. Being a BPJS Employment participant is not only mandatory for workers in the formal sector, but also informal workers.

The Manpower Social Security Organizing Agency (BPJS) provides protection for workers to overcome certain risks and the implementation uses a social insurance mechanism. As a State-Owned Enterprise engaged in the field of social insurance BPJS Labor formerly named PT Jamsostek (Persero) is the implementer of the Mid-Term Social Security Law. So

that in general the formation of social security programs is one of the responsibilities and obligations of the State to provide social economic protection to the community.

The form of efforts to fulfill the protection regulated in the BPJS Law is through the obligation of the employer to register his workers as participants to BPJS, but according to the authors of this law there are gaps in the provisions, especially in providing sanctions against employers who do not register their workers only subject to administrative sanctions as stipulated in Article 17, whereas employers who do not pay BPJS participant contributions for their workers are subject to criminal sanctions provided for in Article 55 of this law. So according to the authors with the existence of this provision, it has the potential to be detrimental to the workforce, because employers who do not register their workers will only be subject to administrative sanctions.

Based on the description, there is an urgency to reform the provisions in Article 17 of Law Number 24 of 2011 concerning the Social Security Organizing Agency (BPJS), so that it is expected to be able to optimize the provision of protection for workers.

A. Problem Formulation

The problem formulation in this study is : What is the urgency of revision of law number 24 of 2011 as an effort to provide protection for labor?

B. Research Method

This study is normative, because it uses secondary data, or often called the research literature. Normative legal research is legal research laying down the law as a system of building norms. Norm system in question is about the principles, norms, rules of legislation, court decisions, agreements and doctrines.[2] Secondary data used in this study include legislation relating labor protection, documents and writings relating to the cases studied.

Methods of data analysis used in this research is descriptive qualitative, meaning authors will present and explain the data obtained from the study of literature, which is manifested in a logical and systematic description. Once the ingredients necessary legal collected, the next step was made an analysis to clarify the settlement of the problem, then the conclusions drawn deductively, from things that are common to the things that are special. At this stage the legal material worked on and utilized in such a way to successfully conclude the truth of which can be used to address the issues raised in the study.

C. Discussion

The function of the state in the economic field, according to W. Friedman, namely as a guarantor (provider) of people's welfare, the state as a regulator (regulator), the state as an entrepreneur (entrepreneur) or run certain sectors through State-Owned Enterprises (BUMN), and the state as referees (umpire) to formulate fair standards regarding the economic sector including state corporations.[3]

The function of the state as a regulator in the effort to provide protection for workers is reflected in Act Number 24 of 2011 concerning the Social Security Organizing Agency, as stated in Article 3, namely:

"BPJS aims to realize the delivery of guarantees to meet the basic needs of a decent life for each Participant and / or family members."

The law on BPJS confirms the obligation towards employers starting with the obligation to register their workers until the obligation to submit the contribution contributions of BPJS workers as stipulated in Article 15 and Article 19, as follows:

Article 15:

(1) The employer must gradually register himself and his Workers as Participants to BPJS in accordance with the Social Security program that is followed.

(2) The employer, in registering as referred to in paragraph (1), is required to provide complete and correct data of himself and his employees and their family members to BPJS.

Article 19

(1) The Employer is obliged to collect contributions which are borne by Participants from his Workers and deposit them to BPJS.
(2) The employer is obliged to pay and deposit contributions which are his responsibility to BPJS.

The irony in this provision is for employers who do not fulfill the obligation to register themselves and their employees in the BPJS program, will only be subject to administrative sanctions as stipulated in Article 17, namely:

(1) Employers other than state administrators who do not implement the provisions referred to in Article 15 paragraph (1) and paragraph (2), and anyone who does not implement the provisions referred to in Article 16 are subjected to administrative sanctions.
(2) Administrative sanctions as referred to in paragraph (1) may be in the form of:
    a. written warning;
    b. fine; and / or
    c. do not get certain public services.

Whereas employers who did not pay BPJS participant contributions are subject to criminal sanctions, as provided for in Article 55, namely:

"Employers who violate the provisions referred to in Article 19 paragraph (1) or paragraph (2) shall be sentenced to a maximum imprisonment of 8 (eight) years or a maximum fine of Rp1,000,000,000.00 (one billion rupiah)."

This certainly does not fulfill a sense of justice, and does not encourage employers who have not registered themselves and their employees in the BPJS participant program, because the risk of the threat of sanctions if violating the obligation to register is lighter than the threat of criminal sanctions in arrears in contribution. So in this case it is necessary to make changes to this provision so that this BPJS law can play a role in encouraging progress in employment development in Indonesia. In connection with this to understand the relationship and interaction between law and development Mochtar emphasizes two things: first, legal issues as a tool of change (development) and; second, the development or development of the law itself. With regard to the first thing Mochtar repeated it with a different editorial, "Regarding the first problem we want here to address the problems we face in developing law as a tool of social engineering".[4] Here again Mochtar places more emphasis on the dynamic function of law as a means of renewing (changing) society without having to leave the governing legal function which in this case Mochtar calls it a conventional (conventional) understanding of law.

The role of law in development is to ensure that changes occur in an orderly manner, the law plays a role through the assistance of legislation and court decisions, or a combination of the two.[5] But the formation of legislation is the most rational and fast way compared to other legal development methods such as jurisprudence and customary law.[6] In this case Mochtar made the legislation as a concrete form and the main means in carrying out community renewal (social engineering). With this change it is expected that the BPJS law can become a tool in achieving legal objectives as described in the standard priority theory, where legal objectives include justice, expediency, legal certainty.[7]

D. Conclusion

Provisions in the Law on BPJSdoes not fulfill a sense of justice, and does not encourage employers who have not registered themselves and their employees in the BPJS participant program, because the risk of the threat of sanctions if violating the obligation to register is lighter than the threat of criminal sanctions in arrears in contribution. So in this

case it is necessary to make changes to this provision so that this BPJS law can play a role in encouraging progress in employment development in Indonesia.

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THE IMPLEMENTATION OF MOTOR VEHICLE APPROPRIATENESS TEST IN LANDAK REGENCY

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ABSTRACT

The purpose of periodic testing of motor vehicles is to provide technical safety guarantees to motor vehicle users, preserve the environment from possible pollution caused by motor vehicle users on the road, providing assurance that motorized vehicles operated on the road have met technical requirements and roadworthiness in order to create transportation land in accordance with the feasibility to be on the road and also so that land transportation customers feel safe, comfortable, fast, and orderly so that they have more confidence in the means of transportation used. However, in its implementation there are some deficiencies in the periodic testing of motorized vehicles in the Landak Regency, as illustrated in the data of the Landak Regency Transportation Department with the presence of vehicles that have not yet undergone periodic feasibility tests. This study is a normative juridical research, where the data used in this study is secondary data in the form of books, legislation, documents and other writings relating to the problems under investigation. Based on the results of the study revealed that Periodic vehicle testing is a very important thing to do as a requirement of vehicles operating on the road, but in Landak Regency, there are still vehicles that operated without periodic motor vehicle feasibility testing. As for the obstacles encountered in the vehicle testing process, including inadequate facilities and infrastructure and limited human resources in terms of public services testing motor vehicles.

Keyword: *Periodic Motor Vehicles Test*

Background

Responding to the United Nations Resolution Number 64/255 dated March 10, 2010 concerning Improving Global Road Safety through the Decade of Action for Road Safety Program 2011-2020, the Government of the Republic of Indonesia was determined to be one of the pillars of a Safe Vehicle, focusing on:

1. Implementation and Improvement of Periodic and Type Test Procedures;
2. Speed Limitation on Vehicles;
3. Overloading;
4. Vehicle Removal (Scrapping);
5. Establishing Public Transportation Vehicle Safety Standards;

The purpose of periodic testing of motor vehicles is to provide technical safety guarantees to motor vehicle users, preserve the environment from possible pollution caused by motor vehicle users on the road, providing assurance that motorized vehicles operated on the road have met technical requirements and roadworthiness in order to create transportation land in accordance with the feasibility to be on the road and also so that land transportation customers feel safe, comfortable, fast, and orderly so that they have more confidence in the means of transportation used.

Traffic Safety and Road Transportation is a condition that avoids everyone from the risk of accidents during traffic caused by humans, vehicles, roads and / or the environment. The issue in the field of transportation is the problem of traffic accidents and environmental

problems, where one of the factors that influence traffic accidents is the condition of the vehicle.

Types of road transportation in the form of public transportation must be able to move people or goods safely to the destination. Guaranteeing the feasibility of passenger vehicles or goods (public transportation, buses, trucks) that are on the road should be monitored by the government which is carried out through the test kir (periodic testing). The periodic tests conducted by the government of the Republic of Indonesia are based on Republic of Indonesia Law Number 22 on 2009 concerning Road Traffic and Transportation, Republic of Indonesia Government Regulation Number 55 on 2012 concerning Vehicles, and technically thereafter stipulated Regulation of the Minister of Transportation of the Republic of Indonesia Number: PM 133 on 2015 concerning Periodic Testing of Motor Vehicles. Article 4 Regulation of the Minister of Transportation of the Republic of Indonesia Number: PM 133 on 2015 concerning Periodic Testing of Motorized Vehicles, states:

(1) Public passenger cars, bus cars, freight cars, trailer trains and patch-operated trains that operated on the road must be tested periodically.
(2) Periodic Testing as referred to in paragraph (1) consists of:
    a. vehicle registration mandatory periodic testing;
    b. first periodic test; and
    c. periodic testing for the extension period.

Based on this description, the Landak Regency Transportation Office has the duty to supervise the eligibility of each test compulsory vehicle operated in Landak Regency for traffic safety, make contributions deposited to the local treasury, create social order, security and natural comfort of traffic, reduce accident rate, etc. However, in its implementation there are some deficiencies in the periodic testing of motorized vehicles in the Landak Regency, as illustrated in the data of the Landak Regency Transportation Department with the presence of vehicles that have not yet undergone periodic feasibility tests.

A. Problem Formulation

The problem formulation in this study is : How is the implementation of motor vehicle feasibility testing in Landak Regency ?

B. Research Method

This study is normative, because it uses secondary data, or often called the research literature. Normative legal research is legal research laying down the law as a system of building norms. Norm system in question is about the principles, norms, rules of legislation, court decisions, agreements and doctrines.[1] Secondary data used in this study include legislation relating to motor vehicle feasibility testing, documents and writings relating to the cases studied.

Methods of data analysis used in this research is descriptive qualitative, meaning authors will present and explain the data obtained from the study of literature, which is manifested in a logical and systematic description. Once the ingredients necessary legal collected, the next step was made an analysis to clarify the settlement of the problem, then the conclusions drawn deductively, from things that are common to the things that are special. At this stage the legal material worked on and utilized in such a way to successfully conclude the truth of which can be used to address the issues raised in the study.

C. Discussion

Hardiyansah defines that service can be interpreted as an activity given to help, prepare and take care of either goods or services from one party to another.[2] Service is

essentially a series of activities, therefore the service process takes place routinely and continuously, covering the entire life of the organization in society. The intended process is carried out in connection with meeting the needs of recipients and service providers. In terms of public services, one that puts forward its definition is Agus Dwiyanto, who defines public service as a series of activities carried out by public bureaucracy to meet the needs of citizens.[3]

Motorized vehicle testing is often also called motorized vehicle test, in PM No 133/2015, motorized vehicle testing is defined as a series of testing and / or checking activities carried out by examiners on the parts of motor vehicles, trailer trains, patch trains and special vehicles in in order to meet the technical requirements and roadworthiness. The motor vehicle testing service here concerns about vehicle worthiness on the road and motor vehicle maintenance carried out by the Regional Government in this case the Transportation Agency. Motorized vehicles are vehicles that are driven by technical equipment where the equipment constitutes an integrated system consisting of a runway frame, motor drive parts, power transmission devices, vehicle bodies, brake devices, suspension / wheel devices, steering gear along with electricity that hold each other orderly interrelation. As for the number of vehicles in the Landak Regency which are required to have a feasibility test in 2016-2018, can be seen in the following table[4]:

Table 1

Year	Motor Vehicle		
	Must be Tested	Get Tested	Not Tested
2016	2028	1923	105
2017	2102	1665	437
2018	2408	1980	428

From the table above it can be seen that in Landak Regency, parts of the Republic of Indonesia there are still many vehicles operating which are not subject to periodic motor vehicle eligibility tests. In 2016 vehicles that were required to be tested were 2028 vehicles but those that were tested were only 1923 vehicles while the remaining 105 were not tested as worthiness, in 2017 vehicles were required to be tested as many as 2102 vehicles but only 1665 vehicles were tested while the remaining 437 were not tested as feasibility and years 2018 vehicles were required to be tested for a number of 2408 vehicles but only 1980 were tested for eligibility while the remaining 428 were not tested. If presented, in 2018 there were 18% of vehicles that were not tested for eligibility, whereas in 2016 only 5% of vehicles were required to be tested but not tested.

Physical inspection and testing of public passenger cars, bus cars, freight cars, special vehicles, trailer trains and patch trains include testing of technical requirements and roadworthiness. In accordance with the provisions in force in the Republic of Indonesia, tests of roadworthiness requirements carried out at least include:

1. Motor Vehicle exhaust emissions;
2. noise level;
3. main brake ability;
4. parking brake capability;
5. front wheel blades;

6. main light emitting ability and direction of light;
7. accuracy of speed indicators; and
8. tire groove depth.[5]

The length of time required for registration of a Motorized Vehicle to be tested for eligibility is 5 minutes, and the time required for testing in the test building is around 20 minutes. The worthiness test fee for each vehicle is Rp. 75,000.00 - Rp. 85,000.00 depending on the type of vehicle being tested. The feasibility test focuses on the physical condition of the vehicle, lights, brakes and exhaust emissions.[6] The Purpose of Testing of Motorized Vehicles is periodically motorized vehicles to provide a guarantee of technical safety for the use of motorized vehicles, trailers and patch trucks on the road; support the realization of environmental sustainability from the possibility of pollution caused by the use of motorized vehicles, trailers and patch trucks on the road; and provide public services to the community.[7]

There are several obstacles in the implementation of Motorized Vehicle Testing at the Landak Regency Transportation Office including the service building and registration window system to test motorized vehicles that have not been made separately. Efforts made to overcome obstacles in the implementation of Motorized Vehicle Testing include making improvements in motor vehicle testing services, but constrained by budget problems. As for fulfilling the examiners, the Landak Regency Transportation Office held a nursery pattern, while to complete the budgeting equipment, coordinated with the Banggar section. Test equipment owned in the Landak Motor Vehicle Testing including test equipment owned: brake test equipment, main light test equipment, weighing test equipment, wheel wheel test equipment, sepedo meter test equipment, co / hc test equipment, thickness test equipment smoke, horn / sound test equipment ,pot thickness gauge. Facilities and infrastructure that are owned in the Landak Regency Motorized Vehicle Testing are administrative space, test building, parking lot of tested vehicles, mosaics, car wash, toilet and generator room.[8]

Furthermore, based on the Regulation of the Minister of Transportation Number PM 156 Year 2016 concerning the Competency of Periodical Vehicle Drivers regarding the classification of the position of motor vehicle testers based on education and training requirements, work experience, skill level and expertise, authority, and based on rank / class of space from its staffing status to 8 (eight) position groups, but there are only 4 conditions in the Landak Regency Transportation Office, 3 (three) examiners and 1 (one) person as admin.

D. Conclusion

Periodic vehicle testing is a very important thing to do as a requirement of vehicles operating on the road, but in Landak Regency, there are still vehicles that operated without periodic motor vehicle feasibility testing. As for the obstacles encountered in the vehicle testing process, including inadequate facilities and infrastructure and limited human resources in terms of public services testing motor vehicles.

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GENDER EQUALITY RECONSTRUCTION PERSPECTIVE OF HUMAN RIGHTS CONTEXT

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ABSTRACT

The journey of drafting the Gender Equality and Justice Law (RUU KKG) in Indonesia has drawn a variety of pros and cons, both men and women, this bill is important to discuss because there are still many cases of gender injustice that often occur in Indonesia, which in general women become victims. The purpose of this research is to realize equality and rebuild education as part of a cultural movement (cultural force). Fulfillment of Human Rights (HAM) and implementation of CEDAW (Convention on the Elimination of All Forms of Discrimination Agains Woman), political will and real action need to be done so that in the future, women can advance together and feel the same treatment as other citizens (men), because actually women are also human beings who have human rights. The method used in this research is the statutory approach and the conceptual approach. The legislative approach is intended to find the basis for relevant rules while the conceptual approach is carried out to examine the views and doctrines that develop and are relevant to the problem under study. Legal certainty refers to the implementation of clear, permanent, consistent and consistent law. Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights (HAM) mentions the rights of women which is essentially the equality and equality of life of women with men, as contained in Articles 45 to 51, starting from equal rights in elections and appointment in its representation in the executive, legislative and judicial fields. The conclusion of this research is that women's rights have not yet been fully enforced, authoritarian power, namely gender inequality that is allowed to continue, violence against women has not become a central issue of society. Almost all laws and policies issued are directed to pursue economic growth and create national stability. However, the legal system of laws and policies that regulate women's rights in Indonesia cannot be realized in accordance with the law.

Keywords: *Equality, Gender, Human Rights.*

A. Introduction

Gender differences do not really matter as long as they do not give rise to gender inequalities. However, the problem is, it turns out that gender differences have given birth to various injustices, both for men and especially against women. Gender inequality is a system and structure in which both men and women are victims of the system. Gender injustice is manifested in various forms of injustice, such as: Marginalization or the process of economic impoverishment, subordination or perceived insignificance in political decisions, the formation of stereotypes or through negative labeling, violence, longer workloads and burdens, and the socialization of ideological values of gender roles. The Gender Equality and Justice Law (RUU KKG) has drawn a variety of pros and cons from both men and women, this bill is important to discuss because there are still many cases of gender injustice that often occur in Indonesia, which in general women become victims. Although currently the government has issued Presidential Instruction (Inpres) No. 9 of 2000 concerning Gender

Mainstreaming in National Development, but its legal status is still considered too low, does not have sufficient legal force to establish gender equality and equality, and seems to only run in place. The Ministry that runs the Inpres also does not have the power to run it. One of the aims of this bill is to increase women's participation in various aspects, but men are also subject to this law. This law opens equal opportunities for both men and women. So, if at one point women were more dominant, this Law would also be corrected. Gender Equality is a problem that has been discussed globally since one hundred years ago, to reduce gender inequality and injustice among people. Commitment to reduce gender inequality applies to all aspects of human life including education, economy, politics, social and culture. The importance of the discussion is even one of the eight points of international commitment through the Millennium Development Goals (MDGs) promoted by the United Nations (UN).

The emergence of attention in gender issues is in accordance with the development paradigm shift from the security and stability approach (security) to the welfare and equality approach (prosperity) or from the production approach to humanity in a more democratic and open atmosphere. Strong relationships with social and cultural development that are rooted in society limit the achievement of gender equality and justice. But with hard struggle and continuous effort, gender ideologies that tend to bring harm to one sex will be successfully eliminated. In conclusion, if motivation occurs among the community, does this show that our society is able to make it happen? One of the Millennium Development Goals (MDGs) agreements is also an international commitment.

In the explanation of the 1945 Constitution of the Republic of Indonesia it states that the Indonesian State is a state based on law (rechstaat) not based on mere power (machstaat). The name of the rule of law has a very important meaning and meaning to guarantee public order and security, the meaning of the words in the explanation of the 1945 Constitution, among others, is that state power is limited by law and based on law, so it is not based on one's power. The aim is that people's interests and human rights can be guaranteed against the arbitrary actions of the authorities. The law in question must be able to reflect justice and protection of equal rights between individual interests and the interests of the people (community). In the 1945 Constitution states, article 27 (1) All people have the same position before the law. From this article we can understand that there are no acts of discrimination between men and women, all receiving equal treatment before the law.

Research purposes

The purpose of this research is to realize equal rights in obtaining justice and rebuilding education as part of the cultural movement. To guarantee the fulfillment of human rights and the implementation of CEDAW (Convention on the Elimination of All Forms of Discrimination Agains Woman), it is necessary to have political will and real action so that in the future, women can move forward together and feel the same treatment as citizens others (men), because actually women are also human beings who have human rights.

Research methods

Research Type, This research is a normative legal research or doctrinal legal research whose assessment is based on a collection of materials derived from primary legal materials or secondary legal materials relating to the object of research. Research Approach, Sources of legal materials used are: Law No. 39 of 1999 concerning Human Rights, Presidential Instruction (Inpres) No. 9 of 2000 concerning Gender Mainstreaming in National Development, Other legal sources come from research journals, legal dictionaries and other legal materials related to the object of research. Legal Material Collection Procedure,The collection of legal materials used is the study of literature with reference sources relating to consumer protection laws and sources from the internet and print or electronic media that support research. Legal Material Analysis, The legal material that has been reviewed will be analyzed and identified, then the subject matter is determined objectively and systematically.

B. Context of Upholding Human Rights

Evidence of women's limited human rights can be objectively calculated. Statistics from the United Nations reinforce this statement. Women are one of the first victims of unfair development patterns. Keep in mind, the Universal Declaration of Human Right is far broader than ideal. The narrowing of the interpretation that occurs indicates an indication of intentional or inadvertent manipulation (by men), so that many human rights concerning economic and social rights are ignored. Although gender relations are within the private sphere, in reality the state increasingly plays a role in regulating personal life through taxation, social security, immigration and national law, hunting regulations in addition to the Marriage and Family Law. In Indonesia, since the establishment of the Republic, it is explicitly stated in the 1945 Amendment regarding the existence of equal rights and obligations between men and women, including in: Article 27 Amendments to the 1945 Constitution: Every citizen has the right and duty to participate in efforts to defend the state. Article 28: Everyone has the right to live and defend his life and lives.

The new Law No. 39 of 1999 concerning Human Rights also mentions women's rights which are essentially the equality and equality of life of women with men, as contained in Articles 45 to 51, starting from equal rights in elections and lift in representation in the executive, legislative and judicial fields, equal rights in obtaining education and teaching in all fields, gender equality and special protection in the performance of work and equality in matters of marriage. Also in this new Law on Human Rights is the National Commission on Violence against Women.

In the legal system of legislation and policies governing women's rights in Indonesia, especially since the new order is inseparable from the economic and political interests of the government. As it is known to rebuild the country's economy that went bankrupt in the old order, the government intensively conducted various programs to pursue economic growth in political stability as its main prerequisite. Almost all laws and policies issued are directed to pursue economic growth and create national stability. The assumption that men are breadwinners and women are housewives whose lives are supported by their husbands are also used in employment policies, especially regarding wages and prohibition of employers from employing women at night in dangerous places.

But in the field of employment, violations of the rights of women workers, such as the provisions regarding wages, working hours, the provision of shuttle services, occupational health and safety, as well as violations and manipulations of menstrual leave, pregnancy and childbirth often occur. Besides that they also often experience violence in the form of sexual harassment by both male colleagues and employers. Though this kind of thing has been regulated in new legislation namely Law No. 39 of 1999 concerning Human Rights. Article 49 (2) which reads: Women have the right to get special protection in the implementation of their work or profession against matters that threaten their safety and or health with regard to women's reproductive functions. Article 49 paragraph (3) which reads: Special rights inherent in women due to their reproductive function, guaranteed and protected by law.

The condition of women in Indonesia due to the prolonged economic crisis? in other countries, research shows the economic crisis has led to the feminization of poverty (Féminisation of Poverty), which is a condition that shows the deteriorating conditions of women's lives as a result of the economic crisis, so that poor women become poorer, the number of poor women becomes increasingly increased, and when compared to men, women were the poorest group both quantitatively and qualitatively.

With all the backwardness it has, it is not impossible that the economic crisis will cause Indonesian women to suffer the same fate, even worse than their counterparts in other countries. For example, the looting incident which was followed by acts of sexual harassment, especially the rapes experienced by many ethnic Chinese women, which were widely reported

in the media a few years ago, further add to the burden of suffering that must be borne by women, not only the victim, but other women in the form fear and anxiety such tragic events will also befall him. Indications of increased crime in the form of mugging and robbery in the streets, markets and public transportation are starting to appear and women are always the main victims. All that will further narrow the space for women to survive in a crisis situation like this.

From the above, the author concludes that the implementation process of human rights failed.This is due to the facts that:

1. The condition of the people who are still suffering from poverty, so they are unable to meet human rights demands such as equality before the law and government.
2. Many human rights values conflict with customary law and religious law.
3. Gender discrimination does not always have a bad connotation.
4. Erroneous implementation of human rights, the rights of criminals or perpetrators are more indicated than victims.

It is well known that reform in the field of law faces significant obstacles and limitations. The heterogeneity of Indonesian society has added to the existing political and ideological constraints. Incorporating women's agendas into all plans for change will be a challenge in itself given the highly patriarchal structure of society. Increasing the representation of women in decision-making institutions, especially those that have a wide impact on women, is a necessary thing to do. To accelerate the affirmative action policy must be applied in all aspects of life.

C. Closing

Based on the discussion above, the following conclusions can be drawn: From the various problems experienced by women as illustrated above, it shows that women's rights are still not fully enforced, even though various international legal systems have been ratified and many national legal products that guarantee the rights women are already widely available. Authoritarian power, gender inequality that is allowed to take place or rapid social change are the causes of various violations of human rights, including women's human rights. The basic thing is the problem of removing the causes of female subordination. As long as patriarchal ideology and socio-cultural values that are gender biased tend to discriminate against women and continue to be deeply rooted and live in society, women will always be in a backward, suffering, poor and persecuted situation.

The process of implementing the concept of human rights in legislation turned out to have failed in its application which is due to: a. The condition of the people who are still under the suffering of poverty, so they are unable to meet H AM's demands such as equality before the law and government, Many human rights values conflict with customary law and religious law, c. Gender discrimination is not always clearly connoted. d. Errors in the application of human rights are aimed more at the rights of criminals or perpetrators than victims of crime. It turns out that in this modern life violence against women has not become a central issue of society to be prevented and tackled. There are several reasons, namely, First: The issue of human rights is still regarded only as a public problem so violence against women committed in the domestic sector is not considered a violation of human rights. Second: Community perception is no exception to the community of women themselves about violence against women is still limited to physical violence (rape). Third: Violence against women is still seen as a problem between individuals, and has not been seen as a problem related to all forms of torture, violence, cruelty and neglect of women's rights as God's creature. Fourth: There is a dangerous symptom of cynicism in some societies that violence against women is seen as a cause that is raised by women themselves.

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STANDARDIZATION EFFORT OF LABOR WAGE TO INCREASE TO IMPROVE LABOR WELFAREIN IN INDONESIA

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ABSTRACT

Labors wage is an inseparable part from their life. The minimum wage policy which has been implemented by the government is not the best policy, because most labors' lives arestill not growing enough to be stated welfare families but it is in underprivileged families' level based on government policy category. Based on these conditions and facts, it is feasible to make change to the minimum wage policy. One of the effort to improve the welfare of labor is making standardization of labors wagein Indonesia. The standardization of labors wage is expected to be a tactical solution in an effort to improve labors' welfare.Although many obstacles and challenges will be faced, but the government must have the courage to make this effort. This study uses normative legal research with a research approach to the principles of law. Data collection techniques are obtained in the form of secondary data that is carried out by means of library research and uses qualitative analysis.

Keywords: *standardizatio, labors wage, increasing, welfare.*

Introduction

Every 1st May each year during the commemoration of World Labor Day, then on that date also the laborers rallied to demand an increase in wages to the government. Laborers feel that the wages they receive today are actually insufficient to meet their daily needs. Labor's lives are exacerbated by the uncontrolled increase in the prices of goods, so that with such a small wage, labor life is increasingly difficult.

The government itself comprehends of the situation and conditions, the proof is that every year the government together with the Central and regional Wage Councils always increase labor costs, even though it is not as requested by labors. Many components are the basis of the government's consideration in making policies related to labor wages. For example, the company's financial condition, the cost of living needs in each region that is not the same.

Initially the minimum wage policy was set based on the cost of minimum physical needs (MPN). When regional autonomy is determined, in determining the amount of the minimum wage level the basic considerations are: a) Minimum Life Needs cost (MLN), b) Consumer Price Index (CPI), c) inter-regional minimum wage level, d) growth capability and sustainability of the company, e) labor market conditions, and f) economic growth and per capita income (Pratomo, Saputra, 2011: 270).

Different wage standards in each region naturally cause injustice for laborers, while the needs and costs of living between regions are almost the same. The consequence is that laborers never get the welfare of life that should be accommodated by the state. On the other hand, the government is able to provide state civil servants with a salary that is evenly distributed throughout Indonesia, although it is distinguished from rank/class.

Based on the current conditions , it is necessary to formulate how to standardize labors wage an effort to improve the welfare of labors in Indonesia, by using the concept of a welfare state.

B.Review of literature

Working is the main way of labor to gain wage in the other hand it is their right. The wage is earned to fulfill life's need must be appropriate for humanity category so that the wage plays important role and the characteristic of labourer relationship is thecontract between employer and labor. Therefore, the government must involve in handling wage through policy issues.

Law Number 13 of 2003 Concerning Manpower defines wage as labors' rights which are received

and expressed in the form of money in return from employers or employers for workers/laborers whose amount is determined and paid according to a work agreement, a dealor laws and regulations, including allowances for labors and their family for a job and or service that has been performed or will be performed. Whenvarious labor problems are strongly examined that have existed and occurred nowadays, the main problem is about to effort in fullfilement the needs of lifewhich is constitution named as 'livelihood' (hajat hidup). This matter becomes constitutional rights for Indonesian citizen which the constitutional rights included in the constitution will be part of the constitution itself, so that all branches of state power must respect it (Kodiyat, 2019).

According to the perspectives of Kusumaatmadja and Sidharta, the suffering of labors is exacerbated by the fact that the existing of manpower lawsarecolonial products which placed labor as an object; as an object or as one of the factors of production, thus placing of labors at a disadvantage in the service of employment and industrial relations systems that emphasize their position unlickly, so that they are no longer in line with labor development in Indonesia. Placing labors as objects or only as factors of production is not ideal, but must place them as subjects, as an agent in the production process and as a private person with all his dignity and values.(Kusumaatmadja, Sidharta, 2000).

C.Research Methodology

This study uses normative legal research with a research approach to loegal principles .Normative legal research is research which is the source of the data is from secondary data (Asmadi,2019).

The data collection techniques are carried out by means of library research or library research in the library of relevant written legal materials.

The procedure of library data collecting used secondary data (library research) that is library Research or document study used to obtain theoretical foundations in the form of opinions or writings of experts or other authorized parties and also to obtain information both in the form of formal provisions and data through the official text available. To analyze data collected from library research, this study uses qualitative analysis.

D.Research Finding and Discussion

1.The Relations between Labor and Wage

Many terms can provide descriptions relating to people who work in an agency or institution. Some call it the term labors who connotes people who work in factories. There are also those who use the term employees or employees who are connoted with people who work in offices with higher education and well dressed. Another term that relates to a worker is labor which is often relied on by people who work abroad both male and female.

In Sedarmayanti's view that what is meant by laborers are indigenous people of working age (15 years and above) or 15-64 years, or potential residents can work to produce goods and services if there is demand for their labor and if they want to participate in these activities. (2016). According to the Big Indonesian Dictionary, labors are people who work for others with a salary. (Editorial Team of the Big Indonesian Dictionary Language Center, 2008)

According to Law Number 13 of 2003 concerning Manpower (hereinafter written UUTK) in Article 1 number 2, states that what is meant by labor is "everyone who is able to do work to produce goods and/or services both to meet their own needs and to society ". In another level, labor is an inseparable part of the main wheel of the Indonesian economy (Hakim, Ispriyarso, 2016). Worker is the most important company asset in an effort to achieve company goals. (Indriyani, 2014)

According to Husni, wages play a very important role in an employment relationship (employment agreement) (2010). Wages are a means used by workers to improve their welfare (Wijayanti, 2010). Wages are one of the important indicators for assessing the life of workers/employees/labor. (Budijanto, 2017)

According to Article 1 number 30 UUTK what is meant by wages is the rights of workers/laborers received and expressed in the form of money in return from employers or employers to workers/laborers who are determined and paid according to work agreements, agreements, or legislation, including benefits for workers/laborers and their families for work and or services that have been or will be performed".

Limitation on wages according to the Wage Board is that the wage is an acceptance as a reward from the employer to the recipient of work for a job or service that has been or will be done, which serves as a guarantee of decent survival for humanity and production, expressed or valued in the form money that has been determined according to an agreement of laws and regulations and is paid on the basis of an employment agreement between the employer and the work recipient. (Kartasapoetra, et al.: 1994)

Wages for workers/laborers are needed to meet their needs and maintain their survival and their families. Policies and arrangements for the distribution of wages, must be done fairly in accordance with applicable regulations. The legal provisions regarding wages are contained in the 1945 Constitution in Article 27, which states:

(1) Every citizen has the same position in law and government;
(2) Every citizen has the right to work and a decent living for humanity ".

According to Ismail Sunny responding to Article 27 paragraph (2) above is a constitutional paper or a semantic constitutional by recognizing the right of citizens to get work, then in fact the Indonesian people have proclaimed themselves to decide to eliminate unemployment, so the state dares to include the article in its constitution. (Sunny, 2004)

Determination of the amount of wages is adjusted to the applicable minimum wage standard. In the nature of employment relations, although formally the relationship between workers and employers is the same before the law, but sociologically it is not. (Trimaya, 2014)

When examined more closely the various labor problems that exist and have occurred so far, the problem stems from a main problem "efforts to meet the needs of life" which in the 1945 Constitution is known by the term "livelihood". Problems of meeting basic needs, such as food, clothing, and shelter; as well as services such as education, health, and security are the main root causes as well as factors which later become important employment issues.

In order to fulfill their daily needs and their families, the laborers do their work based on what is their responsibility in accordance with the work agreement, but what often happens is that the laborers do not get wages that are in accordance with their workload. The impact is that the necessities of family life are certainly not met. Workers or laborers in the regulations

in force in Indonesia have the right to obtain work, the right to wages in accordance with the agreement, to be treated well and humanely, both in the work environment, the right to social security. (Pertiwi, 2017)

Many problems cause labor dissatisfaction in wages, among others the slow implementation of wage payments, the existence of various wage deductions for the needs and interests of workers without the consent of laborers, the will of the laborers so that their wages are equated with better wages than other companies. The various problems experienced by laborers are actually classic problems that have existed for a long time, but remain "nurtured" by both lawmakers and employers, so laborers/workers are always on the losing side.

The low wage of labor in Indonesia is due to the fact that some employers and even lawmakers still view workers/laborers as limited to an instrument of production in an economic system. With a minimum wage and although it has increased every year, it is still adjusted to the people's purchasing power. The problem is that the percentage increase in wages does not have a strong correlation with the increase in the living needs of workers and society in general (Iskandar, 2004)

According to the perspectives of Kusumaatmadja and Sidharta, the suffering of the laborers was exacerbated by the fact that the existing laws and regulations in the field of employment that had prevailed so far, were colonial products, which placed human labor as an object; as an object or as one of the factors of production, thus placing workers at a disadvantage in the service of employment and industrial relations systems that emphasize their position and interests, so that they are no longer in line with labor development in Indonesia in the future. Placing workers as objects or only as factors of production is not ideal, but should place workers as subjects; as an agent in the production process and as a private person with all his dignity and values (Kusumaatmadja, Sidharta, 2000)

The suffering of the workers/laborers was apparently not over when the regulations derived from colonial products were replaced with more "Indonesian" laws. When examined in depth, the statutory regulations related to wages, namely the Labor Law, apparently also do not provide the concept of minimum wages, the concept of decent living, the concept of wage protection, and wage safety nets. According to the Labor Law, the minimum wage provisions must be obeyed by all companies in Indonesia, although the capabilities and conditions of these companies are certainly different from one another, be it micro companies, small companies, medium companies and large companies. These provisions will certainly affect the level of company compliance related to minimum wages. (Yetniwati, 2017)

Wages for economists are determined based on the level of living needs, other economists set wages based on marginal productivity provisions. Conventional economic theory, wealth will increase with the increase in skills and efficiency of the workforce, in line with the percentage of the population involved in the production process. Based on this, the economic welfare of each individual depends on the comparison between total production and the number of occupations or what is currently known as real income per capita. (Abha, 2013)

Adam Smith said that the biggest money payments to finance production and distribution were 3 (three), namely wages, rent and profit. Labor’s wages cannot therefore be paid in full as much as the real value of the product they produce, because part of the real value must be provided for profit. This means that profit is an absolute element of a production. (Abha, 2013)

In a capitalist perspective, reasonable wages are the minimum cost of living. The capitalist will increase the wage, if the burden of his life increases to the minimum limit. The capitalist will reduce it if the burden of his life is reduced. Based on these conditions, the exchange rate of a worker is determined based on the burden of his life without regard to services provided by a person. (Abha, 2013)

The socialist in evaluating an item must be equal to the costs of producing the item, which includes labor costs in the form of natural wages. (Abha, 2013). Karl Marx as one of the pioneers of socialist thought states that the excess value of the labor productivity of workers over natural wages as surplus value, which is only enjoyed by the owners of capital. The smaller the wages paid to the workers, the greater the more value enjoyed by the owners of capital, which according to Marx means the exploitation or exploitation of the owners of capital over the workers. (Magnis, 1999)

2.Determination of Wages in Various Legislation in Indonesia

The issuance of Law No. 13 of 2003 concerning Manpower is the answer to questions related to the government's political will in the field of labor law which actually has a noble purpose for legal protection of workers in:a.Empower and utilize the workforce optimally and humanely;b.Achieve equal opportunity employment and the provision of labor in accordance with national development needs in accordance with development and regional needs;c.Provide protection to workers in realizing welfare; d.Improving the welfare of the workforce and their families.

One important issue that never stops to be discussed is the issue of wages. The wages received by workers/laborers to this day, have not been able to provide welfare, so workers/laborers still live on a mediocre basis. The many protests from the workers/laborers made the government issue regulations related to the wage system.

In accordance with the mandate of Article 97 of Law Number 13 of 2003 concerning Manpower, on October 23, 2015 Government Regulation No. 78 of 2015 on Wages was established. This Government Regulation is one of the government agendas in order to provide protection for the rights of wages for workers/laborers and provide business certainty for employers and to realize fair remuneration. (Motherland, 2017)

It turns out that Government Regulation No. 78 of 2015 concerning Wages, is in favor of employers and is detrimental to workers/laborers. The Confederation of Indonesian Trade Unions (CITU) eventually demanded that the Government revoke the Government Regulations (GR). The reasons proposed by CITU are: first, the establishment of GR No. 78 of 2015 does not involve Tripartite, so that it conflicts with ILO Convention No. 144 of 1976 and the provisions of Law Number 11 of 2012 (Yetniwati, 2017). In establishing legal norms in labor legislation, it should pay attention to ILO Convention Number 144 of 1976 regarding Tripartite Consultation to Improve the Implementation of International Labor Standards which have been ratified by Presidential Decree No. 26 of 1990 dated 18 June 1990. The protest carried out by the KSPI constitutes a fairness because the government has violated the "principle of openness", as stipulated in Law Number 11 Year 2012. Second, substantially the provisions of Government Regulation Number 78 Year 2015 apparently only consider the rate of inflation and economic growth but do not pay attention to the necessities of decent living (NDL) workers per year in setting the Provincial Minimum Wage every year (Yuliandri, 2007).

The minimum wage is the lowest wage for workers/laborers at the lowest level, in a work period of less than 1 (one) year, so workers/laborers who have a higher level or a period of more than 1 (one) year should receive wages greater than the minimum wage. For this reason, it is necessary to have a salary scale for company workers. (Budiyono, 2007)

According to Article 88 Paragraph (4) of the Manpower Law it is determined that "the Government sets the Minimum Wage as referred to in paragraph (3) letter (a) based on the necessities of a decent life and by observing productivity and economic growth". In setting the Minimum Wage in accordance with Article 89 paragraph (1) and paragraph (2), it is divided into 2 (two), namely: (a) Based on the Province or Regency/City; (b) Based on

sectors in the Province or District/City which are directed towards the achievement of the needs for decent living".

Still in Article 88 in paragraph (4) it is determined that "the Government shall determine the Minimum Wage as referred to in paragraph (3) letter (a) based on the needs of a decent living and by taking into account the productivity and economic growth." The determination of the Minimum Wage is in accordance with Article 89 paragraph (1) and paragraph (2), divided into two namely (a). Based on the province or regency/city, (b). Based on the sector in the province or district/city which is directed towards the achievement of the needs for decent living".

The stipulation of the Minimum Wage is carried out by the Governor as determined in Article 89 paragraph (3) "the minimum wage as referred to in paragraph (1) is determined by the Governor taking into account the recommendations of the Provincial Wage Board and/or the Regent/Mayor". Paragraph (4) "the components as well as the implementation of the stages of attaining a decent living need are regulated by Ministerial Decree".

Wage policy in Indonesia refers to living standards for workers. Law of the Republic of Indonesia Number 13 of 2003 concerning Manpower stipulates that the minimum wage is only based on the standard of living necessities. Article 1 paragraph (1) of the Regulation of the Minister of Manpower Number 1 of 1999 defines the minimum wage as "the lowest monthly wage which includes basic salary and fixed allowances ...".

3. Wages Standardization to increase Laborers subssistence and Welfare

Policies issued by the Government related to minimum wages, in fact many violated by employers. The minimum wage originally intended for workers who are new to work, apparently in fact given to workers who have long worked. The employer's interpretation of the minimum wage policy has led to protests from many laborers/unions.

The minimum wage policy is actually only beneficial for employers, but it is detrimental to laborers/workers. Employers with economic principles certainly try to outsmart the rules, so that the wages paid to workers are limited to the payment of the minimum wage. The impact is that the welfare that is so desired by the workers is still far from expectations, so that most workers and their families are still on the underprivileged family scale.

According to neoclassical economic theory that the minimum wage will in fact increase the income gap rather than reduce it. The minimum wage will cause non-market factors to play a role in determining the minimum wage limit in the labor market, which increases the price of labor. Finally, with rising labor prices, the minimum wage results in a reduction in labor demand and some workers will become unemployed (Sungkar, et al., 2015). On the other hand, it shows the urgency of the value of decent living needs (DLN) to the minimum wage as a tool to reduce poverty levels. The state, at this point with its social policies, actually plays an important role to intervene so that people in the free market can be more productive, stable and harmonious.(Libra,athttps://www.researchgate.net/publication/296488651_Azas_keadilan_Minimum_ Update_Minimum, accessed on April 14, 2019)

Another problem that arises from the minimum wage policy is that the actual minimum wage policy is actually applied to single workers with less than 1 year of service, but it also applies to workers with more than 1 year of service and most are married. As a result the minimum wage, which is calculated based on the KHL of single workers, is unable to meet the living needs of household laborers who are married. The high percentage of workers who get wages below the minimum wage means that the level of compliance in the implementation of the minimum wage is minimal. (Izzaty, Sari, 2013)

Based on the facts above, it is appropriate to apply labor wage uniformity in Indonesia, to realize welfare and justice towards labor wages in Indonesia. Although the Manpower Law

has sought to accommodate the interests of workers through their wages, the Manpower Law has not yet been fully implemented, so the determination of the minimum wage remains based on the MIC. At present, the eligibility of a minimum wage standard is based on the needs of workers in accordance with the criteria, namely: 1) minimum living needs (MLN); 2) Consumer Price Index (CPI); 3) The company's ability, growth and sustainability; 4) minimum wage standard in the surrounding area; 5) labor market conditions; 6) economic growth and per capita income (Sulistiawati, 2012)

An idea was initiated by Rekson Silaban about efforts to achieve fair remuneration in order to minimize wage conflicts. The wage system should be carried out through several steps, namely (Ibrahim, 2013 :):

a. Broader transparency is needed from wage tripartite councils, particularly in the method of setting wages, survey mechanisms, final agreement on wage rates. The minimum wage that will be determined should first be socialized so that input, objection and clarification are obtained from unions who are not members of the wage tripartite council.
b. Sectoral wages for certain cities in the industry (Batam, Banten, DKI, Bekasi, Karawang, Pasuruan, Semarang, etc.), should set sectoral wages. This should be done to require "wage generalization", because each sector has a different level of excellence and business opportunities.
c. The need for all companies to have a wage structure and scale. Based on Decree of the Minister of Manpower Number 49/Men/2004, every company is recommended to make a structure and scale of wages based on competence, education, position, years of service. The problem is that there are no administrative sanctions, so only a handful of companies follow suit. As a result, every wage adjustment negotiation is always problematic, because there are no standard guidelines.
d. Supervision by involving tripartite. Given the large number of industrial relations conflicts that originate from wages, it is better if the supervision system related to wages is conducted in a tripartite manner. Although official investigators remain in the hands of the government, the procedures for supervision, planning, evaluation, are still carried out in a tripartite manner. It is hoped that this system can sharply reduce non-compliance with wage provisions.
e. A quick and cheap complaint mechanism. In cases of non-compliance with wage provisions it is necessary to introduce a new Manpower Decree, so that no more cases of non-compliance with wages are submitted to the Industrial Relations Court.
f. It is necessary to revise Minister of Manpower Regulations Number 17 Number 2005 regarding Consideration Factors in Wage Determination. In the Minister of Manpower Regulations, there are 4 (four) factors that must be considered in setting wages, namely: the necessities of a decent living, productivity, economic growth, the most marginalized businesses. In practice, it is very difficult to accommodate these four factors in setting wages. That is the cause of frequent voting in the wage council when setting the minimum wage. Survey results are usually always greater than the final agreement. Even in some regions, wage increases have been set below the inflation rate.
g. In some countries, this factor is simplified by making only two factors, namely the inflation rate (IR), and economic growth (general and sectoral).

Rikson Silaban's opinion above, in practice is recognized as difficult to do, because many factors can be a barrier for various parties to set the minimum wage. Based on these conditions, it is very possible to uniform the wages of laborers/workers in Indonesia. Wage differences only occur depending on level of education, and years of service.

At least the laborers/workers with low degrees will certainly be motivated to return to school so that their standard of living is more decent. Although the current campaign for the elimination of discrimination in terms of gender, education, age and experience in the world of work, actually in terms of education and experience there needs to be differences because it

shows the professionalism of work. In fact, it becomes unfair if people with high education are paid the same as those with low education.

The other negative side of the minimum wage policy is structurally beneficial only to employers, caused; First, the nominal minimum wage is below the real wage. Workers are required to work hard with long working hours to make ends meet. Workers still have to live subsystems just to meet their daily needs which are increasingly narrow. Second, there is no adequate control tool for optimizing the minimum wage, so that capital owners are in a favorable position and are free to determine the wages they pay. Third, the mechanism for determining minimum wages is still largely dominated by state apparatus. Even those who represent workers in a trade union are not part of the workers, they only represent workers who cannot be expected to accommodate the aspirations of workers (Hendrastomo, 2010)

There are several benefits that can be obtained from the uniformity of labor wages in Indonesia, namely:a.The occurrence of equal distribution of labor/worker wages;b.Laborers are no longer placed in positions as people who have no bargaining value (especially workers with sufficient skills);c.Laborers/workers will be more motivated to work;d.The state is present in every effort to prosper the people.

Weaknesses of uniform labor costs include:a.There will be rejection from employers who object to the uniformity of labor wages;b.It is feared that investors will flee to other countries if labor/worker wage uniformity is carried out;c.New conflicts between the government, employers and workers will continue to emerge.

Reading the plus and minus efforts to uniform wages for laborers/workers, the government should be a facilitator for the interests of workers and employers able to provide effective and concrete solutions for the welfare of laborers/workers, while making Indonesia a welfare state. A welfare state is defined as a state in which the government of the country is considered responsible for guaranteeing a minimum standard of welfare for every citizen. (Fuadi, 2015)

A country can be said as a welfare state if there are 4 (four) main pillars, namely: 1) social citizenship; 2) full democracy; 3) modern industrial relations systems; and 4) rights to education and expansion of modern mass education systems (Fuadi, 2015). The four pillars must exist in a country that indicates the country is a welfare state, where the state is obliged to impose the application of social policy as the conferring of social rights to its citizens on the basis of citizenship and not on the basis or social class. (Triwibowo and Bahagijo, 2006)

The concept of a welfare state actually refers to the role of the government which is responsible for managing and organizing the economy. This means that the state is expected to be able to carry out its responsibilities to ensure the availability of basic welfare services to a certain degree for its citizens.

For laborers, labor law policies in favor of the welfare of workers are needed, because the standard of living is increasing every year. Expecting employers to raise minimum wages for workers is certainly far from expectations. The government as the party most responsible for making regulations, is expected to be able to provide bright hopes for workers to achieve prosperity.

According to Mahfud M.D., the welfare state is focused on the implementation of a social protection system that is institutionalized for everyone as a reflection of the right of citizenship, on the one hand, and state obligations on the other. The welfare state is aimed at parents and children, men and women, rich and poor, as well as possible. The state must strive to integrate the source system and provide a service network that can maintain and improve the well-being of citizens in a fair and sustainable manner. (Mahfud, 2012)

Uniformity wages for laborers/workers in Indonesia, although difficult to do with various considerations, is not impossible to realize. The government as a representative of the State can carry out this desire if labor law policies are in favor of the interests of

laborers/workers, without having to neglect the interests of employers or investors. Even though the concept of a welfare state does not always compare to high wages, at least laborers/workers complain about the wages they receive, it should be a basic reference for a decent living for laborers/workers.

D.Closing

a. That regulations related to minimum wage have both positive and negative sides which have been a consideration for both the central and regional governments and the wage council in setting minimum wage.
b. Whereas regulations which have been the basis of minimum wage policies have often been rejected by workers because they have not provided a decent wage which has an impact on welfare.
c. Standardization of wage for workers/labors in Indonesia, as an effort to improve the welfare of workers deserves to be floated, although many obstacles will be faced.

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FORMS OF LIABILITY FOR THE ENVIRONMENTAL CRIME COMMITTED BY CORPORATIONS OF MINE INDUSTRY IN INDONESIA

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ABSTRACT

A beautiful, safe, and comfortable environment is a dream of every community and country in the world including Indonesia. However, the large number of mining activities in Indonesia has caused pollution to environment. The government of Indonesia together with the Parliament has made regulations regarding environmental protection, namely Law No. 32 of 2009 concerning Environmental Protection and Management. The law regulates the various forms of liability that can be imposed on corporations that have caused environmental damage. This study used normative research methods, using sources of legal materials, namely primary legal materials and secondary legal materials. The results showed that environmental protection is not only regulated by criminal sanctions, but also by civil and administrative sanctions which can be imposed on corporations that have caused damage to the environment. Liability in environmental crimes also regulates the absolute or strict liability, which means the element of error does not need to be proven by the plaintiff as the basis for compensation payments. This principle also constitutes a special legal principle or *lex specialis* in unlawful acts.

Keywords*: Liability, Environmental Crime, and Corporations.*

1. Introduction

A good and healthy environment is the basic right of every Indonesian citizen.[1] The mandate of the 1945 Constitution of the Republic of Indonesia Article 33 Paragraph (3), states that: "the earth, water and natural resources contained therein is controlled by the state and used for the greatest prosperity of the people…" That all the natural resources of Indonesia are intended solely for the people of Indonesia. However, in reality, many of the natural products of Indonesia are not intended for the people of Indonesia, but are traded abroad, for example the Freeport Mine in Papua.

In developing countries, the topic of mining has always been a hot issue from the past up until now, including in Indonesia. Illegal mining practices that still widely occur actually make Indonesia experience a lot of losses, mining activities that should be able to contribute to the Regional Original Revenues, in fact, are mostly illegal. The issue of environmental pollution and destruction caused by mining always appears especially if the activity causes casualties. The repressive and preventive aspects are always ignored to produce good and economical products also to make money more quickly rather than the prevention and recovery aspects, so that the damage is more widespread and out of control.

The history of mining in Indonesia began when the Indonesian government in the New Order era gave permission for concessions to the United States to manage the Freeport mine

[1] Article 28(H), *the 1945 Constitution of Republic of Indonesia*

in Papua, which had caused economic and ecological losses to Indonesia. This was encouraged by the President's policy in the new order era with the pretext for development that made us lulled. The New York Agreement which was agreed upon after the resignation of President Soekarno and replaced by Soeharto has opened a wide door for the free exploitation of Indonesia's natural resources.

Mining law has a very close relationship with environmental law because every mining business, whether it is related to general mining, oil or gas mining, is required to maintain a more sustainable environment and health. This is commonly referred to as the preservation of environmental functions (Article 1(5) Law No. 32 of 2009 concerning Environmental Management).

From the background described above, the legal issue that can be used as the formulation of the problem in this study is forms of responsibility or punishment that can be given to environmental offenders committed by mining corporations in Indonesia.

2. Literature Review

2.1. Research Accomplished

The authors have tried to trace several other articles which are similar to the title of this study, and the authors did not find any article discussed the similar issue or content. However, there are several articles related to the issue, the first is a thesis written by Desi Permata Sari entitled 'Criminal Law Policy towards Corporations Committing Crimes against Environmental Exploitation and Pollution (Law No.32 of 2009 concerning Environmental Protection and Management)'. The results of this thesis are: - that the criminal liability system for the perpetrators can used a substitute criminal liability system or Vicarious Liability, which can be interpreted as a criminal liability imposed on someone for a criminal offense committed by another person; - efforts to crime prevention in general can be divided into two, namely the criminal line (criminal law) and the non-criminal line (non-criminal law)[2] both of them can be imposed on environmental offenders.

As for the other thesis, namely 'Criminal Law Policy in the Enforcement of Environmental Law'. This thesis, written by So Woong Kim, discussed criminal law policies in the effort to enforce environmental law in the present and the future. The study shows that the current criminal law policy is not optimal because the law does not have a deterrence effect yet. Law enforcement in environmental criminal acts only functions as *ultimum remidium*, so that the content of criminal sanctions enforcement is not dominant. For this reason, it is necessary to reform the criminal penalties and sanctions in the Environmental Management Law which has the values of legal certainty and justice upheld by all parties.[3]

2.2. The Concept of Responsibility

The concept of liability or responsibility can be seen in legal philosophy perspective. The Roscoe Pound in the 20th century defined liability as an obligation of the offender to pay compensation to the injured party. In discussing criminal liability, inevitably, an act must take precedence. The concept of responsibility must be preceded by the intention of a criminal act or known as the *mens rea.*

[2] Desi Permata Sari (2017), *Kebijakan Hukum Pidana Terhadap Korporasi yang Melakukan Tindak Pidana Perusakan dan Pencemaran Lingkungan Hidup (UU Nomor 32 Tahun 2009 tentang Perlindungan dan Pengelolaan Lingkungan Hidup)* [Criminal Law Policy towards Corporations Committing Crimes against Environmental Exploitation and Pollution (Law No.32 of 2009 concerning Environmental Protection and Management)], Master Program Thesis, University of Pasundan, Bandung, retrieved from http://repository.unpas.ac.id/28085

[3] So Woong Kim (2009). *Kebijakan Hukum Pidana dalam Upaya Penegakan Hukum Lingkungan Hidup* [Criminal Law Policy in the Enforcement of Environmental Law], Master Program Thesis, Diponegoro University, Semarang, retrieved from http://eprints.undip.ac.id/18235/1/So_Woong_Kim.pdf

2.3. The Concept of Mining in Indonesia

Indonesia, as the fourth most populous country in the world, has many islands spread from Sabang to Merauke, so it is not surprising that Indonesia known as one of the largest archipelago countries in the world. According to BP Statistical Review of World Energy data sources, Indonesia is the fifth largest coal producing countries in the world, where there is China in the first position, followed by United States, India and Australia.[4] The types of natural resources owned by Indonesia are very abundant, both natural products in agriculture, plantations, and waters, as well as those originating from the earth, namely mining. Obtaining mining products is certainly not easy. Mapping needs to be done first by using geological maps. Such geological maps make it easy to find out the mining location. Mining products are included in the non-renewable natural resources. There are several types of mining products that can be obtained in Indonesia, including petroleum, which is used as vehicle fuel, household needs, electricity generation, industrial raw materials, and others. The other one is coal, coal has several categories based on the carbon element. The higher the carbon level, the darker the colour of the coal will be. Coal has several elements of Anthracite (86-98% carbon content), bituminous (68—86% carbon content), sub-bituminous (less carbon content and more water content), lignite (35-75% carbon content, brown colour, known soft and light), and peat (porous with water content up to 75%). Besides petroleum and coal, there are also other types of mining, namely tin, iron ore, gold, copper, diamond, and nickel. Specifically regulates issues regarding mining, Indonesia has a number of legal provisions, one of them is Law No.4 of 2009 concerning Mining, Minerals and Coal.[5]

2.4. Theories and Forms of Liability of Corporations on Environmental Crimes

2.4.1. Theories of Corporate Crime

The word corporation originated from Latin which is etymologically called as *corporatio* or *corporare. Corporare* itself comes from the word *corpus* which means body. In Dutch, it is called *corporatie*, and in German it is also called *corporation*. Theoretically, there are three types of corporate crime, i.e: 1) Crimes for corporation, crime which is committed in the interests of the corporation not the other way around; 2) Crimes against corporation, which is committed by the management of the corporation itself (employee's crime); 3) Criminal corporations, a corporation that is intentionally formed to commit crime.[6]

While substantively, there are three models of corporate criminal liabilities, the first is the corporation's management as the perpetrators of the crime so the management is responsible. As a legal entity, corporation cannot be given criminal penalties because the perpetrator is always the management. Second, corporation as the perpetrator so the management is responsible. Occurred when corporation is referred to as perpetrators, however the responsibility is given to the management. Third, the corporation as a perpetrator and also as a responsible party. In this case, it occurs when the management as the responsible party is considered insufficient, so the corporation must also be responsible.[7]

Corporate criminal liability basically has five theories. First is identification theory, according to this theory the corporation can only commit a number of offences directly by the

[4] Rikhza Hasan, *10 Negara Penghasil Batu Bara terbesar di Dunia, Ada di Indonesia* [10 Largest Coal Producing Countries in the World], retrieved from https://economy.okezone.com/read/2019/01/31/320/2012015/10-negara-penghasil-batu-bara-terbesar-di-dunia-ada-indonesia , on 10 September 2019

[5] Adi Nugroho, *Jenis-Jenis Barang Tambang di Indonesia* [Types of Mining Products in Indonesia], retrieved from http://kitacerdas.com/jenis-jenis-barang-tambang-di-indonesia/, on 10 September 2019

[6] Hariman Satria (2017), *Penerapan Pidana Tambahan dalam Pertanggungjawaban Pidana Korporasi pada Tindak Pidana Lingkungan Hidup* [The Application of Additional Crimes in Corporate Legal Liability in Environmental Crimes], *Judicial Journal,* Vol.10 No.2, 155.171, p 6

[7] Muladi and Priyatno, D (2010), *Pertanggungjawaban Pidana Korporasi (edisi revisi)* [Corporate Criminal Liability (revised edition)] Kencana Prenamedia Group, Jakata, p.148

management that is very closely related to the corporation, acting for, and on behalf of the corporation.[8] Second is strict liability (absolute responsibility), this type of responsibility does not consider the party who commit offences.[9] Third is vicarious liability (substitute criminal liability), this theory refers to a party who is responsible for the offences committed by other party.[10] Fourth, aggregation theory, this theory allows the aggregation or combination of offences by people in the corporation, so that the responsibility can be imposed to the corporation.[11] Fifth, the theory of corporate cultural models or work culture models, this theory asserts that a legal entity can be criminally liable if a person's actions have a reasonable basis that the corporation grants permission or authority for his actions.[12]

2.4.2. Forms of Liability for the Environmental Crimes Committed by Corporations

The Law No. 32 of 2009 concerning Environmental Protection and Management regulates forms of liability that can be imposed on corporations who commit environmental crimes. Such forms of liability are described as follows:

a. Civil Liability

If a corporation or company commits an environmental crime, compensation can be imposed as a result of its actions against the law. The illegal acts refer to an act committed by one or more parties that harms the other party and is done intentionally or unintentionally that the other party feels that their rights have been violated.[13]

In the event of an unlawful act that brings harm to others, the perpetrators are required to bear the consequences of the violations they have committed.[14] The granting of compensation from corporations or companies that commit environmental crimes, is also regulated in Act No.32 of 2009 concerning Environmental Protection and Management, in Article 87 paragraph 1, reads:

"Every party responsible for a business and/or activity that commits an illegal act in the form of pollution and/or environmental damage that causes harm to other people or environment must pay compensation and/or take certain actions."

Corporations that commit environmental crimes are obliged to pay compensation imposed by the Panel of Judges in accordance with the amount of compensation that has been predetermined.

b. Criminal Liability

In criminal liability, the principle of error or "there is no criminal without error" and "there is no criminal liability without error" applied. For corporations that commit criminal acts must be held responsible for their actions. In Law No.32 of 2009 concerning Environmental Protection and Management, criminal liability is regulated in several articles, namely Article 116, Article 117, Article 119, and Article 120. Criminal penalties that can be imposed are imprisonment and fines. Additional criminal sanctions and disciplinary action can also be imposed are:

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[8] Hariman Satria (2017), *op cit,* p 160

[9] Smith J.C, and Horgan, B (1998) *Criminal Law (Fourth Edition),* Butterworths, London, p.79

[10] Sutan Remi Sjahdeini (2006), *Pertanggungjawaban Pidana Korporasi* [Corporate Criminal Liability], Grafiti Pers, Jakarta, p.84

[11] *Ibid,* p.108

[12] Eddy O.S. Hiariej (2014), *Prinsip-Prinsip Hukum Pidana* [The Principles of Criminal Law], Cahya Atma Pustaka, Yogyakarta, p..207

[13] *Article 1 No.5, Regulation of the Minister of the Environment No.13 of 2012 concerning Compensation for Pollution and/or Environmental Damage*

[14] Marhaeni Ria Siombo (2012), *Hukum Lingkungan dan Pelaksanaan Pembangunan Berkelanjutan di Indonesia* [Environmental Law and Implementation of Sustainable Development in Indonesia] Gramedia Pustaka Utama, Jakarta, p.118

a. Expropriation of profits from criminal acts
b. Closure of all or part of business premises and/or activities
c. Damage Repairs due to criminal acts
d. Placement of the corporations under control under the maximum of three years.

In addition to being imposed to corporations for environmental crimes, criminal sanctions can also be imposed on the person who gave the order to commit the crime or the person acting as the leader of the activity in the crime.

c. Administrative Liability

In environmental crimes committed by corporations in the mining industry, administrative sanctions are also often imposed. In Article 76 of Law No. 32 of 2009 concerning Environmental Protection and Management, it is stated that the minister, governor, or regent/ mayor can give the administrative sanctions. These administrative sanctions can be in the form of written warnings, government coercion, granting or revoking the environmental permits. Article 77 also stipulates that the Minister may impose administrative sanctions on responsible party in corporations if the Regional Government considers is deemed intentionally not imposing administrative sanctions for the serious environmental violations. Besides that, in Article 78, administrative sanctions do not exempt the responsible party of the corporations and/or activity from the criminal liability and charge. Article 79 also stated that the administrative sanctions may also be imposed on corporate actors in the form of suspension or revocation of environmental permits, if the corporation does not carry out the government coercion.

Besides regulating the civil, criminal, and administrative liability, Law No. 32 of 2009 concerning Environmental Protection and Management also regulates dispute resolution outside the court (non-penal approach). The types of dispute resolution outside the court can be in the form of negotiation, mediation, and arbitration. First, the negotiation effort according to the author is an effort to resolve disputes between the parties by discussing and bargaining the best way to resolve the case between the corporation as the perpetrator and the community or government as the victim. The purpose of this effort is so that cases of environmental damage can be resolved without a lawsuit to court. Second is mediation efforts, in Supreme Court Regulation (Perma) No.1 of 2008, Article 7 regulates how to resolve disputes through a discussion process to obtain the agreement between parties with the assistance of the mediator.[15] The role of an independent mediator is needed in conducting negotiations between the disputing parties. According to Elizabeth Mewengkang[16], in resolving disputes over environmental pollution through mediation efforts, at least there are three forms of satisfaction that can be achieved, i.e. substantive, procedural, and psychological satisfaction. Substantive satisfaction is related to the specific satisfaction of the disputing parties, for example compensation. On Procedural satisfaction, the disputing parties have the same opportunity in presenting ideas during the negotiations. Psychological satisfaction itself is more concerned with the emotional level of the disputing parties. Third, arbitration effort is also a way in settling dispute outside the court. Definition of arbitration is a written agreement made by the parties both before and after the dispute arises. According to Law No.32 of 2009, Mediation, Negotiation and Arbitration are only used for civil matters.

[15] *Supreme Court Regulation No. 1 of 2008 concerning Mediation*
[16] Elizabeth Mewengkang (2014*),Prinsip Tanggung Jawab Perusahaan terhadap Pencemaran Lingkungan* [Principles of Corporate Liability for Environmental Pollution]*, Jurnal Lex Crimen,* Vol.III, No.2.

3. Methods

The method used in this study is the normative legal research method. By using several sources of legal materials, namely sources of primary and secondary legal materials. This normative research method has different characteristics from other social sciences. According to Peter Mahmud Marzuki, legal research is the process of discovering legal principles, the rule of law, and legal opinion. Normative research in writing this article also uses several approaches, which are the law approach, concept approach, and case approach.

4. Results

The results obtained in this article are that in ensnaring corporations that commit environmental crimes due to mining, the government has three types of liability that are regulated in Law No.32 of 2009 concerning Environmental Protection and Management. These forms of liability are criminal liability, civil liability, and administrative liability. Criminal liabilities that can be imposed on corporate actors are in the form of imprisonment and fines, in this case the actors are the management, director or head of the corporation. In addition to imprisonment of head of the corporation, fines and compensation can also be imposed on the corporation. Civil liability can also be imposed to the corporation by paying compensation to the injured party. As for administrative liability, business license or environmental permit revocation can be carried out for corporation that is proven to have committed environmental crimes. According to the author, these forms of liability should be given in a stricter manner to the corporation and its management, so that the corporation and its management do not necessarily commit acts that are detrimental to the environment, community and other parties.

5. Conclusion and Recommendation

The conclusion that can be drawn in this study is that there are three forms of liability that can be given to corporations which are proven to have committed environmental crimes. This is in line with the government's intention to eradicate mining mafias and also environmental damage. The recommendation that can be considered is that the panel of judges must give not only criminal penalties, but also civil and administrative liabilities so that the deterrent effect is more pronounced, and in order that other corporations do not commit similar acts.

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THE CHILD PROTECTION AS VICTIM OF SEXUAL ABUSE BY PENAL THROUGH CASTRATION PUNISHMENT

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ABSTRACT

As a victim sexual abuse, child will be to experience traumatic for along time. Even can be a criminal of sexual abuse. One of the factor which considered can make sexual abuse is rule of the law that can not to protection of child. One of the way to protection of child is throught castration punishment. But castration punishment have many problems, because considered contradiction with human right. The research purpose for explain the child protection as victim of sexual abuse by penal through castration punishment. The research is normative juridical research. The technique to collecting data is library research. Based on the research discovered that the chemical castration and installation the tool of electronis detection is imposed to criminal of sexual abuse, with the following criteria; done by parents, guardians, people who have family relationships, caregivers, educators, educational staff, apparatus that handles child protection, or do it by more than one person together, criminal who has been punished because do it same criminal act, in the event that a criminal offence raises a victim of more than 1 person, resulting in severe injuries, physiological disruption, infectious diseases, disrupted or loss of reproductive function, and/or death.

Keywords*: child protection, victim sexual abuse, castration punishment.*

A. Introduction

Sexual abuse to child always happen in the community. The child have to be a next generation, have been to be a victim sexual abuse which can break their future.

As a victim sexual abuse, child will be to experience traumatic for along time. Even can be a criminal of sexual abuse.

Many people want that criminal could be punished with maximal punishment, even death punishment (Nursariani Simatupang dan Faisal, 2017).

One of the factor which considered can make sexual abuse is rule of the law that can not to protection of child. One of the way to protection of child is throught by do castration punishment. But castration punishment have many problems, because considered contradiction with human right.

In order for each child to assume the responsibilities given to him, each child needs to have a widest opportunity to grow and develop optimally, physically, mentally, and socially, and have a good moral Protection efforts and to realize the justice and welfare of the child by providing assurance to the fulfillment of its rights, one of which is the protection of the child by default through the application of the castration punishment.

The research purpose for explained the child protection as victim of sexual abuse by penal through castration punishment.

B. Literature Review

1. The Child Protection

Children are part of the younger generation as one of the human resources which is the potential and successor of the nation's struggle ideals, which have strategic roles and have special characteristics and traits, requiring coaching and protection in order Ensure that the physical, mental, and social growth and development are intact, harmonious, aligned and balanced.

The child is also seen as a whole person, thus having a birthright that must be protected. This view requires adults (biological parents, Governments, communities), to be fully responsible for each child born in the world. Child protection is thus part of the implementation of human rights (Hadi Supeno; 2010).

The child is the buds, potentials, and young generations of the successors of the nation's ideals, has a role and is strategic and has a special characteristic and nature that guarantees the continuity of the existence of the nation and State in the future (M. Nasir Djamil; 2013).

Children has the rights to protection and need protection is adult responsibility for ensure so children not to became violence and exploitation victim (T. Riza Zarzani, 2017)

Child protection are all of activity for ensure and protect the child and their rights so that can live, grow up, developing and get in participation by optimal corresponding with value and dignity of humanity, and get the protection from violence and discrimination.

Child protection is a business and activities of all walks of life in various positions and roles, which realize exactly the importance of children for Nusa and the nation in the later days. If they have matured social or mental growth, then it is time to replace the previous generation. Child protection activities carry legal consequences, whether related to written law or unwritten law. The law is a guarantee for child protection activities (Maidin Gultom; 2014).

Indonesia's child protection means protecting the potential of human resources and establishing the whole person of Indonesia, towards a fair and prosperous society, the spiritual material based on Pancasila and the Constitution 1945 (Nashriana; 2012).

2. Sexual Abuse

Violence is essentially an aggressive act, which everyone can do (Yesmil Anwar; 2010). One of the most common forms of violence is sexual abuse, and the victim is a child.

There are tree sexual abuse are (Abu Huraerah, 2012);

a. Rape.
   Criminals of rape action are usually men. Rape often happens at a time when the perpetrators threatened and demonstrated his power to the child. If the child is examined immediately after the rape, then physical evidence can be found like tears, blood, and bruising wounds which is a surprising discovery of the acute discovery of a persecution. If there is kasusu rape with child violence, it is the greatest risk, because persecution or violence often impacts unstable emotions. Especially for children as victims are protected and not returned in situations where rape, perpetrators of rape should be kept away from the child.
b. Incest.
   Incest is defined as sexual intercourse or sexual activity between individuals who have a close relationship, where the marriage between them is prohibited by law or culture. Incest usually happens for a long time and often concerns a process of movement.
c. Exploitation.
   Sexual exploitation includes prostitution and pornography. This is quite unique because it often includes a group of participating. It can occur as a family or outdoors with some adults.

Sexual abuse forms are (Atikah Rahmi, 2018);

a. Rape.

b. Sexual harassment.
c. Sexual explotation.
d. Sexual torture.
e. Sexual slavery.
f. Intimidation.
g. Compulsion of prostitution.
h. Compulsion of pregnancy
i. Compulsion of abortion.
j. Compulsion of marriage.
k. Exploitation women for sexual purpose.
l. Sexual control.
m. Inhumane punishment and sexual nuanced.
n. The traditional sexual theme practice that endanger woman.

3. Castration Punishment

There are two kinds of the castration that are applied in various countries, namely the physical castration and the chemical castration. Physical castration as applied in the Czech Republic and Germany, is done by amputation of a pedophilic criminal, so that the criminals of testosterone deficiency affect their sexual impulses. Meanwhile the chemical castration, different with the physical castration, is not done by amputation of the testes. The exsexutor will incorporate with drawal chemicals that can weaken the hormone testosterone. The way can pass pills or injections (Mardiya, N. Q. A. (2017).

C. Research Metod

The research is normative juridical research. The technique to collecting data is library research. Analyzed data that used is qualitative approach.

D. Result and Discussion

Sexual abuse always happen to children. The contributing factors include:

1. Once a victim of sexual violence.
2. The sexual disorder of the perpetrator causes always wanted to do the deeds to channel his sexual desires.
3. Media television, internet featuring several impressions, images and access that are not to be seen by children.
4. Environmental influences.
5. Lack of moral and religious education.
6. Insufficient legal device.

Protection of children as victims of sexual abuse managed by the Republic of Indonesia Law Number 23 of 2002 corcerning The Child Protection.

Republic of Indonesia Law Number 23 of 2002 corcerning Child Protection has been amended by Law Number 35 of 2014 concerning amendment of Law Number 23 of 2002 concerning the child protection, which one of the changes focuses on Criminal sanctions against child sexual abuse. However, changes in the law have not significantly reduced the level of sexual violence towards children.

Therefore, the country needs to take the optimal and comprehensive measures by not only providing criminal sanctions, also implementing a preventive form (preventive) by giving chemical castration, installation the tool of electronis detection and rehabilitation for criminal sexual abuse to child.

In order to respond to children sexual abuse phenomenon, to provide a deterrent effect to the criminals, and to prevent child sexual abuse, has been established Law Number 17 of 2016 concerning The Second Amendment to Law Number 23 of 2002 concerning The Child Protection on May 25, 2016.

Castration punishment is manage by the Republic of Indonesia Law Number 17 of 2016 concerning the second changed of the Republic of Indonesia Law Number 23 of 2002 corcerning Child Protection in Article 81 point 7.

The protection provided by the law against the child as a victim of sexual abuse is to include the punishment of the castration as a sanctioned penalty for the criminals of sexual abuse to children. The implementation of a chemical castration is accompanied by rehabilitation.

Every person who commits sexual harassment or abuse of threats forces a child who has sex can be given the punishment of castration. Exceptions apply if the criminal of sexual abuse is child.

The chemical castration and installation the tool of electronis detection is imposed to criminal who commit violence or violent threats forcing the child to do a copulation with it or with others, with the following criteria;

1. Done by parents, guardians, people who have family relationships, caregivers, educators, educational staff, apparatus that handles child protection, or do it by more than one person together,
2. Criminal who has been punished because do it same criminal act,
3. In the event that a criminal offence raises a victim of more than 1 (one) person, resulting in severe injuries, physiological disruption, infectious diseases, disrupted or loss of reproductive function, and/or death.

Castration punishment done for periode maximal 2 years, after prisoner do prime punishment.

Although still has weaknesses, the punishment of Capon is considered as a solution for the fulfillment of justice for children and protection for children of victims of sexual violence. Punishment of Capon is expected to minimize sexual abuse of children. In addition, the keal sentence is also expected to provide a deterrent effect for perpetrators of sexual violence in children and to give a frightening effect to the prospective perpetrators of sexual violence against children. The punishment of the keal will make prospective perpetrators dare not commit sexual violence.

There are some advice, that castration punishment need not, because:

1. Castration is considered contradiction with human right.
2. Castration punishment don't have defferent effect.
3. Consideder is not effective to minimalize sexual abuse to child, because the most important are moral education and moral rehabilitation.

Family have the important role for moral education. The family is the smallest social unit in the community that plays an enormous influence on the social development and personality development of each family member (Lailatus Sururiyah; 2017).

Family influence to child education is very big in many side. The family prepare of growth potential and personality formation and child morals (Elfrianto, 2015).

For the first time, castration in Indonesian was imposed to Muhammad Aris (20 years old). PN Mojokerto was punish him to 12 years prison and a fine of Rp. 100 million subsideir 6 months confinement. Muhammad Aris punished with additional punishment of chemical castration. Muhammas Aris proved guilty of rape to 9 children from 2015. The average child who became a victim of Muhammad Aris is still sitting on a kindergarten.

The chemical castration as a punishment additional that was dropped to Muhammad Aris was as an implementation of Article 81 point 7 of the Republic of Indonesia Law Number 17 of 2016.

Muhammad Aris appealed to the Surabaya High Court. The verdict of PT Surabaya to strengthen PN Mojokerto. The verdict is contained in the ruling of PT Surabaya number. 695/PID. SUS/2019/PT SBY on July 18, 2019.

E. Conclusion

The chemical castration and installation the tool of electronis detection is imposed to criminal who commit violence or violent threats forcing the child to do a copulation with it or with others, with the following criteria;

1. Done by parents, guardians, people who have family relationships, caregivers, educators, educational staff, apparatus that handles child protection, or do it by more than one person together,
2. Criminal who has been punished because do it same criminal act,
3. In the event that a criminal offence raises a victim of more than 1 (one) person, resulting in severe injuries, physiological disruption, infectious diseases, disrupted or loss of reproductive function, and/or death.

Castration punishment done for periode maximal 2 years, after prisoner do prime punishment.

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THE IMPLICATIONS OF ADVANCED RESEARCH DEVELOPMENT IN FORENSIC SCIENCE & TECHNOLOGY TOWARDS SYARIAH LEGAL SYSTEM

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ABSTRACT

Forensic science in the broadest context is the application of science to the legal system. It is an umbrella term enveloping a diverse of professions that utilize their skills and expertise to assist legal enforcement officers in handling their investigation. This article integrates work in the areas of forensic science and Syariah law, to investigate significant of Fiqh Forensics theory. It identifies and analyses the implication of advanced research development in forensic science and technology towards the Syariah legal system. Having discussed the relationship between forensic science and Syariah law, advanced research development in forensic science lead to numbers of positive implications towards Syariah legal system in Malaysia; enhance the quality of human capital in Syariah legal institutions, broaden the application of expert opinion under Syariah Court Evidence Act or Enactments, and complement the probative value of evidence tendered before the Syariah courts. This paper concludes and suggests for rejuvenation of Syariah legal system through the application of forensic science. The kick-start of the application forensic science may come from the relevant provisions of expert opinion in the Syariah Court Evidence Act or Enactments.

Keyword (s): *Fiqh Forensics; Forensic Science; Technology Development; Malaysian Syariah Legal System; Syariah Court Evidence Law; Rejuvenate Syariah Legal System.*

Introduction

Forensic science could simply be defined as the application of scientific principles and disciplines or technical practices to the recognition, collection, analysis and interpretation of evidence for criminal and civil laws or regulatory issues that are enforced by public authorities in a judicial legal system(Alcaraz-Fossoul & Roberts, 2017; Metwally, 2019; Saferstein, 2015). The main goal for any forensic practitioners is to generate impartial and reliable proof of fact based on the data collected (Alcaraz-Fossoul & Roberts, 2017; Metwally, 2019). Other than that, it also carries numbers of objectives, *inter alia*, obtaining and analysing the physical evidence, and identifying criminals (Alcaraz-Fossoul & Roberts, 2017). Besides the analysis of evidence, the most important duty of a forensic practitioners is to testify in court as an expert witness (Houck & Siegel, 2015; Saferstein, 2015). This activity distinguishes forensic science from all of the other sciences. Some excellent scientists cannot function in the pressurized atmosphere of a courtroom and would be ineffective as an expert witness. Meanwhile, some proficient orators do not make good scientists and would be equally fruitless. A successful forensic practitioner will be proficient at both the science and the testimony.

Epistemologically, the term "Fiqh Forensics" is a combination of the words 'fiqh' and 'forensics' (Ahmad, Razak, Saharudin, et al., 2019a). It refers to the knowledge and understanding of Islamic law regarding the practice of forensic science in the Muslims daily life based on Islamic legal sources (Ahmad, Razak, Saharudin, et al., 2019a; Baharuddin,

2014, 2017a, 2017b). This term is not only expresses the elements of integration between science and Islamic law but also in accordance with the *shumūliyyah* and *murūnah* principle in Islam which covers various aspects of knowledge (Baharuddin, 2017b; Baharuddin, Bidin, Dagang, Ruskam, & Yacob, 2015). Knowledge based on the integration of science with Islamic law is a requirement for all Muslims. This is serving as counteract to the doctrine of dichotomy of knowledge between science and religion practiced and influenced by Western ideas (Adebayo, 2015; Hamdan, Samian, & Muslim, 2018).

With regards to the theory of Fiqh Forensics, it comprises of four main components, namely, Forensics Jurisprudence (Fiqh Forensics), Human Capital, Forensic Analysis, and Accreditation as shown in Figure 1. This theoretical framework was introduced by Baharuddin (2017b) in his doctoral philosophy study.

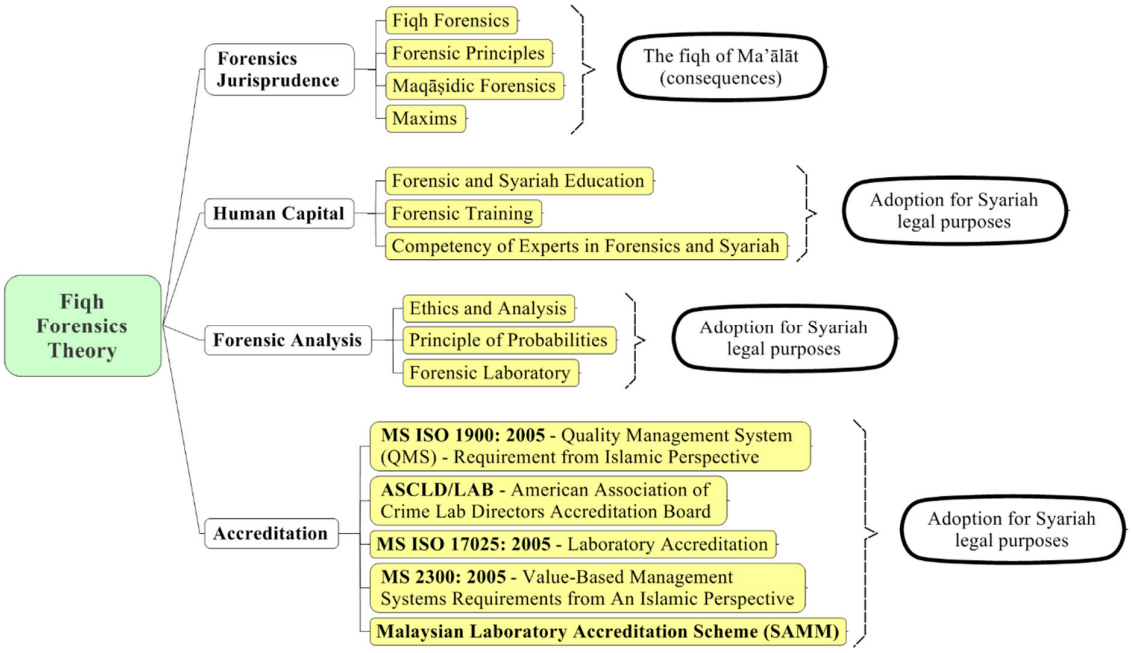

Figure 1: Fiqh Forensics Theoretical Framework (Baharuddin, 2017b)

Figure 1 shows the theoretical framework of Fiqh Forensics. The first component relates to basic knowledge that needs to be learned and acquired such as *fiqh al-ithbāt*, *maqasid al-syari'ah*, forensic science, and Islamic legal maxims. These knowledge need to be learned and possessed to realize the theory of Fiqh Forensics. The second component relates to human capital in Syariah legal institutions is Syariah officer. They need to have proper education on the integration of Syariah and forensics. Furthermore, this knowledge cannot be acquired without practical training. These officers need to undergo periodic and intensive training in order to build their understanding on the matters related to integration of Syariah and forensic. Next, the third component is forensic analysis. This component focuses on the areas of forensic science including the basic principles of forensic science, forensic science methods, ethics when conducting forensic analysis, and forensic laboratories. The last component is accreditation. Accreditation is proposed as a guideline to the development and stabilization of human capital within Syariah legal institutions. This establishment aims to produce skilled and knowledgeable human capital in the handling of exhibits in scientific and orderly manner. In addition, the accreditation also focuses on several standards that must be met in establishing a Syariah forensic laboratory.

This study identified and analysed the implication of advanced research development in forensic science and technology towards the Syariah legal system. Advanced research development in forensic science had led to numbers of positive implications towards Syariah legal system in Malaysia. This paper discussed and dealt with this matter thoroughly.

Enhance the Quality of Human Capital in Syariah Legal Institutions

Human capital symbolizes one of the key resources for the advancement of organizations and nations (Mahmood, Hashmi, Shoaib, Danish, & Abbas, 2014). According to Habib, Abbas, and Noman (2019), human capital is a blend of training and skills gained by personal exertion during education and job. When the workers committed in learning and acquiring new skills, the quality of human capital will increase. The performance of human capital in a certain organization is determined through the knowledge, competency and satisfaction (Kamaluddin, Kassim, Alam, & Samah, 2018).

Meanwhile, from the Islamic perspective, human capital is viewed as the ability of human being to accomplish the responsibility and obligation as a successor and slave of Allah (s.w.t.) on this Earth (Abdullah, 2012). The said ability comprises moral, ethical, intellectual, and physical advancement without omitting the improvement of skills and expertise (Kamaluddin et al., 2018).

Human capitals in Syariah Legal Institutions for this study are referring to the syariah officers' position of LS41, LS44, LS48, LS52, and LS54 as prescribed under *Pekeliling Perkhidmatan Bilangan 1 Tahun 2016* (Public Service Department Malaysia, 2016). These include Syarie Judges, Syariah Public Prosecutors, and Religious Enforcement Officers. Furthermore, Baharuddin (2017b) suggested to include 'Syariah oriented' forensics experts to be of the human capital in Syariah Legal Institutions. This is due to the provisions related to Expert Opinion as prescribed under Syariah Court Evidence Act and Enactment that allowed the opinion of forensic expert to be admitted as part of the expert opinion evidence. In fact, they are the most appropriate person to be called during court proceeding to explain the forensic analysis carried out by them to the court. Figure 1 simplified the idea of rejuvenating human capitals in Syariah Legal Institutions.

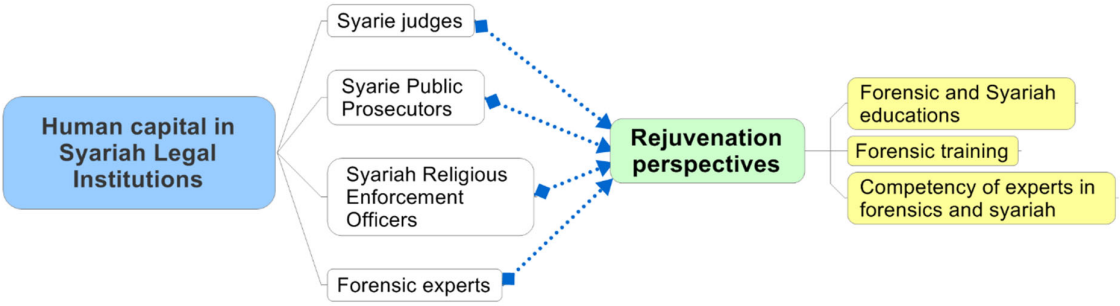

Figure 2: Rejuvenation Framework of human capital in Syariah Legal Institutions

As portrayed in the Figure 2, this study suggests the existing levels of human capital in Syariah Legal Institutions can be rejuvenated through the advanced research development in forensic science and technology. The rejuvenation intended is from the perspective of education and training as these are among the essential attributes that influenced the level of human capital in a particular organisation and nation. It is submitted that the judgement, knowledge, and understanding of the forensics science are paramount – but it should not be "unfettered knowledge". Instead, the knowledge should be managed effectively through training and calibration (Tarran, 2019).

Due to the advancement of research and development in forensic science and technology, it is feasible to provide them with sufficient knowledge and adequate training. They can undergo continuous and serial training courses related to modern scientific and advanced evidence to enhance their knowledge and skills in handling scientific evidence. Furthermore, specific Fiqh Forensics fundamental module also can be developed to supply fundamental knowledge about forensic science integrated with the Islamic evidence principals (Baharuddin et al., 2019).

Broaden the Application of Expert Opinion under Syariah Court Evidence Act or Enactments

There are numerous literatures authored by researchers that thoroughly discussed on the application of scientific evidence in Malaysian Syariah Courts (Ahmad, Razak, Saharudin, et al., 2019a, 2019b, 2019c; Ahmad, Razak, Saharudin, Shah, Hashim, Kamaruzaman, et al., 2019; Ahmad, Zakaria, et al., 2019). The focal points of previous researches were centred on the relationship between scientific evidence and *qarinah* (circumstantial evidence). Less was related to expert opinion.

However, due to the advancement of research and development in forensic science and technology, their paradigm has been shifted towards the integration of forensic science and expert opinion from Islamic perspective. More research has been developed and many theories have been introduced including the theory of Fiqh Forensics (Ahmad, Razak, Saharudin, et al., 2019a; Baharuddin, 2014, 2017b). The areas of expert opinion that have been less discussed in the past have begun to be discovered. As for example, the former intellectual discourse of expert opinion is typically equated with *asḥāb al-masā'il* (al-Māwardī, 1999), *ahlu al-maʿrifah* (Ibnu Farḥūn, 2016), and *ahlu al-khibrah* (Ibnu Qayyim, 2011). While the scope is restricted to the things that cannot be seen or felt by naked eyes (*mā yataʿazaru al-iḥsās bihi*) which need to be attended by an expert (Shanyur, 2005).

However, as far as the research and development in forensic science and technology concern, the discussion of expert opinion in Islamic perspective has become broaden and more progressive to include opinion from forensic expert (al-Umar, 2008; al-Zuḥaylī, 1982; Ali, 2008; Shanyur, 2005). This is because the Syarie judges have no sufficient knowledge related to the scientific evidence. Furthermore, the Syarie judges were prohibited from adjudge matter before them that they have no knowledge pertaining to it (al-Juwaynī, 1980). Therefore, they needed assistance from someone to explain this matter to them, and such matter can only be explained by forensic expert (Alcaraz-Fossoul & Roberts, 2017; Houck & Siegel, 2015; Metwally, 2019; Saferstein, 2015).

Another extrinsic point is related to the expert qualifications. Previously the discussion of expert qualifications was only in general form (Ali, 2008; Shanyur, 2005), but today, it has been refined and improved by incorporating forensic science-related requirements and qualifications. Number of key aspects to be considered in determining the credibility of forensic expert, inter alia, in-depth knowledge of a particular subject matter, long-term experience in the field (McCarthy Wilcox & NicDaeid, 2018), lack of bias, clarity of evidence (Blackwell & Seymour, 2015), forensic science method scientifically tested, and sophistication of the forensic science technology (Koehler, Schweitzer, Saks, & McQuiston, 2016). In addition, there are nine requirements and qualifications that need to be fulfilled in order to qualify a person to become an expert in Syariah Courts (Ahmad, Razak, Saharudin, et al., 2019c; Baharuddin, 2017b; Baharuddin, Anan, Harun, Ruskam, & Yacob, 2015), *inter alia*:

1. A person who is free and not owned by anyone as a slave.[1]

[1] Evaluation in the current context is that experts should be free from any stress or disturbance that may affect their technical evaluation.

2. Comply with general requirements for giving testimony in Islam.[2]
3. Having a high level of knowledge and understanding of the particular field, recent developments in the area and the number of competent instruments (not limited to specific tools in the analysis).[3]
4. Have a very sufficient and adequate basic knowledge about the field.
5. Qualified[4] and efficient[5].
6. Just.[6]
7. Individuals should be appropriate to the case.[7]
8. Must undergone continuous training and examinations in the field of expertise within the prescribed time.
9. Having basic knowledge of Syariah law including the specific and general procedures such as evidence, court procedures and general submissions.

These requirements and qualifications are from the continuous research in the field of Fiqh Forensics. Furthermore, this is among the evidence that the application of expert opinion has been broaden due to the advancement of research and development in forensic science and technology. However, these set of requirements and qualifications are not yet to be codified under any specific laws or regulations. It would be better if the lawmakers take into consideration about this matter and enact it into the existing Syariah Court Evidence Act or Enactments.

Complement the Probative Value of Evidence Tendered Before the Syariah Courts

There is an improvement with regards to the application of expert opinion in the Malaysian Syariah Courts (Ahmad, Razak, Saharudin, et al., 2019b; Ahmad, Razak, Saharudin, Shah, Hashim, Kamaruzaman, et al., 2019; Ahmad, Zakaria, et al., 2019). The said improvement is with regard to the admissibility of forensic science as part of the evidence in Malaysian Syariah Courts.

This is evident from numbers of Syariah cases reported in law journals such as Jurnal Hukum and Shariah Law Journal. There are cases that admit the scientific evidence and there are also cases that reject it. Among the related cases are *Pendakwa Syarie Negeri Sabah lwn. Rosli bin Abdul Japar* 2007),[8] *Eddyham bin Zainuddin lwn. Rahimah bt. Muhamad* 2015),[9] *Tunku Noor Hayati bt Almarhum Tunku Abdul Rahman Putra & Ors v Tunku Khadijah bt Tunku Abdul Rahman Putra (administrator for the estate of Almarhum Tunku Abdul Rahman*

[2] Must be a person of intellect (*ʿāqil*), adult (*bāligh*), and just (*ʿadl*).

[3] Experts only provide evidence based on experience, research, practice, and testing that have been implemented and conducted for many years in the field. The expert is also skilled in using a variety of tools and devices that can help the task (al-Zuḥaylī, 2011). Experts must also be among the registered members in competent institutions.

[4] Qualified person under the written law.

[5] Efficiency in Islam including the ability to be polite, calm, and free from adversity, either from itself or others (Baharuddin, 2017b).

[6] Free from social relations with *fāsiq* or bad guys (Ali, 2008).

[7] As for example, if the case requires a DNA forensic expert to give evidence or opinion, the individual must be in accordance with the prescribed suit.

[8] This case deals with the crime of committing illegal intercourse to give birth to an illegitimate child. The Syarie judge has admit the evidence from DNA analysis that there is a paternity relationship between that illegitimate child with the accused person.

[9] This case relates to a denial of *nasab* (lineage) in which the appellant proposes to use DNA paternity tests to deny his paternity to the disputed child. Unfortunately, the Negeri Sembilan Syariah High Court rejected such proposal because it did not apply in the case of denial of *nasab* (lineage).

Putra) & Anor 2016),[10] and *Khalid bin Abdul Samad v Ketua Pendakwa Syarie Selangor* 2018).[11]

Dabbūr (1985), ʿUzayzah (1990), Anwarullah (1999), Haneef (2005, 2006, 2007), Mutalib and Ismail (2012), Muhamad et al. (2015), Baharuddin (2017b), Yusof, Rajamanickam, and Halim (2019), and Baharuddin et al. (2019) were consistently state that scientific proof through forensic science is part of the *qarinah*. This is in line with the provision of Section 33(1) of Syariah Court Evidence (Federal Territories) Act 1997 which provides expert opinion evidence as part of *qarinah* (Mohamed & Nawasdeen, 2005).

The *qarinah* in terms of probative value has three levels as shown in Figure 3 below, namely, the strong or definite *qarinah* (*qarīnah al-qāṭiʿah*), the weak *qarinah* (*qarīnah ghayr al-qāṭiʿah*), and the false *qarinah* (*qarīnah al-kāzibah*) (Ahmad, Razak, Saharudin, et al., 2019b). This study has concluded that only the first and second levels are admissible in evidence.

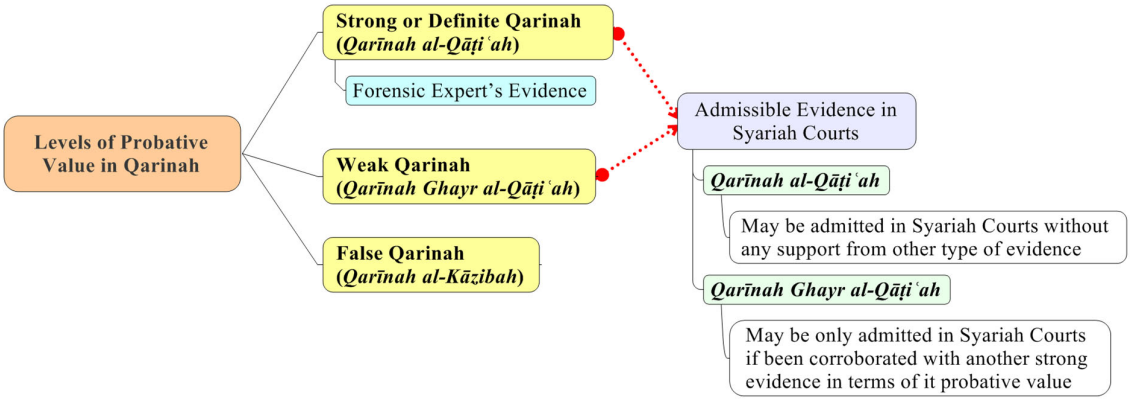

Figure 3: Levels of Probative Value in *Qarinah* (Ahmad, Razak, Saharudin, et al., 2019b)

With regard to the probative value of the forensic expert's evidence, this study agrees with the opinion of Haneef (2006, 2007), Muhamad et al. (2015), and Mutalib and Ismail (2012) stating that it belongs to the first level of *qarinah*. This is based on several factors that can be used as justifications for this study. The paramount justification is due to the advanced research development in forensic science and technology. The evidence or exhibits found and collected during the crime scene investigation will be analysed using scientific methods. This is done in order to obtain important information that can be used for the purpose of prosecution or claim. This process of analysis is carried out empirically using modern and scientific tools and technologies. The results of the analysis will be obtained in quantitative form as a percentage of the similarity between the analysed exhibit and the suspect.

[10] The Selangor Syariah Appeal Court has made an order based on the results of the DNA analysis which was made in writing in the chemist's report. The case regarding the first and second plaintiffs' status as daughters and heirs to the late Tunku is being challenged in the Syariah Court. The court has made unambiguous and conclusive conclusion that the first and second plaintiffs are the daughters of the deceased Tunku and both are included as beneficiaries to the deceased Tunku's estate.

[11] The lawyer for the appellant has recommended to the Shah Alam Syariah High Court that the video footage marked as exhibit P5 be sent to Digital Forensics Department Cyber Security Malaysia for analysis and verification of its content before it is admitted by the court. However, the court rejected the proposal because the appellant failed to demonstrate the legal requirement to do so. In addition, the court also held that the recording was merely corroborative evidence. Although there was a defect in the admissibility of such evidence, the defect did not affect the prosecution's case as it was only corroborative in nature and there were two strong evidence from witnesses' testimony that have been presented by the prosecution in this case.

By considering to these facts, this research deduced that advanced research development in forensic science & technology can be a complement in term of the probative value of evidence tendered before the Syariah Courts. This is because opinion from the forensic expertise is regarded as a strong and definite *qarinah*. In addition to supporting weak or equal evidence, it can also be used in the convicting the charge or exonerating the innocent person.

Kick-start of the application forensic science in the Syariah Court

This research believes that the kick-start for the application forensic science in the Syariah Court may come from the relevant provisions of expert opinion in the Syariah Court Evidence Act or Enactments.

As far as this research concern, there are less previous researches to be found in relation to forensic expertise as part of expert opinion. Furthermore, Nasri, Ismail, Samuri, and Yaziz (2017) concluded in their research that the application of Section on the expert opinion in Syariah Courts today is seen to be less applicable although cases in court have become more complex and require expert testimony in certain areas rather than relying solely on the knowledge of the judge.

It is important to note that, up to this date, the lawmakers in each state have provided a specific procedure for the adoption and application of scientific evidence through the provisions of the Syariah Court Evidence law in each state of Malaysia. Expert opinion is provided under Section 33(1) of Syariah Court Evidence (Federal Territories) Act 1997. Figure 4 below lists several types of forensic science methods that may be used and in accordance with the provision of Section 33(1).

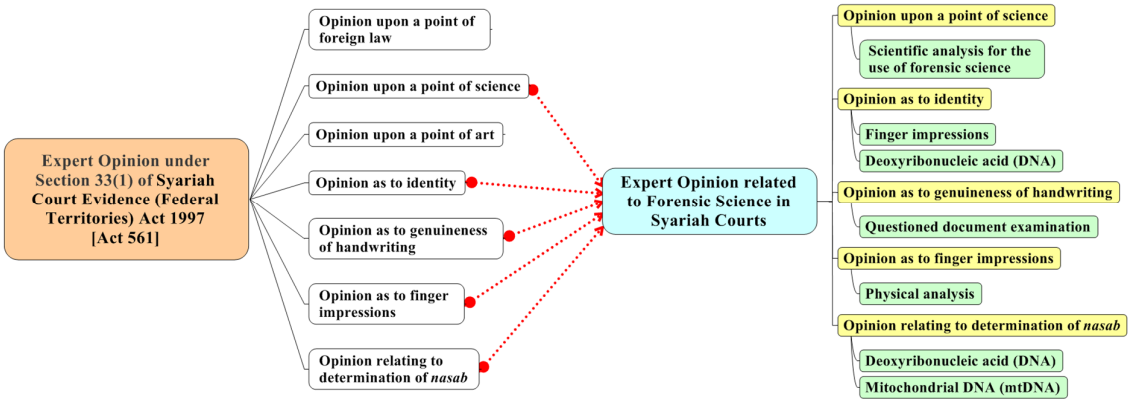

Figure 4: Forensic Expert Opinion under Section 33(1) of Syariah Court Evidence (Federal Territories) Act 1997

In general, Section 33(1) of Syariah Court Evidence (Federal Territories) Act 1997 provides a means of proving or evidence admitted in the Syariah Courts which is expert opinion. There are seven types of expert opinions provided, and five of them have to do with forensic science: opinion upon a point of science, identity, genuineness of handwriting, finger impression, and determination of *nasab* (lineage) (Ahmad, Razak, Saharudin, et al., 2019a). Scientific evidence through forensic expert evidence is flexible as it can be used in both criminal and criminal investigations.

Conclusion

After looking at the positive implications of the Syariah legal system as stated, it is clear that forensic science is justifiable to be implemented in the Syariah Courts. This paper concludes and suggests for rejuvenation of Syariah legal system through the application of forensic

science. Such rejuvenation can be started by overcoming three main issues that play as integral parts in handling the scientific evidence, which are, lack of knowledge, adequate experience, and sufficient training. This study recommends the development of Fiqh Forensics Fundamental Module which covers the theoretical and practical aspects of forensic science. The said module integrates the work of forensic science with Islamic evidence principal and Malaysian Syariah law. By suggesting the development of this module, this study believes that the issues put forward can be resolved since the module will provide sufficient information and adequate training for the targeted reader, Syariah officers in Syariah Legal Institutions.

Another rejuvenation that this study intended to point is the establishment of accredited Syariah forensic laboratory. Most of the analyses performed by the forensic practitioners including DNA analysis are done in forensic laboratories. Up to this date, DNA analysis for the purpose of court proceeding has been conducted by the Forensic DNA Division of the Department of Chemistry Malaysia (KIMIA). If the accredited Syariah forensic laboratory is successfully established, it can ease the existing burden borne by the KIMIA by distributing the exhibits and samples for the purpose of Syariah Courts proceeding to this suggested laboratory. Furthermore, by establishing this laboratory, it can move the Syariah legal system as well as Syariah legal industry to another step forward and being at par with the civil industries.

In a nutshell, from the throughout findings and discussion stated in this study, it can be deduced that advanced research development in forensic science lead to numbers of positive implications towards Syariah legal system in Malaysia. Furthermore, Fiqh Forensics theory also plays a significant role toward the rejuvenation of Syariah legal system through the application of forensic science. All four main components are directly and indirectly applied in this discussion. Not only that, this theory also serves as a bridge to close the gap between forensic science and Syariah law. In fact, it is undeniable that there is a significant relationship between forensic science and Syariah law as the meeting point between this two entities is through the expert opinion of *ra'yu al-khabīr*.

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COUNTER NARRATING RADICAL AND EXTREME NARRATIVES ABOUT ISLAM

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ABSTRACT

The rise of radicalism and extremism under the name of Islam has tainted its true teachings. In the resolution adopted by the United Nations General Assembly (A/RES/70/291), terrorism and violent extremism cannot and should not be associated with any religion, nationality, civilization or ethnic group. It is a response to the distortion of religious values by terrorist movements such as the Islamic State in Iraq and the Levant (ISIL) and Al-Qaida, used to support the cause of their political ideologies. This paper highlights the most common misconceptions by radicalists and extremists about Islam. In order to counter narrate these misconceptions, this paper conducts content analysis study on selected publications issued by these ideological movements in comparison to the referred interpretations of the Quran and Hadith as well as highly regarded publicists and scholars in the field of Islamic law and jurisprudence. The findings indicate that the major misconceptions evolve around the concepts of jihad and Islamic state. It reveals how these concepts were misused in their texts and context and the suggested counter narrations in the foundation of peace as the underlying philosophy in Islam. Building on the abovementioned Islamic principles, this paper contributes to encountering the narratives within these movements to curb its spread among the people as part of prevention and deradicalization effort through education and social empowerment. This will shed light in removing prejudice and discrimination due to the Islamic faith.

Keywords: *Islamophobia, ISIS, Peace*

Introduction

The distortions of the Islamic jurisprudence are detrimental to the religion of Islam. Islam's image as a religion of peace is tainted by ideologies that manipulate its teaching to gain legitimacy, power and followers.[1] These ideologies promote violations of fundamental human rights, such as the committal of torture, rape, terrorist acts, forced marriage and permission of slavery, making it the current largest threat to world peace.[2] The ideological cause and the means in achieving an Islamic state is incoherent to the Islamic teachings and belief.[3] It also contradicts to the community wide understanding of Islam as a religion that is in line with

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international human rights.[4] The acts of terrorism by such movements have triggered response from Muslims around the world to oppose the distortion in the religion. An example of this can be seen in an open letter to Abu Bakar al-Baghdadi of the self-declared Islamic State (IS) which contains 24 general principles and refutations about its ideology.[5]

Methodology

The paper adopts a qualitative content analysis of the texts of the ideology, founded primarily in IS propaganda magazines of *Dabiq* and *Rumiyah*. Other publications include issuance of directions by the movement to enforce the followers' commitment, such as *Al-Mar'ah fi al Dawlah Islamiyyah* (Women of the Islamic State), a manifesto on women by the Al-Khanssaa Brigade, with much emphasis for women.[6] References is also made from interviews, data collections and sources from the authorities that deal directly with detainees and work in curbing radicalism and extremism. The data is analysed from the Islamic viewpoints, based on the mainstream consensus among the Muslim scholars and the prevalent views in the general Muslim community.

Counter Narrative as a Conflict Resolution Intervention

The ideological inconsistencies between IS movements and Islamic teachings, indicate a situation of conflict of values. In the current situation, this conflict of values has escalated into real threat to the society, not only between direct parties within a geographical area, but the general public, in the form of Islamophobia and hate.

In conflict resolution studies, conflicts do not occur in a vacuum. There are contextual factors that influence conflicts such as culture, class, history, geography, ethnicity, religion, gender and media.[7] In the Syrian landscape, recruits comprise of young Syrians who are frustrated by both the ruling regime, and the resistance groups which have their own foreign interests. They saw ISIS as an alternative power that could provide protection, revenge and civilian rights under the dream new state.[8] Another contextual element is the sectarian differences between Shia and Sunni militant groups which harbours in the conflict. In the South East Asia Region of Mindanao, the unfulfillment of recognition towards the Muslim identity along with socio-economic needs, gave rise to a reason for 'filling of the gap' by some groups to resort to ideologies that could offer alternative routes to it. In other parts of the world, there are recruits, sympathizers and supporters from western countries like France, Belgium, the UK, Germany, and the Netherlands joining as fighters with various motivations, among others

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[6] Women in the Islamic State Translation of a Manifesto by the Al Khanssaa Brigade. Translation and analysis by Charlie Winter. 2015. Quilliam; sea also Yılmaz, Z. (2017). Critique of ISIS' Women Policy. *Türkiye Ortadoğu Çalışmaları Dergisi*, *4*(2), 13-39; Ali, M. (2015). ISIS and Propaganda: How ISIS Exploits Women. *Reuters Institute for the Study of Journalism*, 10-11.

[7] Abdalla, A., Akay, L. H., Hassanzadeh, A., & Tabari, M. Islamic Perspectives on Peace and Conflict Resolution Teaching and Training Manual.

[8] Rebecca Crozier. "Why Young Syrians are Joining ISIS" Newsweek 5/11/16. Accessed at https://www.newsweek.com/religion-not-main-motivator-young-syrians-isis-458653; Ian Black. "Poverty Driving Syrian Men and Boys into the Arms of ISIS. 4 May 2016. The Guardian Accessed at https://www.theguardian.com/global-development/2016/may/04/poverty-driving-syrian-men-and-boys-into-the-arms-of-isis

are, "reaching for a sense of belonging, a sense of notoriety, a sense of excitement."[9] Studies have shown that many of the recruits have poor or basic knowledge of the Shariah.[10] The Shariah, the call for one true Islamic statehood and the sense of urgency that comes with it, are manipulated to garner legitimacy and supporters beyond Syria, Iraq and any contextual justifications peculiar to each community. Remove Islam from the name, the movement is purely a criminal organization.[11]

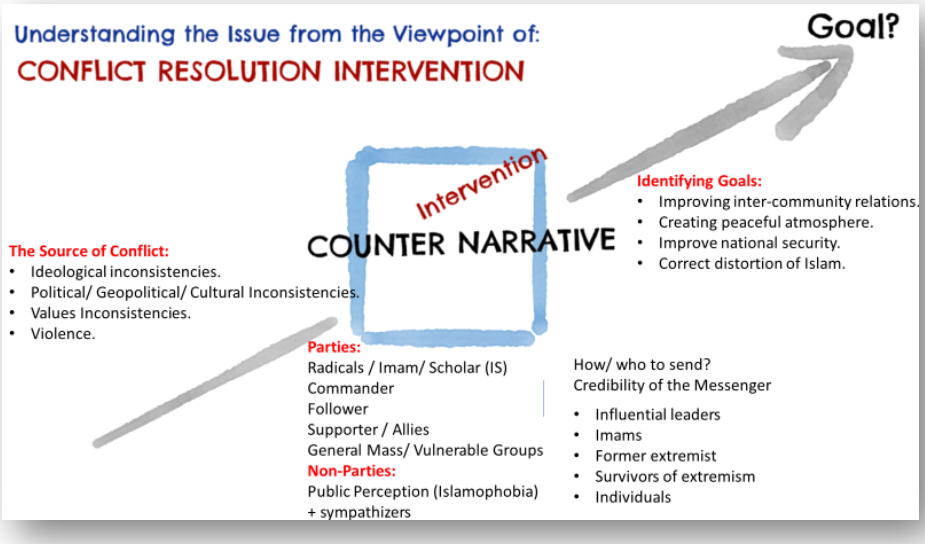

Diagram 1: Conflict Resolution Intervention

IS have been utilising media and narratives as a technique, by providing professionalised high-quality materials of reports, daily life inside ISI areas, exclusive interviews and pictures for dissemination. [12] As graphically presented in Diagram 1, the effort of counter narrative comes in the form of intervention. Counter narrative is positioned as a method to provide alternative narration to the target group and to deconstruct or to delegitimise extremism. It is a form of non-physical strategy to encounter the exact method deployed by the extremists, using narrative as an instrument of psychological warfare. Whilst the content is the major concentration in counter narrating method, it is equally important to choose the right tone of counter narration, as it can be in the form of scholarly, reflective, sentimental or casual narration.[13] The goals of counter narrative can be to improve inter-community relations, creating peaceful atmosphere, improve national security, correct distortion of Islam, to sow the seeds of doubt' in far-right extremist individuals, to build awareness and to discourage people from joining or subscribing to extremist narratives.

[9] Aya Batrawy et al. "Leaked ISIS Documents Reveal Recruits Have Poor Grasp of Islamic Faith: Recruits Ordered 'The Koran for Dummies' and 'Islam for Dummies' to Prepare for Jihad". Independent. 16 August 2016.

[10] Lizzie Dearden, ISIS: Islam is 'Not Strongest Factor' Behind Foreign Fighters Joining Extremist Groups in Syria and Iraq – Report: Military Analysts Say Militant Groups Can Prefer Recruits Who Won't Challenge Ideology." Independent. 16 November 2016

[11] Fuller, G. E. (2008). A World Without Islam. *Foreign Policy*, 46-53.

[12] Ali, M. (2015). ISIS and Propaganda: How ISIS Exploits Women. *Reuters Institute for the Study of Journalism*, 10-11.

[13] Silverman, T., Stewart, C. J., Birdwell, J., & Amanullah, Z. (2016). The Impact of Counter-Narratives. *Institute for Strategic Dialogue, London. https://www. strategicdialogue. org/wp-content/uploads/2016/08/Impact-of-Counter-Narratives_ONLINE. pdf--73.*

Misinterpretation of Islam and Radical Narratives

It is important to decipher the radical narratives contained in the primary publications. This paper outlines the understanding of the ideology which negates the basic tenets of Islamic teaching. This includes rejecting *ijma'* (consensus among the scholars) and *qiyas* (analogy), declaring others as non-believers (*takfir*) due to certain standards of faith and sanctioning violence. The primary publications of the ideology contain Quranic texts and hadith that are distorted in its interpretation to achieve an 'Islamic Caliphate' which opposes the modern understanding of democracy and constitution.

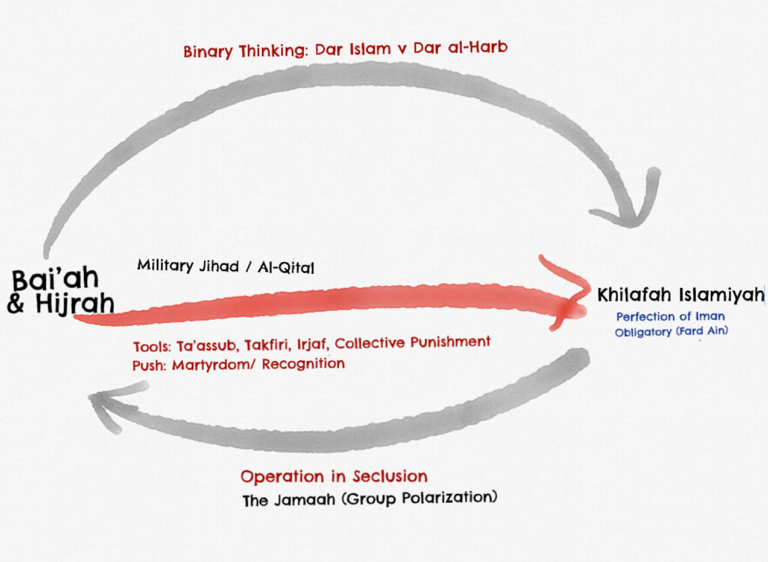

Diagram 2: The Islamic State Movement Method

As illustrated in Diagram 2, the major narrative in this ideology is the ultimate reach of the perfection of *iman* which is obligatory on every follower through the accomplishment of the Islamic Caliphate. Such accomplishment begins with an oath called 'the *bay'ah*' and migration (*hijrah*) backed with Quranic texts and Prophetic traditions. The main methodology deployed is military actions, termed as *'military jihad*' or '*al-qital*' with martyrdom (*shaheed*) as a motivation. Other conceptual tools applied are fanaticism to leaders (*ta'assub*), the concept of muslim community (*ummah)* under one banner, and the misconception of predestination (*qadr)*. This is instilled by the binary thinking of House of Islam (*Dar al-Islam)* and House of the Infidels (*Dar al-Harb)*. There are also psychological aspects of group polarization that are manipulated by the use of concepts such as the '*jama'ah*', loyalty and disavowal (*wala' wa al bara'*), punishing scaremongers/ demoralizers (*irjaf*) and collective punishments. Among the prevalent narrations are:

i. *Urgency of Hijrah:* The urgency of hijrah from *Dar al-Kufr/ Harb* to *Dar Al-Islam*. The urgency is taken from *Surah Taha*: 84, as how Prophet Musa a.s hastened towards his Lord.

ii. *Urgency of Taking Oath (Bay'ah):* Bay'ah is regarded a characteristic of the believer. Those who disbelieve are allies of one another. There is an urgency to fight the unbelievers to avoid corruption on earth. This urgency is taken from *Surah al-Anfal*: 73.

iii. *Urgency to Impose Dakwah:* To follow the methodology of preaching ordained to

Prophet Nuh a.s: The IS believes that there is no option to 'preach/ change by way of peace) because it contradicts the method of the Prophets. This is taken from *Surah Hud* 11: 25-26 where Prophet Nuh a.s was sent as a clear warner for the punishment of a painful day.

iv. *Standard of Iman*: According to this ideology, a person who has submitted the *shahadah* (*la ilaha illallah*) is not necessarily a Muslim who is free from acts of apostacy (*shirk or kufr*). An analogy is made to the period of the Prophet SAW where there were only a small number of people who truly understood the religion. Therefore, other people who show signs of apostacy must be opposed.

v. *War as the only Method of Jihad*: Real Jihad is not preaching (*da'wah*). There is a clear order for killing in *Surah Al-Tawbah* 9: 5. The justification being is that those people are open enemy. Terror must be 'justly' (by revenge) conducted on their lands as how Muslim lands were terrorized.

vi. *Faith in the Oneness of Allah SWT:* Non-Muslims must be hated because they do not believe in the oneness of Allah SWT. This is based on *Surah Al-Mumtahanah*: 4. According to IS, it is necessary to disassociate oneself from non-Muslims because they worship other than Allah. It is ordained to declare animosity and hatred forever until they believe in Allah alone.

These narrations are contained in IS publications of Dabiq and Rumiyah. In response to this, general refutations were made in the open letter to IS, by describing the way of thinking of the ideology as "oversimplify(ing) Shariah matters and ignore(ing) established Islamic Science", "ignore (ing) the reality of contemporary times when deriving legal rulings" and "disapproving differences of opinion."[14]

Counter Narrative Intervention: Overarching Principle and Islamic Worldview

The abundance of authorities to support that Islam promotes peace, moderation and mercy are sourced from Al-Quran and the prophetic traditions. Counter narrating requires the understanding of where each narrative derives from, the contextual interpretations of the authorities, and the appropriate responsive tone for the narrative. These are selected aspects in the ideology that are crucial for counter narrative intervention:

Khilafah Islamiyyah and Perfection of Iman

Achieving an Islamic caliphate is the main motivation of the IS movement. According to the IS movement, it is regarded an obligation on each of the followers to reach the perfection of Iman. It justifies actions of anarchy and terrorism, excommunication (*takfir*), jihad and extremism (*al-ghuluw*) and violation of human rights and brutality. The issue of caliphate *(khilafah)* is a matter of *fiqh*, and *fiqh* allows the application of reality, practicality.

However, for the extremists, the questions of *Khilafah* or *Imamah* (popularly used by the Sunni for the former, and the Shiites for the latter) became a pillar of the religion which affects the completion of the faith (*iman*). This was the reason of the rejection of the Shiites pertaining to the nomination of Abu Bakar r.a as the Caliph after the demise of the Prophet SAW to maintain the political rights only to the family of the Prophet SAW (*ahl al-Bayt*). This reason was made a justification for the friction and acts of aggression committed by these groups towards other Muslims in the Islamic history.

[14] Open Letter to Dr. Ibrahim Awwad al-Badri alias 'Abu Bakar al-Baghdadi' and to the Fighters and Followers of 'The Self Declared Islamic State' 19 September 2014.

The motivation towards an Islamic state is supported by the IS' self-claim status to be the people mentioned in the hadith on the black banners/ flags *(ahadith al-rayat al-sud*).[15] The usage of the hadith on the black flag is not new but has been exploited during the Abbasid revolution against the Umayyads. By claiming that the source of the movement is from the hadith, it is to confirm that they are the "truth bearing group", having "a legitimate struggle", "a victorious group" and "a group which Muslims are obliged to support and join". [16] Some scholars have also argued on the authenticity of the hadith to ascertain its validity in Islam.[17]

Relating to this, the Prophet SAW depicted that there will be people in the end of times who have the best of religious outlook, but deviate from Islam like an arrow going through the game:

> … I heard Allah's Messenger ((ﷺsaying, "In the last days of this world there will appear some young foolish people who will use (in their claim) the best speech of all people (i.e. the Qur'an) and they will abandon Islam as an arrow going through the game. Their belief will not go beyond their throats (i.e. they will have practically no belief), so wherever you meet them, kill them, for he who kills them shall get a reward on the Day of Resurrection. "Sahih al-Bukhari 3611, Book 61 Hadith 118

While the establishment of a state is a logical extension of Islam and as an instrument to facilitate implementation of its Shariah, the idea of having one form of Islamic state is erroneous. Hashim Kamali in his writing "The Characteristics of an Islamic State" mentions that 'the truth is that Islam does not require conformity to any particular form. There is not only one form of Islamic State but many, and it is for the Muslims of every period to discover the form most suitable for their needs.' The Shariah as a legal system provides the principles that are adequate for the establishment of a state, the form of which is dependent on the suitability of the needs of the society. Muhammad Asad states that "an Islamic state is not a goal or an end in itself but only a means: the goal being the growth of the community of people who stand up for equity and justice, for right and against wrong…"[18]

Sheikh Yusuf Al-Qaradawi states that Islamic state is neither a state of theocracy, nor it is a secular state. An Islamic state encompasses a civil state (*madani*) which is based on the tenets of Islamic principles, built under the strength of oath (*bay'ah*) and consultation(*shura*). The leaders are appointed amongst those who are capable, trustworthy and knowledgeable. An Islamic state has a universal face or dimension which exceeds racial or cultural ties.[19] An Islamic State holds steadfast to the Islamic principles, including commitment to trust *(amanah)*, justice, equality, welfare, preservation of rights, morality and the *Maqasid al-Shariah.*

Excommunication (Takfir)

The IS ideology uses the doctrine of excommunication (*takfir*) as a theological declaration to justify the killing of another Muslim – e.g Muslim scholars, Muslim leaders, whomsoever in their opinion has deviated from the cause. This method for political legitimacy is also not

[15] Nurdin, Kamaluddin. Fenomena Ekstrimisme dalam Aliran-aliran Teologi. Conference on Social Science and Technology (ICONSITECH), 24-25 Nov 2018. Malaysia
[16] Bahari, M., & Hassan, M. H. (2014). The Black Flag Myth: An Analysis from Hadith Studies. *Counter Terrorist Trends and Analysis*, *6*(8), 14-17.
[17] Bahari, M., & Hassan, M. H. (2014). The Black Flag Myth: An Analysis from Hadith Studies. *Counter Terrorist Trends and Analysis*, *6*(8), 14-17.
[18] Asad, M. (1961). *The Principles of State and Government in Islam*. University of California Press.
[19] Yusuf Al-Qaradawi Fiqh al-Dawlah (Trans.) Fiqh Kenegaraan. ABIM 1999.

new. The method of *takfir* was practised by the seceders (*Kharijites*) after the demise of Prophet Muhammad saw, upon the disagreement of choosing a new caliphate. The biggest turning point of conflict during the time of the four pious caliphs was during the assassination of the third caliph Uthman bin Affan r.a, which led to frictions in the Muslim ummah. Among the most extreme in this sect were *Al-Azariqah* (which allowed/ endorsed Abu Muljam's assassination of Ali Abi Talib), *Al Najdat* (which negated the need of state governance), *Al-Yazidiyah*, *Al-Sufriyah*, *Al-Ajaridah*, *Al-Maimuniyah* and *Al-Ibadiyah* with many variations of belief and deviated practice.[20] The implication of these historical accounts are:

- It provides the sources for 'legitimacy' for *takfiri*, extremism, and to execute those who not line with their beliefs.
- Give rise to the movement of anti -hadith.
- Led to the belief that in politics, there is no need of a leadership which is disobedient to God. This leadership and the people supporting it must be battled, and can be executed.[21]

Takfiri methods were also prevalent in the early Islamic history among the Mutazilites and the Shiites. Takfir is an issue of jurisprudence. According to Imam Al-Ghazali, suspecting belief is unbelief itself. The impact of the designation of unbelief is as the following,

> 'Unbelief' is a legal designation (*hukm syar'i*) that refers to 1) a person's loss of property rights, 2) the licitness of shedding his blood and 3) his dwelling in the hellfire forever. As such, the basis upon which it is established is the same as that upon the rest of the rules of religious law are established: sometimes they are based on certainty; sometimes on a preponderance of probability; and sometimes on sources to which one cannot fully commit either way. And whenever one finds oneself unable to commit (to his would be source), he should refrain from branding a person an unbeliever (with emphasis)."[22]

Takfir is accompanied with the dogma of *wala wa al bara'* which means loyalty and disavowal. This is a strong doctrine adopted by early Khawarij, the first sect in Islamic history. [23] Applying this doctrine, members are tested and directed on whom should loyalty be given, and who should be rejected. It gives the sense of 'us' and 'them' and the consequences that follow from this labelling.

Jihad

An important element is the exploitation of the concept of Jihad which formed the basis of the terrorists' operation. Abdul Hamid A. Abu Sulayman pointed out the differences among the scholars in understanding jihad, whether it is a permanent obligation or whether the permanent situation between Dar Islam and Dar Harb is neutrality, revolving around the question of duration of a peace treaty.[24] A notable misleading view was by Majid Khadduri, who maintained the permanent status of jihad, and the limited treatment on a *Harbi*, entitling

[20] Nurdin, Kamaluddin. Fenomena Ekstrimisme dalam Aliran-aliran Teologi. Conference on Social Science and Technology (ICONSITECH), 24-25 Nov 2018.
[21] Nurdin, Kamaluddin. 2011. Nash'at al-Firaq wa Tafarruquha, Lebanon-Beirut, Darul Kutub Ilmiah.
[22] al-Ghazālī, A. H. (2002). On the Boundaries of Theological Tolerance in Islam: Abū Hāmid al-Ghazālī's Faysal al al-Tafriqa. *Trans. Sherman A. Jackson. Oxford: Oxford University Press*.
[23] Clycq, N., Timmerman, C., & Vanheule, D. (Eds.). (2019). *Radicalisation: A Marginal Phenomenon Or a Mirror to Society?* (Vol. 4). Leuven University Press.
[24] AbuSulayman, A. (1987). *Towards an Islamic theory of international relations: new directions for Islamic methodology and thought* (Vol. 1). International Institute of Islamic Thought. p. 20

a *Harbi* 'to Islamic justice during the brief span of peace', maximum being ten years of peace treaty.[25] Another general misconception adopted by extremist groups is on the method of abrogation concerning 'the sword verse' from *Surah al-Tawbah* 9: 5 (hostility towards polytheists) by generalising the call for slaying infidels wherever they are found. In the context of interpretation of the 'sword verse', it is submitted that;

- The interpretation of the verse has been taken out of context.
- The interpretation of the verse must be read together with the verses before and after it which shows the mercy of Islam - to honour the pagans who did not break the treaty (*Surah al-Tawbah* 9:4), to open the way of the pagans who repent (*Surah al-Tawbah* 9:5), to provide for the pagans asylum if they ask for it (*Surah al-Tawbah* 9:6), and if the pagans stay true to the Muslim, the Muslim must stay true to them (*Surah al-Tawbah* 9:7)
- The verse was revealed against the pagan Arabs who defied Islam and oppressed the Muslims, within the context of the time.

The verse is said to abrogate all earlier verses that contains the messages of patience and tolerance. If this problematic approach is taken, it will cause a reduction in the meaning and purpose (*maqsad*) of Al-Quran and negate the Quranic spirit in reviving human consciousness.[26]

There is also a misconstruction of the term 'Islamic Holy War'. There is no Islamic source that permits a Muslim to fight non-Muslims solely on the basis that they are not Muslims. Islam promotes coexistence as shown in the Islamic State of Madinah. This stems from a basic principle in Islam in *Surah Al-Baqarah* 2: 256, that there is 'no compulsion in religion'. Religion is not a motive for warfare, nor to subordinate or compel others to convert to Islam.[27] The majority view (*Hanafi*, *Maliki* and *Hanbali* jurists) is, the only primary Islamic justification for war is defense against another's aggression.[28]

Extremism (Al-Ghuluw) and Violation of Human Rights and Brutality

In terms of torture and brutality towards captured individuals in the hands of terrorists, these practices find no justification in the Islamic law. Extremism or excessiveness in religion is dangerous. The IS movement justifies excessiveness as a necessary method to achieve the ends in establishing an Islamic Caliphate. The Prophet SAW has reminded on exaggeration in religion in a hadith reported by Ibn Abbas:

> The Messenger of Allah, peace and blessings be upon him, said, "**O people, beware of exaggeration in religion, for those who came before you were destroyed by exaggeration in religion.**" *Sunan Ibn Mājah* 3029

The purposive description of the Islamic ummah is described in the al-Quran to be 'the best of peoples' (*khayr al-ummah*) for mankind, enjoining what is right, and forbidding what is wrong, and believing in Allah. (*Surah Al-Imran*: 110). Sheikh Yusuf Al-Qaradawi highlighted that moderation, or balance, is 'not only a general characteristic of Islam, it is a fundamental landmark'. This is based on the Quranic verse, in *Surah Al-Baqarah* 2: 143,

> "…And thus we have made you a just community that you will be witnesses over the people and the Messenger will be a witness over you."

[25] Khadduri, M. (1984). *The Islamic Conception of Justice*. JHU Press.p. 167
[26] AbuSulayman, A. (1987). *Towards an Islamic theory of international relations: new directions for Islamic methodology and thought* (Vol. 1). International Institute of Islamic Thought.
[27] Al-Zuhili, S. W. (2005). Islam and international law. *International Review of the Red Cross*, *87*(858), 269-283.
[28] Al-Dawoody, A. (2015). Al-Sarakhsi's Contribution to the Islamic Law of War. *UCLA J. Islamic & Near EL*, *14*, 29.

Traditional readings can be found in books written by disciples of Imam Abu Hanifah for example Al-Shaybani and other scholars as Ibnu Khaldun in his writing *Al-Muqaddimah* and *Al-Mawardiyy in Ahkam al-Sultaniyyah*. A more contemporary writing, *Athar Al-Harb Fi Al-Fiqh Al-Islamiyy, Dirasah Muqaranah*, a distinguished research by Prof. Dr. Wahbah Al-Zuhailiyy has academically discussed on the principles of war in Islamic law. The discussion revolves around the effect of the war on every stage including the effect during the war and after the war. The book provides an in-depth study on the status of the captives of war in Islamic law based on the Al-Quran and Sunnah, and analysises the opinion of Islamic scholars from the view of different schools of law (*mazaahib*). Other works are such as Ahkam *Al-Harb Fi Al-Shari'ah Al-Islamiyyah wa Al-Qanun,* written by Mahmud Abdul Fattah Mahmud Yusof and Ali Ahmad Jawwad *(2005)* in *Ahkam Al-Usra Fi Al-Fiqh Al-Islamiyy Wa Al-Qanun Al-Wad'ie.*

An important approach is to move away from concentrated legalistic differences and discussions, towards a purposive understanding of Islam. Islam by the name itself means peace which is always true in time and space. Among the relevant verses to show this purposive rule are *Surah Al-Anbiya* 22: 107, '…we did not send you, except as mercy to all the worlds', *Surah Al -An'am* 6: 54, '…your Lord has inscribed for Himself (the rule of) mercy', and *Surah Al-A'raf* 7: 156, '…but My mercy embraces (encompasses) all things.'

Conclusion

Extremism does not find a space in Islam.[29] An ummah that is contaminated with elements of *Ta'assub* (bigoted adherence), *Tafarruq* (splitting) and *Takfir* (declaration of another Muslim as non-believer) is the unwanted scenario of the Muslim ummah. It is thus pertinent for every Muslim, especially the young generation to understand his own religion to be resilient against the threats of distortion. It must be done by encountering the narratives to curb its spread among the people as part of prevention and deradicalization effort through education and social empowerment. This will shed light in removing prejudice and discrimination due to the Islamic faith.

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ISU MUNAKAHAT DALAM KALANGAN ORANG KURANG UPAYA (OKU) PENDENGARAN

MUNAKAHAT ISSUES AMONG PEOPLE WITH EARING DISABILITY

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ABSTRAK

Perkahwinan merupakan sunnah Nabi Muhammad SAW dan anugerah yang diberikan oleh Allah SWT kepada manusia bagi meneruskan kelangsungan manusia di muka bumi ini. Setiap manusia mempunyai fitrah untuk hidup berpasangan tidak kira sama ada manusia normal mahupun kekurangan dari segi fizikal atau mental. Terdapat beberapa isu berkaitan perkahwinan yang dihadapi oleh orang kurang upaya (OKU) pendengaran seperti isu akad nikah, taklik, cerai, rujuk dan sebagainya. Justeru, objektif kajian ini adalah untuk mengenalpasti isu-isu munakahat dalam kalangan OKU pendengaran. Selain itu, kajian ini bertujuan untuk menjelaskan tentang hukum dan penyelesaian bagi masalah tersebut. Metodologi kajian ini adalah berbentuk kualitatif dengan menggunakan kaedah perpustakaan, dokumentasi dan temubual bagi mendapatkan data berkaitan kajian. Hasil dapatan kajian mendapati terdapat lima isu berkaitan akad nikah, taklik, cerai dan rujuk yang mempunyai hukum yang tersendiri berdasarkan situasi OKU pendengaran. Setiap isu mempunyai kesan-kesan yang besar terhadap golongan OKU pendengaran sekiranya tidak dijelaskan dengan baik. Hal ini terjadi disebabkan oleh kurang perbincangan berkaitan golongan OKU pendengaran terutamanya dalam munakahat. Kajian lanjutan tentang isu-isu dalam kalangan OKU pendengaran dari aspek muamalat, ibadat dan jenayah perlu dijalankan bagi membantu golongan ini memahami dengan lebih baik dan mendalam tentang isu-isu tersebut.

***Kata Kunci**: Isu, Munakahat, Orang Kurang Upaya (OKU) Pendengaran*

ABSTRACT

Marriage is the sunnah of the Prophet Muhammad and the gift given by Allah SWT to all mankind for the continuation of human existence on Earth. Every human being has a desire to live with their partner and in pairs regardless of whether a normal human being nor for the lack of physically or mentally. There are many marriage-related issues that people with hearing disability have such as marriage, taklik, divorce, rujuk, and so on. Therefore, the objective of this study is to identify the marriage issues among people with hearing disability. In addition, this study aims to shed light on the law and its solution to the problems. The methodology of this study is qualitative in nature by using library methods, documentation and interviews to obtain data related to the study. The results showed that there were five issues related to marriage, taklik, divorce and rujuk, which had their own laws based on the situation of the hearing impaired. Each issue has significant effects on the hearing impaired if everything not explained thoroughly. This is due to the lack of discussion regarding the issue among hearing impaired especially in the munakahat. Further study on issues among the hearing impaired in terms of muamalat, ibadat and crime should be conducted to help the hearing impaired get better and deeper understanding and on these issues.

***Keyword(s):** Issue, Munakahat, People With Hearing Disability*

Pendahuluan

Perkahwinan merupakan satu perkara yang akan dialami oleh masyarakat tidak kira sama ada golongan normal atau orang kurang upaya (OKU). Akad nikah dalam perkahwinan amat penting dalam Islam kerana ia akan menentukan kesahihan sesuatu perkahwinan. Akad nikah menghalalkan pergaulan antara lelaki dan wanita yang diharuskan berkahwin. Allah SWT berfirman dalam surah an-Nur ayat 32:

وَأَنكِحُوا الأَيَٰمىٰ مِنكُم وَالصّٰلِحينَ مِن عِبادِكُم وَإِمائِكُم ۚ إِن يَكونوا فُقَراءَ يُغنِهِمُ اللَّهُ مِن فَضلِهِ ۗ وَاللَّهُ وٰسِعٌ عَليمٌ

Maksudnya: "*Dan kahwinkanlah orang bujang (lelaki dan perempuan) dalam kalangan kamu, dan orang yang soleh dari hamba-hamba kamu, lelaki dan perempuan. Jika mereka miskin, Allah akan memberikan kekayaan kepada mereka dari limpah kurnia-Nya kerana Allah Maha Luas (rahmat-Nya dan llimpah kurnia-Nya), lagi Maha Mengetahui*".

Ayat tersebut menerangkan tentang keharusan berkahwin bagi lelaki dan perempuan yang mampu. Selain itu, berkahwin merupakan salah satu cara untuk mengelakkan penzinaan dari berlaku. Tujuan perkahwinan adalah untuk memenuhi tuntutan fitrah, mengikuti sunnah Rasullah SAW, menghindari maksiat dan untuk mendapatkan zuriat bagi meneruskan keturunan seseorang.

Firman Allah SWT dalam surah Ar-Rum ayat 21 menerangkan tentang matlamat perkahwinan sebagaimana berikut:

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً ۚ إِنَّ فِي ذَٰلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ

Maksudnya: *"Dan di antara tanda-tanda yang membuktikan kekuasaan-Nya dan rahmat-Nya, bahawa Dia menciptakan untuk kamu (wahai kaum lelaki), isteri-isteri daripada jenis kamu sendiri, supaya kamu bersenang hati dan hidup mesra dengannya dan dijadikan-Nya di antara Kamu (suami isteri) perasaan kasih sayang dan belas kasihan. Sesungguhnya yang demikian itu mengandungi keterangan orang yang berfikir."*

Pasangan suami isteri yang berkahwin perlu memahami tanggungjawabnya dalam memastikan rumah tangga harmoni dan bahagia. Selain daripada ilmu rumah tangga, suami isteri perlu mengetahui hak masing-masing termasuklah talak, rujuk, taklik dan poligami. Perkahwinan meliputi ilmu tentang hidup berpasangan yang membolehkan seseorang itu menuntut hak mereka secara adil memandangkan perkahwinan melibatkan dua individu yang menjalani kehidupan bersama. Islam menjelaskan dengan terperinci setiap hak individu selepas berkahwin dengan jelas di dalam al-Quran seperti cerai, taklik, poligami dan rujuk. Hal ini adalah bertujuan bagi memastikan hak setiap individu terpelihara dengan adil dan selaras dengan tuntutan syarak.

Islam adalah agama yang adil dan saksama. Oleh itu, Islam tidak mengenepikan kepentingan dan hak OKU malah memberikan ganjaran dan kelebihan kepada golongan ini dalam semua aspek termasuk munakahat. OKU adalah seseorang yang mempunyai kecacatan atau kekurangan dari segi anggota atau pancaindera yang menjadikannya kurang berkemampuan dari segi fizikal dalam melaksanakan tugas-tugas dan aktiviti seperti orang normal. OKU terbahagi kepada beberapa jenis iaitu OKU pendengaran, OKU pertuturan, OKU penglihatan dan OKU anggota.

Golongan OKU pendengaran termasuk dalam kategori golongan orang yang cacat dari segi pancaindera kerana mereka tidak mampu mendengar sebarang bunyi mahupun percakapan. Golongan ini juga mempunyai kesukaran dalam bertutur dan kebanyakkan mereka menggunakan bahasa isyarat untuk berkomunikasi dengan masyarakat normal dan golongan yang sama dengan mereka.

Kajian Literatur

Dalam sesebuah institusi keluarga, perkahwinan dan sistem kekeluargaan Islam haruslah dititkberatkan, kerana melaluinya, terbentuklah ummah yang akan melahirkan pelapis dan warisan yang mampu membangunkan institusi negara ke arah kemajuan yang seiring dengan negara-negara maju yang lain pada masa akan datang. Menurut Bernama (2016), Datuk Azizah Mohd Dun iaitu Timbalan Menteri Pembangunan Wanita, Keluarga dan Masyarakat berkata, sebanyak 48, 077 kes penceraian telah berlaku dalam kalangan pasangan yang beragama Islam sejak Januari hingga 10 Julai tahun 2017.

Dari segi bahasa, menurut Muhammad Qasim al-Ghazzi (1970), perkahwinan ialah himpunan,pengumpulan, percantuman, persetubuhan dan akad. Menurut Mat Saad Abd. Rahman (1993), dari segi istilah pula, perkahwinan merupakan satu akad yang menghalalkan pergaulan di antara seorang lelaki dengan seorang perempuan yang bukan muhrim dan menimbulkan hak serta kewajiban antara kedua-dua mereka. Mengikut syarak, perkahwinan bererti suatu akad yang menghalalkan pergaulan yang membatasi hak-hak kewajipan serta tolong-menolong antara seorang lelaki dengan seorang perempuan yang di antara keduanya bukan mahram, Sulaiman Rasjid (1988). Tuntasnya, perkahwinan merupakan satu akad yang menyatukan dan mengikat antara seorang lelaki dan seorang perempuan yang bukan muhrim untuk menghalalkan hubungan mereka.

Perkahwinan adalah suatu cara yang berfaedah bagi tujuan-tujuan sosial yang mulia dan menjamin lahirnya hubungan yang kukuh di antara anggota-anggota masyarakat (Taib Azamudin, & Aminah Zakaria, 1993). Selain itu, konsep perkahwinan dalam Islam turut menitik berat soal kesucian dalam hubungan dengan menekankan faktor penerusan zuriat yang halal (Rozumah Baharudin & Rumaya Juhari, 2002) bagi menjamin kebaikan sosial yang terjalin antara dua keluarga menerusi pertalian darah yang diredhai oleh Allah (Abdul Jalil Mohd Hassan, 1982).

Setiap manusia mempunyai keinginan untuk berpasangan tidak kira manusia normal mahupun kurang upaya. Orang kurang upaya atau OKU adalah seseorang yang mempunyai masalah dari segi anggota atau pancaindera mereka yang menyebabkan mereka sedikit berbeza dengan orang-orang normal. Namun, hak mereka tidak pernah dilupakan dalam Islam, malah mereka diberikan kelonggaran dalam kehidupan untuk beribadah mengikut kemampuan. Begitu juga dalam aspek perkahwinan, hak mereka tidak pernah diabaikan (Hussein et. al, 2019).

Sejak kebelakangan ini, pelbagai persoalan dan isu yang timbul berkaitan perkahwinan golongan OKU pendengaran dan kebanyakkannya disebabkan oleh kaedah komunikasi yang digunakan oleh golongan ini iaitu bahasa isyarat. Para fuqaha sepakat menyatakan bahawa sebarang isyarat yang tidak boleh difahami atau tidak jelas daripada orang bisu tidak boleh diterima. Namun, jika isyarat yang diberikan itu datang daripada orang bisu yang mempelajari bahasa isyarat dan isyarat itu dapat difahami dengan jelas, maka ia diterima dalam akad perkahwinan (Ibn Nujaym, t.t.; al-Shirbini, t.t.; al-Mardawi, t.t.; Ibn Muflih, 1980). Malah, menurut Hussein ‘Azeemi (2019), bagi pengantin yang boleh menulis, adalah lebih baik baginya untuk menulis berbanding dengan hanya menggunakan isyarat. Dia juga boleh menggunakan wakil untuk menyampaikan apa-apa yang ingin diperkatakan.

Penggunaan tulisan dalam hal berkaitan perkahwinan dilihat membantu golongan OKU pertuturan umumnya dan golongan OKU pendengaran khususnya berkomunikasi dengan orang ramai. Pilihan untuk menggunakan penulisan dapat mengelakkan salah faham dalam mentafsirkan bahasa isyarat dan melancarkan urusan-urusan rasmi seperti perkahwinan. Namun, penggunaan kaedah penulisan mungkin tidak terlalu efisen dan kondusif bagi golongan OKU pendengaran kerana mereka perlu membawa pen dan kertas ke mana sahaja bersama mereka. Kebanyakkan OKU pendengaran lebih selesa menggunakan bahasa isyarat sebagai kaedah komunikasi secara harian dengan orang sekeliling.

Metodologi

Kajian ini menggunakan dua kaedah penyelidikan iaitu kajian perpustakaan dan kajian lapangan. Bagi maksud tercapainya objektif kajian, penyelidik menggunakan dua sumber maklumat sebagai asas kepada kajian iaitu data primer dan data sekunder. Data primer diperoleh daripada temu bual bersama ahli Persatuan Orang Pekak Negeri Sembilan (NESDA) berkaitan isu-isu yang timbul berkaitan munakahat dalam kalangan OKU pendengaran. Data sekunder diperolehi dengan melakukan kajian perpustakaan. Antara bahan bacaan yang dirujuk adalah bahan-bahan yang berkaitan dengan zakat, kajian-kajian lepas, dalil daripada Al-Quran, dan bahan-bahan penulisan yang lain seperti junal dan artikel. Data yang diperoleh daripada sumber-sumber yang dinyatakan di atas akan dihuraikan dan dibincangkan bagi mendapatkan kefahaman yang jelas tentang isu-isu munakahat dalam kalangan OKU pendengaran.

Perkahwinan Orang Kurang Upaya (Oku) Pendengaran Menurut Perspektif Islam

Sebagai manusia biasa, keinginan untuk berkahwin hadir secara semula jadi. Begitu jugalah bagi golongan OKU yang sememangnya mempunyai hasrat yang sama. Tidak kira golongan normal ataupun golongan OKU, Islam menjadikan perkahwinan sebagai ibadah dan semestinya diberikan ganjaran yang besar buat mereka yang melakukannya (Azman, 2016).

Ulama terdahulu telah membincangkan beberapa keadaan yang boleh memberikan kesan kepada akad perkahwinan. Salah satu daripada keadaan tersebut ialah kekurangan atau keaiban yang boleh menghalang tujuan sebenar akad perkahwinan, iaitu persetubuhan (Azman, 2016). Antara aib atau penyakit yang menghalang persetubuhan adalah seperti penyakit *al-Jabb* (zakar terpotong), *al-'Unnah* (mati pucuk), *al-Khisa'* (mengkasi), *al-Ratq* (lubang vagina tersumbat dengan daging), *al-Qarn* (lubang vagina tersumbat dengan tulang) atau penyakit-penyakit lain yang boleh menghalang persetubuhan antara suami dan isteri.

Berdasarkan penyakit-penyakit tersebut, jelaslah bahawa kekurangan yang dialami oleh OKU pendengaran tidak diklasifikasikan sebagai halangan yang boleh menghalang seseorang OKU pendengaran daripada berkahwin. Hal ini kerana, kekurangan yang dialami oleh mereka yang pekak tidak menghalang mereka daripada bersetubuh dan merasai nikmat-nikmat perkahwinan yang lain. Oleh itu, kekurangan dan kecacatan anggota atau pancaindera seorang OKU pendengaran tidak termasuk dalam perkara-perkara yang boleh mengharuskan perceraian antara pasangan yang berkahwin.

Secara keseluruhannya, hukum perkahwinan antara orang normal dengan OKU pendengaran adalah sama iaitu harus dan digalakkan dalam Islam sekiranya individu tersebut mampu untuk berkahwin. Namun terdapat perbezaan kecil antara perkahwinan orang normal dan OKU pendengaran iaitu perbezaan dari segi penyampaian akad nikah dan taklik yang dinyatakan melalui bahasa isyarat dan bukan melalui lisan. Hal ini kerana, OKU pendengaran tidak mampu bertutur seperti orang normal dan pertuturan mereka mungkin tidak jelas.

Walaupun perkahwinan OKU dengan orang normal hampir sama namun kebanyakkan isu yang timbul berkaitan munakahat OKU pendengaran tidak sama dengan isu munakahat orang normal. Golongan OKU pendengarana memerlukan penjelasan yang jelas dan terperinci dalam setiap hal yang berlaku disekeliling mereka memandangkan keadaan mereka yang berbeza dengan orang normal. Tidak ramai pihak yang membuat kajian secara mendalam dan terperinci tentang isu-isu munakahat yang di alami oleh golongan OKU pendengaran.

Oleh itu, penulisan ini akan memberi penerangan tentang beberapa isu yang dihadapi oleh pasangan OKU pendengaran dalam hal berkaitan munakahat. Justeru, dalam penulisan ini terdapat lima isu dalam keadaan-keadaan yang berbeza berkaitan isu munakahat OKU pendengaran yang akan dibincangkan meliputi isu berkaitan akad nikah, mas kahwin, taklik dan cerai.

Isu Munakahat Dalam Kalangan Orang Kurang Upaya (OKU) Pendengaran

1. Isu suami mengisyaratkan isyarat cerai tanpa mengetahui maksud

Dalam keadaan ini, suami mengisyaratkan isyarat cerai berulang kali kepada isterinya tanpa mengetahui maksud isyarat tersebut. Oleh yang demikian, suami perlulah mengetahui isyarat talak tersebut diisyaratkan dengan niat untuk berpisah dengan isteri atau tidak. Namun, terdapat situasi dimana suami dengan niat untuk bercerai sewaktu berlaku krisis rumahtangga mengisyaratkan isyarat cerai tanpa mengetahui maksud isyarat tersebut. Apabila keadaan suami isteri sudah kembali tenang, keduanya menjalankan kehidupan berumahtangga seperti biasa.

Jika isyarat talak yang dilakukan oleh suami dapat difahami maka talak tersebut adalah sah (Malik, Al-Gharnati, Al-Qurtubi, 1967). Terdapat dua jenis talak iaitu lafaz talak sarih dan lafaz talak kinayah. Talak sarih ialah lafaz talak yang menunjukkan talak secara jelas dan tidak dapat diandaikan kepada maksud lain (Zulkifli, 2011). Sebagai contoh lafaz sarih ialah "aku menceraikanmu" atau "aku lepaskan engkau". Perkataan 'cerai' dan 'lepaskan' merupakan perkataan yang jelas menunjukkan bahawa suami ingin berpisah dengan isterinya dan menurut hukum ia adalah jatuh talak. Jenis talak yang kedua ialah lafaz talak kinayah atau lafaz yang tidak menunjukkan maksud talak secara jelas, boleh diandaikan dengan maksud yang lain selain talak (Zulkifli, 2011). Talak ini memerlukan kepada niat suami semasa melafazkan talak sama ada suami berniat untuk menceraikan isteri atau tidak.

Bagi suami yang terdiri daripada golongan OKU pendengaran, isyarat talak yang diisyaratkan adalah termasuk dalam kategori lafaz talak sarih kerana isyarat talak atau cerai yang diisyaratkan dianggap sama dengan lafaz sarih. Namun, sekiranya suami mengisyaratkan isyarat yang menunjukkan isyarat cerai secara kinayah seperti "pergi jauh dariku" atau "engkau haram bagiku", maka isyarat tersebut memerlukan kepada niat suami untuk menceraikan isteri. Secara umumnya, hukum cerai menggunakan bahasa isyarat dan lafaz adalah sama dan ianya hanya akan sah sekiranya lafaz tersebut sarih atau kinayah berserta niat menceraikan isteri.

Berdasarkan hukum, sekiranya suami melafazkan talak kali ketiga, maka suami tidak boleh kembali kepada isterinya lagi dan jika suami masih hendak kembali kepada isterinya, maka hendaklah isteri tersebut menyempurnakan lima syarat (Mustafa, 1967) iaitu iddah dengan suami telah tamat, bekas isteri berkahwin dengan lelaki biasa dengan akad nikah yang sahih, disetubuhi oleh suaminya yang baharu, suami baharu itu telah menceraikannya atau meninggal dunia dan iddah dengan suami baharunya telah tamat. Syarat-syarat ini juga perlu disempurnakan oleh orang normal sekiranya ingin kembali kepada isterinya setelah melafazakan talak tiga.

Lafaz talak adalah satu lafaz yang berat dan akan memberi kesan yang besar dalam sesebuah perkahwinan. Hal ini kerana dengan lafaz tersebut hubungan suami dan isteri terputus dan tidak boleh hidup bersama seperti pasangan suami isteri. Hubungan suami isteri tersebut menjadi seperti pasangan bukan mahram dan jika bersama atau bersetubuh maka ia dikira dosa berzina.

Bagi suami yang melafazkan cerai di luar Mahkamah Syariah, mereka perlu hadir ke mahkamah untuk mengesahkan perceraian di hadapan Hakim Mahkamah Syarie (Seksyen 57 Enakmen Undang-undang Keluarga Islam (Negeri Sembilan) 2003). Mahkamah akan mengadakan siasatan ke atas pihak-pihak terlibat untuk mendapatkan fakta kes sebelum, semasa dan selepas talak dilafazkan. Hakim akan mendengar keterangan kedua-dua pihak suami dan juga isteri sebelum mengesahkan perceraian. Sebelum menentukan sama ada lafaz talak boleh disabitkan atau tidak, mahkamah terlebih dahulu akan mengenal pasti bentuk talak yang diucapkan oleh suami sama ada lafaz tersebut termasuk dalam lafaz sarih atau kinayah.

Sekiranya mahkamah berpendapat bahawa lafaz tersebut adalah sarih, maka niat tidak diperlukan. Manakala sekiranya lafaz tersebut adalah lafaz kinayah dan suami mengaku berniat untuk menceraikan isterinya semasa lafaz tersebut diucapkan, maka mahkamah akan mensabitkan lafaz tersebut dengan talak satu (Raihanah, 2000). Bagi perceraian OKU

pendengaran, lafaz talak tersebut akan ditentukan melalui bahasa isyarat. Jika isyarat tersebut jelas dan difahami maka talak tersebut adalah sah dan diterima (Malik, t.t).

Bagi suami yang ingin kembali bersama isterinya selepas melafazkan talak, suami hendaklah merujuk kembali isteri dengan berkata kepada isterinya sebagai contoh dengan ayat seperti "Aku rujuk engkau ke pangkuanku". Bagi suami OKU, boleh merujuk isterinya semula sama ada melalui tulisan, isyarat yang difahami atau tindakan yang menunjukkan dia ingin merujuk semula seperti memegang isterinya dengan bernafsu dan isterinya masih dalam tempoh iddah (Azman, 2016). Secara umumnya, cara rujuk antara orang normal dan golongan OKU pendengaran adalah sama. Tidak ada perbezaan atau keistimewaan di dalam hal rujuk ini kepada mana-mana golongan.

2. Suami menganggap isyarat cerai daripada isteri sebagai jatuh talak

Suami hendaklah memahami rukun dan syarat sah talak yang akan menjadikan lafaz talak itu sah. Talak membawa maksud memutuskan ikatan perkahwinan dengan lafaz talak (Mustafa, 1967) dan terdapat empat rukun talak iaitu suami yang baligh dan berakal, lafaz talak, isteri dan niat talak. Oleh sebab itu, lafaz atau isyarat talak daripada isteri adalah tidak sah dan tidak menjatuhkan talak ke atas suami.

Islam menuntut umatnya untuk menuntut ilmu agama dan memahami dengan baik ilmu berkaitan perkahwinan sebelum membina rumah tangga. Hal ini kerana bagi mengelakkan daripada berlaku salah faham antara suami isteri dan bertujuan untuk memastikan pasangan suami isteri menjalankan tanggungjawab masing-masing dengan sebaiknya bagi mengekalkan rumah tangga yang bahagia dan harmoni. Selain itu, ilmu perkahwinan juga akan membantu pasangan mengetahui hak-hak yang diberikan oleh Islam kepada pasangan suami isteri dan cara-cara menuntut hak tersebut sebagaimana ditetapkan oleh syarak.

Talak terbahagi kepada tiga jenis iaitu talak raj'ie, talak bain sughra dan talak bain kubra. Talak raj'ie ialah talak boleh rujuk disebabkan isteri diceraikan dengan talak satu atau dua dan selepas berlaku persetubuhan dan masih dalam iddah (Mustafa, 1967). Hukum talak ini adalah suami boleh rujuk kembali isterinya dalam tempoh iddah. Manakala bagi talak bain sughra pula ialah isteri yang diceraikan dengan talak satu atau dua sebelum berlaku persetubuhan.

Talak bain sughra juga boleh membawa maksud isteri yang diceraikan dengan talak satu atau dua selepas berlaku persetubuhan dan tempoh iddahnya telah berakhir (Mustafa, 1967). Isteri yang diceraikan secara khuluq juga termasuk dalam kategori talak bain sughra dan hukum talak ini adalah suami tidak boleh rujuk kembali isterinya melainkan dengan akad nikah dan mas kahwin yang baharu. Jenis talak yang ketiga ialah talak bain kubra iaitu talak bagi isteri yang diceraikan dengan talak tiga sama ada sebelum atau selepas persetubuhan.

Berdasarkan situasi dalam isu ini, isteri tidak berhak melafazkan talak atau mengisyaratkan cerai kepada suaminya kerana hak untuk menjatuhkan talak adalah hak milik suami. Hal ini kerana syarat sah talak adalah suami yang sah kepada isteri, baligh, melafazkan talak tersebut dengan rela hati tanpa dipaksa dan waras. Justeru, lafaz atau isyarat talak daripada isteri adalah tidak memberi apa-apa kesan ke atas perkahwinan.

3. Taklik secara isyarat tanpa kefahaman mendalam

Taklik ialah suatu ikrar yang telah ditetapkan oleh Jabatan Agama Islam sesebuah negeri yang dibaca oleh suami sebaik sahaja selepas akad nikah selesai dilakukan (JAKIM, 2018). Ikrar tersebut mengikat janji suami kepada isteri untuk tidak melakukan perkara-perkara yang boleh mendatangkan kemudaratan dan penganiayaan kepada isteri (JAKIM, 2018). Tujuan lafaz taklik adalah untuk menjaga kebajikan isteri sepanjang hidup bersama suami dan menjadi peringatan kepada suami tentang tanggungjawab dan hak isteri. Lafaz taklik juga

membolehkan isteri memohon pembubaran perkahwinan sekiranya suami melanggar taklik yang dilafazkan selepas akad nikah tersebut.

Lafaz taklik di setiap negeri adalah berbeza sebagai contoh lafaz taklik di Negeri Sembilan yang mengikat suami dengan janji sekiranya dia gagal untuk memberikan nafkah kepada isterinya selama tempoh empat bulan berturut-turut atau hilang tanpa khabar berita sama ada hidup atau mati atau suami didapati telah mencederakan isteri maka akan jatuh talak satu tanpa memerlukan kepada lafaz talak daripada suami.

Taklik biasanya dibaca selepas akad nikah secara lisan, namun membaca lafaz taklik secara isyarat bagi golongan OKU pendengaran adalah sah selagi jelas dan boleh difahami maksudnya. Kesan lafaz taklik menggunakan bahasa isyarat adalah sama seperti lafaz taklik secara lisan dan lafaz tersebut akan berkuatkuasa sepanjang tempoh perkahwinan suami isteri. Taklik memberikan implikasi terhadap perkahwinan seperti lafaz taklik tidak boleh ditarik balik dan talak tidak akan jatuh selagi perkara yang dilafazkan tidak berlaku.

Pelanggaran syarat taklik oleh suami tidak mengakibatkan gugurnya talak secara terus selagi mana isteri tidak membuat aduan ke Mahkamah Syariah. Sekiranya pelanggaran taklik berlaku, isteri boleh membuat aduan dan permohonan perceraian di bawah taklik di Mahkamah Syariah. Jika benar seperti mana aduan isteri (Seksyen 50 Enakmen Undang-undang Keluarga Islam (Negeri Sembilan) 2003), Mahkamah akan mensabitkan suami telah melanggar lafaz taklik dan talak akan gugur mengikut lafaz taklik yang telah dibaca oleh suami selepas akad nikah.

4. Tidak memahami lafaz nikah

Segelintir golongan OKU pendengaran yang tidak memahami lafaz nikah dalam erti kata yang sebenar. Mereka hanya memahami nama suami dan nama isteri sahaja tetapi kesucian ijab kabul tersebut tidak difahami dengan sebetulnya. Maksud nikah ialah akad yang mengharuskan hubungan suami isteri yang dibenarkan oleh syarak (Mustafa, 1967). Akad nikah boleh dilafazkan dalam pelbagai bahasa seperti Bahasa Malaysia, Bahasa Arab, Bahasa Urdu atau sebagainya. Bagi golongan OKU pendengaran, lafaz akad nikah boleh dilakukan dalam bahasa isyarat selagi mana isyarat tersebut difahami maksudnya.

Akad perkahwinan dibina berdasarkan konsep berlapang dada yang berbeza dengan akad jual beli yang dibina berdasarkan konsep persetujuan dan keredaan. Jika pengantin bersetuju dengan kecacatan atau kekurangan yang ada pada pasangan mereka, maka akad perkahwinan tersebut sah di sisi syarak.

Terdapat lima rukun nikah iaitu lafaz akad nikah, isteri, suami, wali dan dua orang saksi. Dalam lafaz akad nikah terdapat dua lafaz iaitu ijab yang bermaksud lafaz yang diucapkan oleh wali dan qabul yang bermaksud lafaz yang diucapkan oleh bakal suami sebagai tanda menerima pengantin perempuan sebagai isterinya dengan restu wali.

Wali bermaksud orang lelaki yang diberikan hak kekuasaan oleh syarak untuk mengijab qabulkan jagaannya dalam perkahwinan. Orang yang berhak menjadi wali adalah bapa, datuk, saudara lelaki seibu sebapa, saudara lelaki sebapa, anak saudara lelaki seibu sebapa, anak saudara lelaki sebapa, bapa saudara sebelah bapa seibu sebapa, bapa saudara sebelah bapa sebapa, anak lelaki bapa sudara sebelah bapa seibu sebapa, anak lelaki bapa saudara sebelah bapa sebapa, semua lelaki yang mewarisi harta secara *asabah* dan kadi. Orang yang layak menjadi wali adalah berdasarkan urutan tersebut sebagaimana yang telah ditetapkan dan hak tersebut tidak boleh diberikan kepada wali lain selagi mana wali yang teratas dan layak masih hidup.

Lafaz akad nikah menggunakan bahasa isyarat bagi golongan Oku pendengaran adalah dibolehkan dengan syarat isyarat tersebut difahami dengan jelas. Namun, sekiranya lafaz ijab qabul tidak jelas dan tidak difahami maka lafaz akad nikah tersebut tidak sah. Suami OKU pendengaran perlu memahami lafaz akad nikah dan kesan lafaz tersebut sebelum majlis akad nikah dilangsungkan.

5. Tuntutan mas kahwin selepas bercerai oleh suami

Mas kahwin ialah pemberian wang atau benda bernilai yang wajib diberikan oleh suami kepada isterinya dengan sebab akad perkahwinan (Mustafa, 1967). Kadar mas kahwin telah ditetapkan oleh beberapa buah negeri dan terdapat negeri yang tidak menetapkan kadar mas kahwin. Bagi Negeri Sembilan, kadar mas kahwin untuk anak dara adalah bernila RM200. Bagi negeri yang tiada ketetapan kadar, maka nilainya harus ditentukan oleh ahli keluarga pihak perempuan melalui rundingan yang dipersetujui bersama.

Namun yang menjadi persoalan adalah apabila suami OKU pendengaran ingin menuntut kembali mas kahwin yang diberikan kepada bekas isterinya selepas dia menceraikan bekas isterinya. Terdapat beberapa keadaan yang membolehkan suami menuntut keseluruhan mas kahwin iaitu apabila perpisahan berlaku sebelum persetubuhan disebabkan oleh isteri contohnya isteri murtad atau isteri membubarkan perkahwinan melalui fasakh disebabkan terdapat keaiban pada suami atau suami membatalkan perkahwinan disebabkan terdapat keaiban pada isteri.

Manakala dalam keadaan tertentu suami hanya berhak menuntut setengah daripada mas kahwin atau langsung tidak mempunyai hak untuk mendapatkan kembali mas kahwin tersebut. Bagi suami isteri bercerai sebelum berlaku persetubuhan, suami berhak menuntut separuh daripada mas kahwin yang telah diberikan dan keadaan suami tidak boleh menuntut mas kahwin iaitu apabila suami telah bersetubuh dengan isteri.

Suami tidak boleh menggunakan atau mengambil manfaat daripada mas kahwin yang diberikan kepada isteri jika tidak mendapat kerelaan dan kebenaran isteri kerana mas kahwin merupakan hak milik isteri yang telah diisytiharkan oleh Allah dalam Al-Quran. Hukum suami menggunakan mas kahwin yang diberikan kepada isteri selepas akad nikah adalah haram menurut syarak. Namun, jika isteri merelakan atau memberi kebenaran kepada suami untuk menggunakannya maka hukum tersebut adalah harus.

Rumusan Dan Cadangan

Isu munakahat tidak hanya timbul dalam perkahwinan orang normal malahan hal tersebut dihadapi oleh semua golongan. Perkahwinan OKU dengan perkahwinan orang normal hampir sama namun disebabkan perbezaan keadaan dan kekurangan yang dihadapi oleh golongan OKU pendengaran menjadikan isu mereka memerlukan kepada penelitian yang lebih mendalam.

Memandangkan kebanyakkan isu yang timbul berkaitan munakahat OKU pendengaran tidak sama dengan isu munakahat orang normal, maka penelitian isu-isu berkaitan golongan OKU dalam aspek lain seperti muamalat, jenayah dan lain-lain boleh di kaji. Hal ini bagi membantu memudahkan golongan OKU memahami hukum dan pandangan-pandangan yang berkaitan dengan situasi mereka. Tambahan, tindakan ini dapat membantu membuang stigma negatif golongan OKU yang merasa disisihkan oleh masyarakat. Namun, sekiranya pelbagai inisiatif dan perhatian diberikan kepada mereka maka masyarakat akan lebih memahami situasi dan halangan yang selalu dihadapi oleh golongan OKU.

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ASSESSMENT ON THE RIGHT TO HEALTHY WATER: THE WAY FORWARD FOR SUSTAINABLE FUTURE

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ABSTRACT

Over the years, Malaysia has played a significant role in promoting the discourse on environmental sustainability both at the local and international forums. Towards realizing the principles and values that governed the vision for attaining the goals for a sustainable development, various policies were formulated by Malaysian government to redress societal expectations and aspirations in fulfilling the access to safe and clean water. Environmentalists have accord the priority of reductionist approach in knowing the nature of ecological crisis. This study attempts to explore Malaysia's experience in implementing government policies on environmental sustainability and change - for the promotion of quality life through safe and clean water. The goal of the study is to assess and analyze government's water vision in relation with the national water resources development plans. This research is very important because it assess the Federal Government intentions to have a uniform law on water service and supply to illustrate clearly the needs to balance development and sustainability in the country. The study relies on primary sources such as unpublished works and fieldwork in addition to library work. Reading materials relating to Malaysia's vision on developing the country's water resources will be consulted. In order to fulfill the goals of the study, the government efficiency in addressing the right to safe and clear water to all, including the environment will be evaluated. The study found out that Malaysian government was able to introduced new laws and policies that are consistent with international standards and strategies. It is therefore recommended that those provisions and policies, which are not consistent with the rights to clean and safe water must be amended. Equality and protection of rights should be given and enjoyed by all including the poor who are not financially capable to make a demand for clean and safe water.

Keywords*: rights to clean and safe water; assessment; sustainable development; Malaysia.*

Introduction

As mandated by the Constitution of Malaysia, government institutions are expected to fulfill the responsibility of developing a healthy environment and to ensure sustainable development, the aspirations and ideals of which are deeply enshrined in the rule of law and the principle of justice and equality. It is rather perturbing to many inquiring minds, however, to learn the geopolitical landscape, historical and legal reasons as to why the relationship between man and environment has given rise to an unpopular discourse among researchers for the past few decades. In addition, the socio-economic and legal implications of sustainability of environment and management of water resources are largely missing in the current researches.

In today's world, theories and practices on economic development have largely shaped the various approaches for environmental sustainability. Given the prevalence of materialistic philosophy of man and nature, its influences can be discerned from the government environmental laws and reform, and Malaysia is not an exemption. It is quite

unfortunate that substantial number of environmentalists has accorded the priority of reductionist view of knowing the reality and truth about ecological crisis.

At the beginning, our society seems to be complacent with the minor effects of modernization towards the environment and water resources. Lacking the comprehensiveness of environmental laws and policies, it has been disheartening to witness the devastating effect of pollution to the water resources and climate change. Concerned individuals like the green parties and nature lovers have emphasized the importance of having a profound knowledge on the concept of environment to ensure sustainable usage of water resources and its management to cope with environmental challenges.

It is worthwhile to ponder on how the past great civilizations had conceptualized the importance of water as indispensable to all living beings. With regards to the scientific traditions of the past civilizations, the knowledge of water resources, its planning and management had reached its pinnacle owing to an in-depth perspective on the harmonious relationship between man and environment. Perhaps, due to the innovative solutions in curbing ecological crisis and challenges of water resources, particularly in the arid countries, water had become more accessible to both urban and rural areas [1].

While Malaysia is at the forefront of securing its national water vision that would benefit both its citizen and economy for the next generation to come, governmental agencies like Malaysian Water Partnership (MWP) and the Malaysian National Committee for Irrigation and Drainage (MANCID) have jointly collaborated in organizing programs to raise national awareness on water issues among the population and decision-makers and develop a comprehensive framework that entails sustainable development which is in accordance with Malaysia's vision for 2025.

With regards to Malaysia's vision for attaining the goals for a sustainable development, various policies were formulated to redress societal expectations and aspirations in fulfilling the access to safe and clean water. What defines good governance is the ability of the government and public institutions in conducting public affairs as well as managing both public and natural resources in the preferred way. It is paramount in the process of decision-making that Malaysia will be viewed by the rest of the world as a good partner for devising innovative-technological solutions towards curbing ecological crisis in the region, particularly allocating the often-limited sources of water to be more accessible to both urban and rural areas [2].

Despite of the recent economic turbulence faced by the country, Malaysia has been consistent in implementing policies on environmental sustainability and change- for the promotion of quality life through healthy water. The national water resources development plans for healthy water will be assessed and analyzed to identify whether it is in line with the government's water vision [2]. This research aims at providing assessment in identifying the policies, Acts, enactments and other provisions, which are directly or indirectly related to the rights for healthy water. This paper also highlights the regulations and enactments that recognize the right to clean and safe water based on the international standard of rights, such as, availability, accessibility, affordability, hygiene, participation, quality, and right to information This paper will also assess the Federal Government intentions to have a uniform laws on water service and supply to illustrate clearly the needs to balance development and sustainability in the country. The study found out that due to the complexities of the issues related to developing the water management, the government was able to introduced new laws and policies that are consistent with international standards and strategies to ensure the sustainability of water resources in the future. However, it is recommended that those provisions and policies, which are not consistent with the rights to healthy water, must be amended. Equality and protection of rights should be given and enjoyed by all including the poor who are not financially capable to make a demand for healthy water. In conclusion, the government efficiency in addressing the right to healthy water to all, including the environment will be evaluated for a better water future.

Conceptualizing the Concept of Healthy Water and Sustainable Development

The planet earth is composed of water that is derived from the seas, lakes and rivers, which falls as rain to bring life to many animals and plants [3]. A chemical compound known as H2O represents the word water. In everyday usage, water is normally referred to different aqueous solutions like river water, rainwater, drinking water and boiler-water. The Water Service Industry Act (WSIA) 2006 categorically define water as either 'treated' or 'water course' water. The former is meant for distribution purposes while the later includes rivers, streams and creek including any tributary, distributary or artificial deviation thereof, seas, lakes, ground water, dams, reservoirs, ditches, drains and passages, other than pipes, through which water flows for the supply of water to any premises [4]. Water is indispensable to the body mechanics of human being. It is a substance that cannot be ignored because it is a necessity for man's existence. It is vital for human consumption and for the survival of the environment.

There has been a global imperative to meet the demands for healthy water for all. The World Health Organization (WHO) and Joint Monitoring Program for Water Supply and Sanitation (*JMP)* define drinking water in terms of its domestic purposes like drinking, cooking and personal hygiene. Another important dimension of such definition is the ability of a particular state or nation to provide proper access to a healthy drinking water. [5]. The WHO guidelines for healthy drinking water serves as the global standard for microbial, chemical and physical characteristics of water. A natural mineral water with a fluoride not exceeding 1.5 mg/L is scientifically approved as healthy water. However, it will not be safe for children below 7 years of age if the amount of fluoride is more than 1.5 mg/L, unless, otherwise clearly stated in the bottle label. Access to healthy water is the proportion of people using improved drinking water sources, which are highly protected, such as, public standpipe, borehole, dug well, spring and rainwater.

The United Nation Committee monitoring the International Covenant on Economic, Social and Cultural Rights (ICESCR) implementation has clarified in Comment 15, 2002 that the "right to water" refers to, a) the availability of a sufficient quantity of water for personal and domestic uses, at least a minimum of 20-50 liters per day/person; b) accessibility on water and sanitation services to everyone in the household or its vicinity on a continuous basis; c) the water must be affordable to all; and d) water has a quality to be safe for drinking and other uses to ensure hygienic access to water. The UN Special Rapporteur handbook briefly defined the "human right to water" as "everyone's right to sufficient, safe acceptable, physically accessible and affordable water for personal and domestic use" [6].

International Framework

The members of the United Nations recognized the right to safe and clean water since 1977 under the Mar del Campaign Plan. Such recognition for the right to safe drinking water and sanitation as part of human rights is stipulated both in the Human Rights Council and the United Nation General Assembly in 2010. It was acknowledged that there was a tragic and growing numbers of people around the world dying from lack of access to clean water based on the WHO study on diarrhea showing that every three and a half seconds in developing world, a child dies of water-borne disease [7]. According to the UN Human Rights Council, human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and is "inextricably related to the right to highest attainable standard of physical and mental health as well as right to life and human dignity" [8]. This right has been expressly provided in the international and regional treaties, declarations and guiding principles. As an instance is the Convention on the Rights of the Child (CRC) under Article 24 which provides that: States parties shall pursue full implementation of this right and, in particular, shall take appropriate measures ---(c) to combat disease and malnutrition,

including within the framework of primary health care, through, inter alia, … the provision of adequate nutritious foods and clean drinking water…. Other international references on clean and safe water can be found in Agenda 21, under Chapter 18 (2), which provides that:

> *Water is needed in all aspects of life. The general objective is to make certain that adequate supplies of water of good quality are maintained for the entire population of this planet (...) and combating vectors of water-related diseases. Innovative technologies (...) are needed to fully utilize limited water resources and to safeguard those resources against pollution. [9].*

On the 17th of December 2015, the United Nations General Assembly passed and adopted the resolution on the human rights to water and sanitation, which the member states recognized that everyone is entitled to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use.

National Framework

The water right has been recognized under the Malaysian laws through a wide range of national policies and regulations. The Federal Constitution based on Clause 11 explicitly provides that the Federal government has jurisdiction on 'water supplies, rivers and canals' and excludes those matter within 'one state or regulated by an agreement between all the states concerned; production, distribution and supply of water power'. There is no single provision in the Constitution that specifically provides for the right to clean and safe water. Having thirteen states, each of them is govern by its owned state water enactment. This makes the law vary from state to state and it becomes difficult to make a complete assessment on the status of the rights on clean water. However, the Federal Constitution has been amended to delete the item 'the State List and it was inserted in the Concurrent List. It indicates that this amendment conformed with the intention of having a uniform law on water service and supply to overcome the differences in the states' laws.

There are local laws and regulations made and implemented to assess in the development of water resources management, particularly, on water treatment and distribution. While issues related to the right for clean and safe water are indirectly considered in the National Water Vision, the Environmental Quality Act 1974 (EQA), National Outline Perspective Plan (OPP3), Water Services Industry Act (WSIA) (Act 655) 2006, Selangor Water Management Authority Selangor Enactment (SWMAE) and other states' water enactments. For the national policy instruments, the National Water Resources Council (NWRC) was set up in 1998 for the purpose of establishing a more effective water management; while the Integrated Water Resources Management (IWRM) has been adopted and clearly applied based on the 9th Malaysian Plan-Economic Planning unit and the National Vision for water in the 21st Century. In addition to that, the Ministry of Natural Resources and Environment created the National Study for the effective implementation of IWRM in Malaysia. The Malaysian government strengthened its role in developing the water resources management by creating the National Water Services Commission Act in 2007 (SPAN), a statutory body to regulate and enforce the provisions of the Water Services Industry Act (WSIA) and any subsidiary legislation created under it. But the scope of these Acts is limited to matters concerning regulation of the water services industry involving mainly the treatment and distribution of water supply.

Assessment on the Rights to Healthy Water under the Malaysian Laws, Policies and Strategies

International law recognizes the right to healthy water and it is currently endorsed by other countries to uphold its principles due to the increasing population growth and the pollution of water resources, climate change and floods impact that reduced the water supplies. Some have responded by recognizing the importance of the rights by reforming their own constitution. The water was recognized to be in a short supply; and in the Millennium

Development Goals (MDGs), it was set to include reducing or halving the proportion of population without sustainable access to safe drinking water by 2015 [10]. The Malaysia early policies also reaffirmed many essential elements of the MDGs on the water supply and the right to clean and safe water. Globally, UNICEF and WHO recognized that there was a progress on drinking water and sanitation. It was estimated that more than ninety percent of the global population now have an access to an improve drinking water. There were 147 countries that met the MDG target for drinking water in 2015.

Malaysia agreed in principle that the universal right to clean and safe water exists and the fulfilment of this right has been impliedly provided in the national and state laws and policies. Past research on human rights issues in Malaysia underlined and assessed that there are provisions of the laws, policies and strategies that implicitly recognised the right to clean and safe water. This is based on the international standard of rights, such as, availability, affordability, accessibility, quality, hygiene, and participation and right to information.

Federal Constitution

Article 8 of the Federal Constitution clearly provides that "All persons are equal before the law and entitled to the equal protection of the law." This provision is a major landmark or highest standard for those who have a long struggle for equal rights. Although, access to clean and safe water as human right is not expressly written in the Federal Constitution, but Article 8 guarantees the equal rights of the citizens. The Constitution does not provide that water is human rights but it has the jurisdiction to regulate as provided in Article 74 that "Without prejudice to any power to make laws with respect to any of the matters enumerated in the Federal List or Concurrent List in the Ninth Schedule. Article 76 is considered as consistent to human rights as Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say: For the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member. It shows that the government has the power to enact any law under the State List for the purpose of achieving uniformity, in compliance with an international treaty, or simply at the request of the state.

Environmental Quality Act 1974

The Environmental Quality Act 1974 is the fundamental basis among the many pieces of environmental legislations. Cursory to this law, Malaysia has introduced various measurements to curve industrial pollution, including wastewater, air pollution from factories and solid waste, which were not previously regulated [11]. Section 25 provides for the restriction on pollution, noise or contamination of inland and coastal waters. As such, Section 27 stipulates for the prohibition of discharge of oil into Malaysian waters. The same case in Section 29 that clearly provides for the prohibition of discharge of wastes into Malaysian waters. However, where any person is charged for any offense under Sec 27, it shall be a defence to prove that such discharge or spillage was, for the purpose of saving human life. Discharging of wastes will reduce the total water availability and the cost of treating the water will be too high. For the rights on water quality sources the Environmental Quality (Control of Emissions from Motorcycles Regulations) 2003 introduced the Pollution Prevention and Water Quality Improvement Programme to develop the existing regulatory, preventive and remedial measures for water quality improvement in the Malaysian rivers.

National Vision 2020

National Vision 2020 was initiated by the Government to ensure that the people, especially the poor have access to basic needs and services. The Vision called for conservation and management of water resources to ensure adequate and safe water. The key objectives are [12]:

- *Water for people*: all have access to safe, adequate and affordable water supply,

hygiene and sanitation

- *Water for food and rural development*: provision of sufficient water that will ensure national food security and promote rural development
- *Water for economic development*: provision of sufficient water to spur and sustain economic growth within the context of a knowledge-based economy and e-commerce.
- *Water for the environment*: protection of the water environment to preserve water resources (both surface and groundwater) and natural flow regimes, biodiversity and the cultural heritage, and mitigation of water-related hazards.

National Biodiversity Policy 1998

National Biodiversity Policy is a sustainable development policy that promotes biodiversity conservation. It provides proactive roles in shaping the right of the people for safe and clean water. This is based on Principle iv of this Policy that the benefits from sustainable management of biological diversity will accrue, directly or indirectly to every sector of society. Therefore, it is the duty of the Government to formulate and implement the policy framework for sustainable management and utilization of biological diversity in close cooperation with scientists, the business community and the public. It shows that conservation and sustainable development of biological diversity, which is based on the National Biodiversity Policy, guarantees the right for sustainable water utilization.

Water Service Industry Act (WSIA) (Act 655) 2006

The Water Services Industry Act was enacted to strengthen the national water resources management. The scope of this Act covers the regulation of water services industry, which involve treatment, and distribution of water supply. The government, as a primary duty bearer of people's right recognized its own accountability under Section 33, stating that a service licensee providing water supply services or sewerage services has a general duty to – a) deal reasonably with consumers; and b) adequately address consumer complaints. In addition, the Water Forum has been created under Section 69 with functions provided under Section 70 as follows: a) To give feedback and make recommendation to the Commission concerning the interest of the consumers; b) to represent the interest of the consumers; *(c)* to promote consumer's interest in relation to the tariffs and standards of water supply services and sewerage services; *(d)* to identify and keep under review matters affecting the interests of consumers and ensure that the water supply services and sewerage services companies are aware of, and responsive to, concerns about their services; *(e)* to publicize the existence, functions and work of the Water Forum in protecting the interests of consumers.

To protect and fulfill the right of the people to have an access with healthy water, Section 36 provides that it shall be the duty of every service licensee providing water supply services to maintain an efficient and economical water supply system. For water distribution, Section 38 provides that licensee shall ensure that all arrangements have been made— for providing water supply to premises within its water; supply distribution area and for making such supply available to persons who demand them. On water availability, the WSIA clearly stated that, the water distribution licensee shall take ALL necessary steps as may be required, including the supply of water by water tankers, to ensure that a consumer within its water supply distribution area is supplied with water.

The WSIA provides quality services to the people by adopting some measures, particularly, in considering the interest of public health and also takes some measure if necessary to prevent an imminent danger to the environment. For water quality and hygiene, Section 41(2) states that the water distribution licensee shall ensure, as far as it is reasonably practicable, in relation to each source or combination of sources from which the licensee supplies water to any premises, that there is no deterioration in the minimum quality standards of the water which is supplied from time to time from that source or combination of sources. According to Section 55, where in the opinion of the water distribution licensee, the supply of water is unsafe for the purposes of normal supply to the public or poses a health risk to the

public, the water distribution licensee shall immediately undertake the measures and shall notify the Commission as soon as practicable of the measures taken.

For affordability standard, the Act regulates the rights of the consumers regarding the rates, charges and deposits. According to Section 84 (2) … regulations may be made—(b) to prescribe the different levels of rates for water supply services and sewerage services based on category of users, consumption, type of use and geographical location or in such other manner as the Commission deems appropriate. On the right to information, Section 78 clearly provides that all inquiries are to be open to the public.

Selangor Water Management Authority Selangor Enactment (SWMAE) 1999

Selangor is the most economically progressive state in Malaysia. It is the only state in the country with free water policy, which was introduced in 2008. According to this policy, every household is entitled to receive a free 20 cubic meters of treated water for every month. Even before the implementation of this policy, the Selangor Government established the Selangor Waters Management Authority Enactment 1999 (SWMAE) to set up an agency responsible in managing river and water sources in an integrated manner. The enactment regulates that water should be affordable as section 44(3) provides that with the approval of the State Authority, any person or class of persons may be exempted from all or a part of the charges upon a written application for exemption made by such person. For accountability, Section 6 provides that: (1) the functions of the Authority shall be to nurture, maintain and facilitate the sustainable development, efficient use and conservation of water sources for public purposes in respect of which it is established, and in particular to–(a) provide advice to the State Authority as to the policies, methods and measures to be adopted to promote, nurture and facilitate the sustainable. In the case of water quality and hygiene, Section 41 stipulates that the state authority may take such measures as it thinks fit for- a) the conservation, replenishment and water supply of; (*b)* the equitable distribution of water; (*c)* the beneficial use of water; *(d)* the protection of water from pollution and the improvement of its quality;*(e)* preventing any unauthorized interference with the flow or availability of water; *(f)* preventing the unauthorized obstruction of a water source or the diversion of the course of a water course. For sanitation and water hygiene, section 79 clearly provides that no person shall cause to enter or discharge into any water source- *(a)* any poisonous, noxious or polluting matter or waste that will render or is likely to render or contribute to rendering such water source or part thereof harmful, detrimental or injurious to the health, safety or welfare of the public or to animal or vegetable life or health therein or to other beneficial uses of such water sources; *(b)* any matter which by virtue of its temperature, biological or chemical content or its effect in discoloring water makes or contributes to making the water source or part thereof a potential danger to public health, safety or welfare or to animal or vegetable life or health or affects other beneficial uses of such water source; (c) any matter which by virtue of its physical nature, chemical or biological content, or its effect in discoloring water makes or contributes to making such water source difficult to treat or affects the flow, quality or quantity of water in the water source; and (*d)* oil of any nature, used, waste or waste containing oil or otherwise.

The SWMAE has adopted two policies for water rights within the State of Selangor. The first policy ensures sufficient water for water supply by protecting the resource, reducing the growth in demand and making better use of the existing resources. The second policy provides that Selangor will ensure clean water for water supply and for the environment by: reduce pollution from existing sources and prevent pollution from existing sources and prevent pollution from new sources.

Water Act 1920 (Act 418)

Water Act 1920 is an old law, which was enacted for the management of rivers and streams. This Act has few provisions that indirectly apply to the international standard in measuring the rights for safe and clean water. For water quality and hygiene, Section 7A (1)

(a) prohibits any poisonous, noxious or polluting matter that will render or is likely to render or contribute to rendering such river or part thereof harmful or detrimental or injurious to public health, safety or welfare, or to animal or vegetable life or health or to other beneficial uses of such river. It is further emphasized in Section 10 that the State Authority shall take into consideration the need to protect public health, safety and welfare and animal and vegetable health and life as well as the need to promote industrial growth and to protect other beneficial uses of rivers.

Malaysian Outline Plans

The Malaysia Second Outline Plan (1991-2000) ensured that in the pursuit of economic development, adequate attention would be given to the protection of the environment and ecology so as to maintain the long-term sustainability of the country's development. In the same case with the Malaysia Third Outline Plan (2001-2010) in reiterating that growth objectives will continue to be balanced with environmental consideration and stress on the importance to reduce energy, materials, pollution, and waste intensity of urban-industrial activities. For water quality and hygiene, the Eighth Malaysia Plan (2001-2005**)** provided a detailed strategic policy thrust for environment and sustainable resource management which include: reducing energy, air pollution, water deterioration and waste disposal. On the other hand, the Ninth Malaysian Plan (ch.22) emphasized the issues to enhance protection of the environment and conservation of natural resources and contribute towards improving the quality of life. While the Tenth Malaysia National Plan committed that the management of resources across the entire water cycle will be reassessed and that is from where water is drawn to how water is treated and supplied to citizens and how wastewater is returned to the environment.

Assessing Progress on the Right to Healthy Water

Malaysia advocates water development and conservation of water sources for public purpose. The government has adopted different sustainable policies for their valuable and rich natural resources for the purpose of a sustainable future. These policies have done well in developing the rights to an adequate standard of living as well as the right to life of which the right to healthy water has been derived. To protect the interest of the people in relation to quantity, quality and affordability of healthy water, the government made it possible to improve the water quality based on the targeted year provided by the MDG. A successful effort has been made for an access to improve water sources in urban and rural areas. Based on the 2015 World Development Indicators for freshwater, access to an improve water source in urban areas in Malaysia is one hundred percent while rural areas reached more than ninety percent water access. In moving forward, Malaysia amended the Federal Constitution by transferring the water supplies and services from the State List to the Concurrent List. The amendment was made under Ninth Schedule to make the water supplies and services as a shared responsibility of which the Federal government acquired a jurisdiction over the water services in the states. Revenue from water supplies and services was also amended by assigning it under the Federal government [13]. The improved drinking water coverage estimates in the rural and urban areas, are illustrated below the tables. [14].

Table 1. Drinking Water Coverage Estimates for Urban Areas

Malaysia	1990 (%)	2015 (%)
Piped onto premises	88	100
Other improved source	7	0
Other unimproved	5	0
Surface water	0	0

Table 2. Drinking Water Coverage Estimates for Rural Areas [12]

Malaysia	1990 (%)	2015 (%)
Piped onto premises	65	86
Other improved source	21	7
Other unimproved	12	5
Surface water	2	2

Conclusions

Recognizing the right to healthy water is a great global achievement for all the people and the environments. In Malaysia, right to healthy water has been identified as one of the most prioritized activities for national action. Although, there are many different struggles and issues to be addressed in developing the water management, the government was able to provide greater access to drinking water for many years. Some of the laws and policies are found to be consistent with the international standards and strategies that ensure the sustainability of water resources in the future. However, it is recommended that provisions and policies, which are not consistent with the rights to clean and safe water, must be amended. Equality and protection of rights should be given and enjoyed by all including the poor who are not financially capable to make a demand for clean and safe water. It is also recommended that those terms used, which are not properly defined, must be explained to ensure that the rights of the consumers are well protected.

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PRINCIPLES OF ISLAMIC ETHICS IN THE ISLAMIC FOREIGN EXCHANGE SWAP IN ISLAMIC BANKING MALAYSIA

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Abstract

Islamic FX swap is one of the hedging mechanisms that will help financial institutions minimize foreign exchange risk as well as protects the value of assets from the market exposure. However, the Islamic Fx swaps is claimed to mimic conventional FX Swap structure which is to some degree is incompatible with Islamic financial ethics. This paper aims to analyze the application of the principles of Islamic ethics in the Islamic Foreign Exchange Swap (Islamic FX Swap) within the Islamic banking institutions in Malaysia. This study used content analysis method of the qualitative approach. This paper concludes that in Malaysia, the Islamic FX Swap operation in Islamic banking institutions runs based on the principles of Islamic ethics. There are four principles of Islamic ethics in the implementation of Islamic FX Swap, which are the absent of *riba*, the absent of *gharar*, the prohibition of excessive speculation and the prohibition of gambling. The implementation of Islamic FX Swap requires these ethical principles to ensure its operation complies with the Shariah.

Keywords: Islamic ethics, Islamic FX swap, Islamic banking

Introduction

Ethics (*akhlaq*) is one of the main branches of Islam after belief (*aqidah*) and Islamic law (Shariah*).* Belief is fundamental for Muslims because it relates all matters of life to Allah SWT as Allah is the One God and the only Creator that humankind must worship. Islamic law is the rules and regulations that govern Muslims' life and conduct in the realization of the Devine will (Laldin, 2006). Meanwhile, ethics is an integral element that co-exists alongside the implementation of Islamic belief and Shariah. Islamic ethics covers all aspects of life, including social, politics, economics, behaviors, interactions, and management (Dusuki & Abdullah, 2007). Islamic finance and ethical finance are two important subjects discussed widely in the global financial market crisis to ensure the sustainability of financial development goals (Tariqullah & Mohomed, 2017). Routinely, the description of Islamic finance centers on it being ethical due to the prohibition of *riba*, *gharar*, and *maysir* in the products. The establishment of Islamic banking and finance system aiming to fulfill the socio-economic objectives and the creation of a just, fair, and balanced society (Dusuki & Abdullah, 2014).

Foreign Exchange Swap (FX Swap) is one of the swap products categorized under derivative products. The purpose of this product is as a hedging mechanism that will help financial institutions minimize the foreign exchange risk FX Swap protects the value of assets from the market fluctuation exposure (Moles, 2016). The

instability of financial markets such as the currency market and interest rate affect creditors and debtors with different risk stages and uncertainty (Wadrep & Buck, 1982). Therefore, the international market uses the conventional FX Swap as hedging, arbitrage, and speculative mechanisms (Obiyathullah 1999; Al-Suwailem 2006; Al-amine, 2008). Vo, Huynh, Vo, & Ha (2019) state, the development of the derivatives instruments such as forwards, futures, options, and swaps had a positive result on economic growth in the short term, as showed in India, Japan, and the U.S.

The contemporary Islamic finance scholars have begun discussing the derivative contract and its operation as early as in the 80s and 90s. Most scholars such as Ahmad Muhayyuddin Hasan (1986), Abu Sulayman (1996) dan Taqi Usmani (1999) rejected the obligations of the conventional derivative market due to the existence of Shariah issues such as uncertainty (*gharar)*, gambling (*maysir*), usury (*riba*) and short selling. Hence, in April 2006, the collaboration between Standard Chartered Saadiq Bank and Bank Muamalat Malaysia introduced the first Shariah-compliant swap instrument by launching two products named Islamic Foreign Exchange Swap and Islamic Cross Currencies Swap.

Despite the introduction of the new products for Islamic FX Swap instrument, they are still prone to criticisms by the scholars. The criticisms center on their operation for not fulfilling the Shariah requirements as they appear as a close copy or a replication of a conventional swap (Hamoudi, 2007; Yusuf Talal, 2007; Ahmed, 2014). Furthermore, they also claim that the existing practice of Islamic banking products has not been able to achieve its goals, which is to be based on Islamic moral values (Mansour, Khoutem, & Majdoub, 2015).

This paper aims to study the application of the principles of Islamic ethics in the Islamic Foreign Exchange Swap (Islamic FX Swap). This study is critical because it paves the way in ensuring whether the Islamic FX Swap products operate based on moral principles or not, which marks the difference from the conventional products. The first section of the paper presents the overview of Islamic FX Swap and its function. The second section discusses the Shariah issues related to it. The third section presents the principles of Islamic ethics in the Islamic FX Swap, and the fourth section concludes the entire discussion.

FX Swap Overview

FX Swap is an agreement between counterparties to exchange a currency for another, at a predetermined time, without incurring foreign exchange risk (Barkbu & Ong, 2010). The FX Swap concept has certain similarities with the forward contract concept due to the exchange of two different currencies. The FX Swap involves dual exchange while forward contract involves a single exchange (Asyraf Wajdi & Shabnam, 2010).

Figure 1 illustrates the operation of an FX Swap contract. In the figure, Bank A, located in the United States, intends to convert USD100 million to MYR400 million. The second party, Bank B, located in Malaysia, wishes to have USD100 million for investment purposes in the States. Thus, Bank A and Bank B sign the FX Swap agreement to exchange their currencies based on today's spot basis and agree upon a

forward date and rate. On the maturity date, the parties reconverted the currencies into the original currency on a forward rate. Both parties have agreed on a rate fixed on the day at the beginning of the contract.

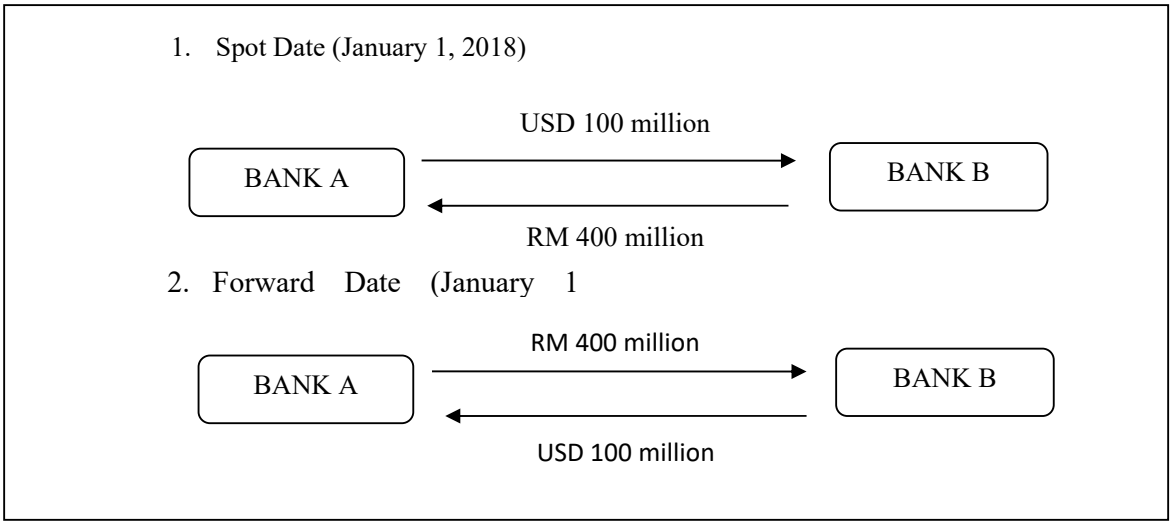

Figure 1

FX Swap Function

Banks and other financial institutions use FX Swap widely to manage liquidity. Bank or financial institution that does not fully utilize its foreign currency deposits may face risk liquidity when there are any changes in the foreign currency exchange rate (Barkbu & Ong, 2010). By entering the FX Swap contract, any changes in the foreign exchange rates will not affect the financial institution or bank as it does not keep the currency by moving it temporarily to other parties. At the same time, the other parties may benefit the foreign currency exchange for their business purposes. For example, client A has Malaysian Ringgit currency, while client B has the US Dollar currency. Both parties enter the Islamic FX Swap transaction by converting both currencies on the spot and promise to reconvert the currencies into the original currency during a forward date. As a result, client A can use the US Dollar for his or her business purposes as well as client B, who is utilizing the Malaysian Ringgit temporarily. Therefore, both parties are not at risk of exchange rates while the unused foreign currencies can benefit other parties (Shamah, 2003). Meanwhile, the FX Swap instrument is an alternative for companies that are seeking foreign currency financing for businesses, asset purchases, and investments in a country. Likewise, financing companies can also minimize the lending cost of foreign currency by using the FX Swap instrument due to the lending cost is higher compared to the cost of FX Swap instrument (Shamah, 2003).

The Shariah Issues on FX Swap

The conventional FX Swap structure to some degree is incompatible with Islamic financial ethics due to the Shariah issues such as usury, uncertainty, gambling, and excessive speculations. Among the Shariah issues that need to be addressed are:

Shariah Issue 1: *Riba*

The main Shariah issue about the FX Swap contract structure is *riba*. It arises when both parties have fixed the forward currency exchange rate on the agreement date (spot date) (Asyraf Wajdi, 2009; Khan, 1988; Sakti, Syahid, Tareq, & Mahdzir, 2016). Therefore, this contract contradicts the Shariah principles governing currency (*bay' al-sarf*) and the principles of Islamic ethics that emphasize the value of fairness in transactions. According to *bay' al-sarf* concept, any transaction that involves different currencies is required to be exchanged on a spot basis. On the contrary, the FX Swap structure involves the element of *riba* in the payment. As debt contract (*al-qard*) serves as the basis in FX Swap debt contract transactions (Obaidullah, 1999), therefore, a client who is using FX Swap contract becomes a debtor and shall repay the future debt with an additional cost. The FX Swap contract structure itself involves *riba* in the payment (Oubdi & Raghibi, 2017). Some Islamic financial scholars have supported this point of view, claiming that the transactions involve the sale of debt for a debt (*bay al-dayn bil dayn)* (Usmani, 1999). Basically, *bay' al-dayn* may be imagined as a sale over an unpaid debt involving either two or three parties. Shariah does not recognized this tyepe of sale due to the element of uncertainty in its repayment and contains the exchange of deferred forms of wealth.(Oubdi & Raghibi, 2017).

Shariah Issue 2: *Gharar*

The second issue that violates the principles of Islamic financial ethics is the existence of *gharar*. *Gharar* is one of the most strictly prohibited elements in Islamic financial transactions and contracts. *Gharar* can define as misrepresentation, fraud, uncertainty, risky or hazard that might lead to damage or loss (Nehad & Khanfar, 2016). Two conditions that lead to *gharar* are the subject of a contract does not exist during the conclusion of the contract, and there is a deferment of goods and prices (Khan 1988; Fahim 1995; Kamali 1996; Taqi Usmani 1999; Obaidullah 1998). In short, the items or assets in FX Swap do not exist, and the actual exchange does not happen. Khan (1988) states that, if a transaction takes place, it will happen without any party having an asset. This transaction resembles the one mentioned in the hadith of the Prophet SAW regarding the ban of *bay al-ma 'dum,* which is the sale of items that the sellers do not own. Other than that, *gharar* exists in FX Swap when the agreed rate (forward rate) could not be expected in the future. This situation affects both of the contracting parties, and they may cancel the contract in the future if the agreed rate does not favor one of the contracting parties. If the agreed exchange rate exceeds the current exchange rate, one party may not exercise the obligation. Both parties are also exposed to credit risk when either party defaults. According to Nordin & Asmak (2011), this situation is due to the reason that there is no particular authority can regulate the transactions as the clearinghouse supervises the future contracts. This clearinghouse exists to prevent uncertainty and *gharar* over the fulfillment of the contracts (Kamali, 1999). Each transaction is guaranteed because the clearinghouse

acts as the seller for each buyer and the buyer for each seller in all future transactions (Kunhibava, 2010).

Shariah Issue 3: *Maysir*

Maysir or gambling refers to the easy acquisition of wealth by probabilities, whether or not it deprives the other's rights (Hameed, 2009). Al-Suwailem (2000) and Fahimah, Azlin Alisa (2008) conclude that there are three characteristics of gambling that luck acts as the sole basis of the profitability where the winners get the losers' part. Therefore, investors expose themselves to high risks conditions, and those risks do not add value to the country's economy. One of the characteristics of gambling is a zero-sum game, which is one party gets profit based on the loss of the other party. Obaidullah (1998), Al-Suwailem (2006) and Daud Bakar (2008) explain that gambling happens when one of the contracting party face the risk of a loss while the other party will gain a profit. In the FX Swap operation, both parties will set an exchange rate in the future, and that will expose them to profit and loss risks. If the exchange rate at the forward time exceeds the rate of the spot time, the client gains profit while the bank suffers losses. If the opposite happens, the forward exchange rate is lower than the spot rate; then the bank earns profits while the client losses. This situation resembles betting for fate as it happens due to the dependence on market prices.

Shariah Issue 4: Speculation

Speculation activity is an unethical act. Historically, financial crises around the globe have proven that speculation is one of the culprits. Speculation may define as an act of buying and selling of commodity in the market, with knowledge of its volatility and the risk involved therein, for the purpose of making a capital gain. It can be understand that speculation occur when participant in the market intend to get a profit by buying shares at a lower price and sell to others at higher price (Habib, 2017; Salamon, 2015). According to Rafikov & Saiti (2017), there are six important elements in speculation namely: asset; buying; knowledge of market volatility; assumption of risk when waiting for positive or negative price change in the market; selling of the commodity; and intention of capital gain.

The noble purpose behind the creation of FX Swap is to enable hedging and managing speculation risk. However, ironically, this instrument has become the most popular financial instrument used for speculation, which opposes its' original purpose. Abdul Rahman (2003), Fahim (1997), Obaidullah (1998), and Tamer (2005) state that the elements of speculation take place in derivative markets when speculators are only interested in the market price changes. The speculators will terminate contracts before the maturity period, whether they are already profitable or to avoid losses, and most of the contracts also do not involve any physical delivery of the asset. Obaidullah (1998) and Usmani (1999) argue that this kind of transaction can be considered as excessive speculation as they place expectations on the market prices' fate, meanwhile, the speculators, their motive is to take advantage from the market price changes. Basically, the act of investors is based on their philosophical, religious or moral

convictions of individual or collective investors (Anas & Mounira, 2009). According to Al-Suwailem (2006), dealers used 97.3% of the total amount of derivatives and, the end users used 2.7% of total derivatives. The percentage shows that dealers who are real speculators will dominate the derivative market while hedgers are the minority. Most of the users entering a derivative contract intend to speculate instead of pursuing real businesses (Saadiah Mohamad & Tabatabaei, 2008).

Principles of Islamic Ethics in Islamic FX Swap

In general, Islam and other divine religions invite humankind to follow moral and ethical principles in every possible condition. Therefore, it predominantly implies that the financial instrument and transactions to be disassociated directly or indirectly from corrupted businesses like gambling, human trafficking, drugs, arms and ammunition, pornography and other activities that fall under the grey areas when ethically and morally screened (Rizvi, Arshad, & Lahsasna, 2014). Other than that, in Islam, there are numbers of criteria for financial instrument and transactions to be permissible and ethical. In terms of the principles, all derivative instrument and transactions must be free from *riba*, *rishwah* (corruption), *maysir*, *gharar,* excessive speculation and *jahl* (ignorance) (Fahim, 1997; Muhammad, 1997; Obiyathullah, 1999).

The development of Islamic finance and banking products has introduced a new chapter in initiating Islamic derivative products. As a public necessity, many academics, Islamic finance practitioners, and Shariah scholars have advocated for the use of such products and devices treating it as a necessity (*hajjah*) for risk hedging based on benefits (*maslahah*) (Ayub & Paldi, 2016). The emergence of Islamic swap products has solved many Shariah-related issues such as usury, uncertainty, gambling, and speculations. In general, there are five criteria must be met in order to avoid any misusing of Islamic derivative instruments as what happened in conventional derivatives markets: (i) the derivative instrument and its underlying commodities are Shariah compliant; (ii) the objective of derivative instrument is for real hedging; (iii) the transaction is based on real investment and real risk that contribute value to the real economy; (iv) the method and practice involved in risk hedging does not sever the risk from its underlying commodities; (iiv) The contract must be in accordance with the Shariah standards as well as its objectives (maqasid al-shariah) (Kasri & Rahman, 2016; Injadat, 2018; Nordin et al., 2019).

Ethical Principle 1: *Riba* Free

The element of *riba* within FX Swap occurs when the exchange of two foreign currencies does not occur on the spot, and it may be fixed by using *wa'd* contract. A *wa'd* contract may define such exchange as a unilateral promise or undertaking that refers to an expression of commitment given by one party to another to perform a particular action(s) in the future (*Concept paper of Wa'd*, 2016). The *wa'd* application in the Islamic FX Swap contract can be illustrated in the following figure:

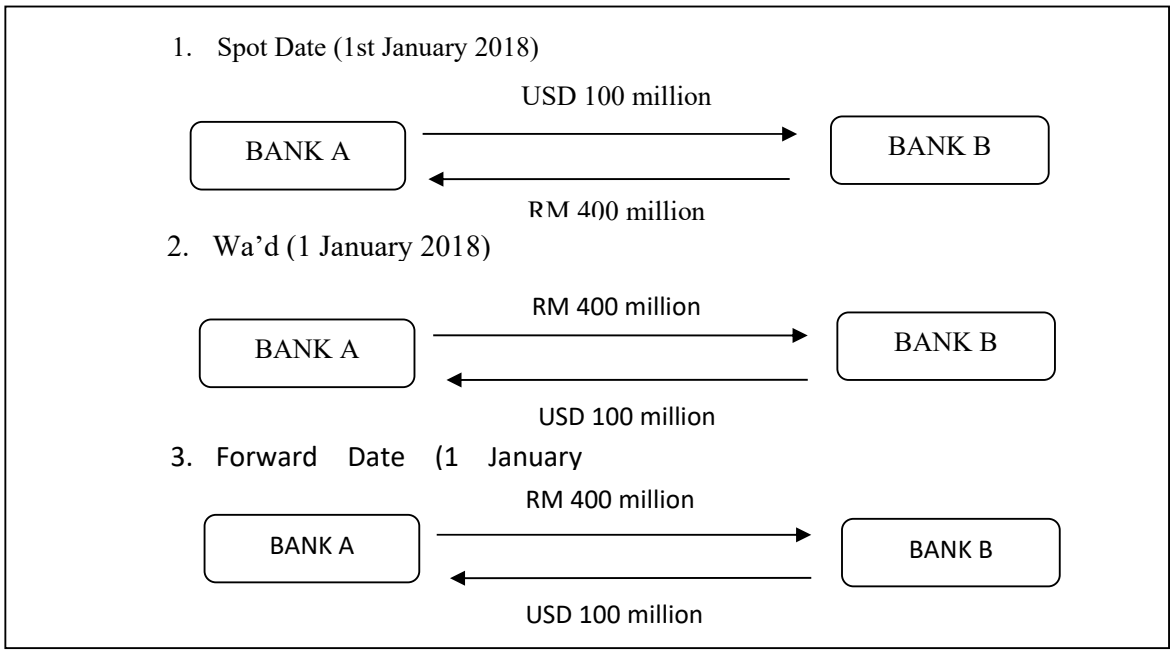

Figure 2

On January 1, 2018, an investor intended to convert his RM400 million to USD100 million. The exchange rate at that time is USD1.00 equivalent to RM4.00. Afterward, the investor and the bank carried out the exchange process. At the first stage, both parties executed the contract following *al-sarf* sales method because the exchange took place at the time the contract was sealed. At the same time, the investor and the bank entered into a *wa'd* agreement to execute the foreign currency exchange again at the agreed date (January 1, 2019) and the exchange rate (USD 1.00 = RM 4.00). On January 1, 2019, the foreign currency swaps were executed based on the agreement made on January 1, 2018.

In the current Islamic banking practice, the *wa'd* structure allows the achievement of the foreign exchange contract function without contradicting the principles of Shariah prohibitions, which is *riba* (Azizu, Abdullah, & Jubri, 2018; Azlin Alisa, Edawati, & Noor, 2014). Besides, the *wa'd* concept is a reapplication of the traditional contract in Islam in the contemporary Islamic banking and finance products to resolve the *riba* issue in FX Swap. This innovation receives support from the Shariah Advisory Council of Bank Negara Malaysia (2010) where it has decided that Islamic financial institutions must execute their derivative instrument such as futures contract, forward contract, option contract and swap based on *wa'd*. Apart from that, the application of *wa'd* in FX Swap is in line with the Shariah objectives (*maqasid al-shariah)* that emphasize the preservation of wealth (*hifz al-mal*). It also coincides with the principle of Islamic ethics, which is protecting the interest (*maslahah*) of both contracting parties.

Ethical Principle 2: *Gharar* Free

The element of *gharar* in FX Swap occurs due to the non-existence asset in FX Swap, and the actual exchange does not take place. The resolution to this issue is by requiring an underlying asset in FX Swap transactions. Since the FX Swap depends on the foreign exchange currency, a *tawarruq* contract may be applied. *Tawarruq* contract involves an asset as an underlying subject of the contract in a transaction (Ahmad et al., 2017). Thus, the FX Swap transaction takes place based on the transaction of a commodity that eliminates the element of *gharar*. There are specific requirements set by the scholars on the underlying assets to ensure the transactions comply with the Shariah. Firstly, the asset must be permissible (*halal*). Secondly, the commodity must currently exist in its physical form. Thirdly, the seller should have legal ownership of the asset in its final form (Obiyathullah, 1999).

Ethical Principle 3: Prohibition of Excessive Speculation

Another issue in the conventional FX Swap practice is speculation activity. According to Fahim (1995), not all kind of speculations is unethical due to the vital role of speculators who dare shift risks from others to them. Speculation is permissible when it is helping the market shifts risks from the producers who are unable to bear the risks to parties who can. This permissible speculation is a requirement in the actual economic activities. Therefore, the implementation of Islamic FX Swap still requires the elements of permissible speculation to avoid mismatches from occurring in risk management. In Islamic economics, it prohibits speculations that do not occur in the actual economic activities; moreover, when it is damaging the financial market. In order to ensure such speculations do not take place in Islamic FX Swap transactions, several Islamic financial institutions provide a declarative document to obtain a guarantee from the counterparties subscribing to the product to ensure the use of the derivative instrument is only for hedging purposes not speculation (Asyraf Wajdi, 2009; Zahan & Kenett, 2012). The aim behind the use of the application of hedging and Islamic derivatives should strictly center on risk management. Even though financial institutions can control the speculators, they are still unable to control speculation activities when it comes to the international market (Saadiah Mohamad & Tabatabaei, 2008). However, most of the Islamic banking practices reject this view because of the Islamic Banks that act as an intermediary institution will ensure clients who subscribe to their Islamic FX Swap are real hedgers. The following figure shows the practice of Islamic FX Swap:

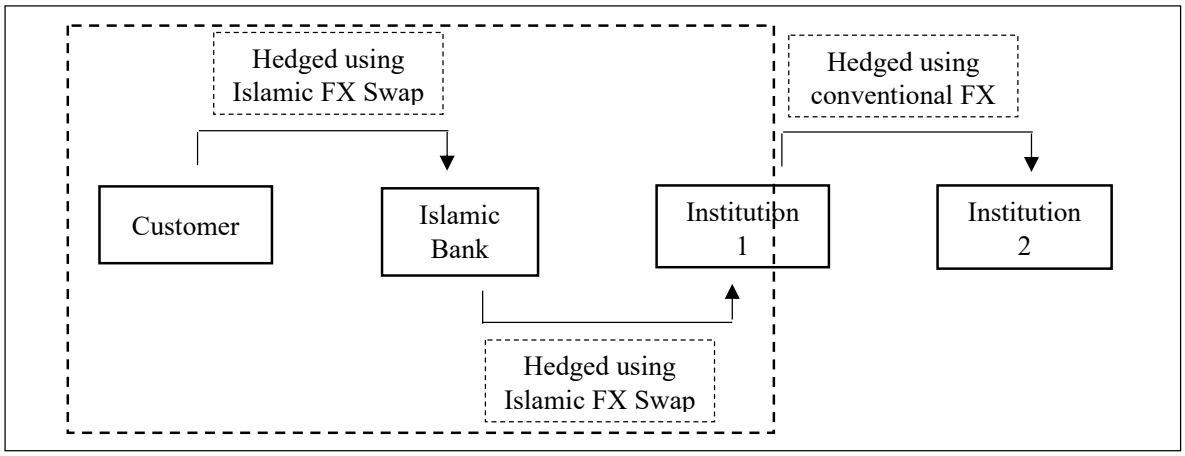

Figure 3

As Figure 3 shows, customer hedged his/her liability by using Islamic FX Swap from the Islamic bank. If the Islamic bank is unable to find the same risk that in line with its clients, it is necessary for the bank to swap the risk to another party that needs a real hedger. If the second party is also unable to bear the risk, it will transfer the risk to another party include Islamic or conventional institution. The Islamic banks will ensure that their clients and the second party who are dealing with them are real hedgers, while for the next parties, it is beyond the banks' responsibility. To ensure this speculative element can be minimized, the Islamic financial institution itself needs to strengthen their enforcement and monitoring body to control the operation of Islamic FX Swap. An ethical aspects in the regulatory framework are also necessary in addition to prudent and sound controls. Through regulatory body in Islamic finance institution, it's provide an upper hand to Shariah scholars to implement their authorities and make efforts for Shariah compliance (Ullah, Harwood, & Jamali, 2018).

Ethical Principle 4: Prohibition of Gambling Elements

The elements of gambling will cease with the resolution of speculation issues as they are the worst form of gambling. According to Obiyathullah (1999), the price change in the market is a result of the price of the underlying assets and not just based on chances. Apart from having the real assets by using *tawarruq* contract, the exchange rates have also been fixed on the spot date, and that denies the elements of gambling in Islamic FX Swap.

Conclusion

This paper has reviewed the application of the principles of Islamic ethics of the Islamic Foreign Exchange Swap. The study of the conventional practice of FX Swap in financial institutions found that there are numbers of unethical issues in the implementation of FX Swap such as *riba*, *gharar*, gambling, and speculation. *Riba* occurs when the contracting parties fix the forward currency exchange rate on the agreement date (spot date). Gambling exists in FX Swap when the subject of a contract does not exist, and the actual exchange does not occur. The elements of

gambling occur in FX Swap when one of the contracting parties prone to a loss while another party gain a profit. Price fluctuation in the market causes speculators to take advantage of it. All in all, the implementation of the new contract innovation such as *wa'd*, *tawarruq* and monitoring efforts from financial institutions may eliminate the elements of *riba*, *gharar*, gambling and speculation in the Islamic FX Swap structure.

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فلسفة الحقوق والحريات السياسية (دراسة دستورية في منهجية التطبيق)

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ملخص البحث

تهدف هذه الدراسة إلى توصيف فلسفة الحقوق والحريات السياسية من خلال منظور دستوري وتطبيق منهجي في الحياة السياسية للشعوب والحكام على حد سواء، ولأهمية هذه القضية فإن الحرية السياسة وقعت بين طرفي نقيض، فهناك من يطلق العنان للحرية السياسية على عوهنها، حتى أصبحت الحرية السياسة عنوانا للفوضى والصراع بين فئات المجتمع والأحزاب والمنظمات، وأدى ذلك إلى تفسخ في النسيج الاجتماعي للبلد الواحد، من جهة أخرى فإن هناك من صادر الحقوق والحريات السياسية للشعوب، واستبد بالأمر من دون الناس، وانتشر القمع والظلم والطغيان، وهنا تأتي أهمية دراسة هذه القضية بشكل دستوري قانوني منهجي وفقا لمصادر الشريعة الإسلامية التي كانت ولا تزال مصدراً للنظُم الإنسانية الراقية التي تساعد البشرية على تنظيم شئونها واحترام إنسانيتها، وحفظت للإنسانية حقها ومن ذلك الحقوق والحريات، والتي من خلالها يتم ضمان حقوق الأفراد والمجتمعات وتنظيم الشئون بين الحاكم والمحكوم لقيام العدالة الاجتماعية التي تعد من ضمن المقاصد الشرعية.

وسوف تدرس هذه القضية من خلال محاور مهمة تتمثل في الآتي: المحور الأول: أصالة مبدأ الحقوق والحريات السياسية. والمحور الثاني: ضوابط مبدأ الحرية السياسية. والمحور الثالث: المجتمع ومبدأ الحقوق والحريات السياسية.

الكلمات المفتاحية: فلسفة– الحقوق– الحريات– السياسية — دستورية– منهجية– تطبيق.

المقدمة:

الحمد لله رب العالمين والصلاة والسلام على أشرف خلق الله أجمعين محمد وعلى آله وصحابته الغر الميامين، أما بعد فإن الحرية السياسية ليست قضية عبثية يطلق لها العنان في فضاء غير منضبط، والا فإن ذلك يتحول إلى فوضى عارمة تعصف بالمجتمعات والدول والنظم، ومن هذا المنطلق فإن الدراسة سوف تتطرق الى قضية الحرية السياسية بشكل نظمي منهجي في مجال التطبيق وذلك من خلال التطرق إلى هذه القضية من خلال اعتبارات مهمة وهي كالتالي:

أولاً: الأصالة: والذي يمثله الأساس الشرعي للنصوص في الوحيين: القرآن والسنة، وذلك من خلال دلالة النصوص الشرعية على أهمية الحرية السياسية وشرعيتها في تكوينها الإنساني الأخلاقي الفطري الأصيل، والذي يجب على السُلطة والشعب على حد سواء التزامها، كونها من الأساسات التي تمثل التكوين النظمي والدستوري والحقوقي والحضاري للدول والبلدان والمجتمعات، وأن هذه القضية لا مشاحة في إثبات أصالتها للبشرية جمعاء.

ثانياً: التطوير: والذي تمثله وتتحيه المعاصرة وفق نظم وآليات معاصرة تمكن من التطوير بناءً لما تقتضيه الظروف، بحيث يكون التطوير مبنياً على أسس تنظيمية دستورية تقود إلى مصلحة راجحة؛ بحيث لا تخل بالأساس الإنساني الخلقي الفطري للحرية السياسية، ولا تخرجها من أصالتها المتجذرة في الفطرة الإنسانية السوية، وإنما يخضع التطوير للمصلحة التي تكون مآلاتها نافعة للبناء النظمي والدستور والحضاري الإنساني، في تنظيم شئون البشرية السياسية والاجتماعية والاقتصادية وغيرها المجالات المرتبطة بالحرية السياسية المنضبطة.

ثالثاً: الممارسة المنهجية: وذلك وفق آليات مناسبة متطورة تمكن من تطبيق الحرية السياسية بشكل دستوري منضبط إضافة إلى الاستفادة من كل ما من شأنه تطوير منهجية التطبيق للحرية السياسية من الأساليب والنظم المعاصرة والمستقبلية بأفضل ما يمكن من السبل والطرق الناجحة والمناسبة التي تصب في خدمة المجتمع والدولة.

المحور الأول: أصالة مبدأ الحقوق والحريات السياسية

الحقوق والحريات تعد من أهم الركائز الفطرية التي فطر الناس عليها؛ حيث جعلها الله سبحانه وتعالى من أفضل المقومات الأساسية التي تقوم عليها حياة البشرية أفراداً وجماعات؛ حيث إنه لا يمكن للناس أن تعتقد وتتدين وتعبد ربها وخالقها لولا ضمان وجود الحقوق الحريات، فكيف بما هو دون ذلك من الأمور الحياتية المهمة، والتي تتطلب ضمان الحريات والحقوق للبشرية. ولكون الحقوق والحرية السياسية تعد من المشكلات العتيقة التي يدور حولها الصراع بين الأنظمة الحاكمة والشعوب على مر العصور، إضافةً إلى كونها ميداناً بحثياً كبيراً للكتاب والنظار والباحثين؛ فقد كان من اللائق بهذه القضية والتي تعد محوراً أساساً من المحاور التي تقوم عليها حياة البشرية أن تكون نظاماً توزن على أساسه الحياة برمتها، بما في ذلك الحياة السياسية بممارساتها المختلفة بين الحاكم والمحكوم[1].

من أجل ذلك؛ نتطرق إلى حقائق مهمة حول الحقوق والحريات الإنسانية السياسية التي يتطلبها قيام نظام ودولة وشعب ومؤسسات وخدمات وغير ذلك من الأمور المهمة التي تكون طريقا إلى قيام حضارة بشرية ذاق قيمة إنسانية راقية.

[1] انظر: العوَّا، **في النظام السياسي للدولة الإسلامية**، ص212.

1. الحقيقة الأولى: الطبيعة الفطرية للحقوق والحريات السياسية

نظام الحقوق والحريات الإنسانية تعتبر الخلفية الحقيقية للفطرة الإنسانية السوية التي كرمها الله سبحانه وتعالى، وجعل منها مخلوقاً متميزاً عن سائر الكائنات، ولذلك فإن الله سبحانه وتعال جعل الإنسان يتمتع بالحقوق والحريات منحة منه سبحانه وتعالى، وليس لأحد في ذلك منه غيره سبحانه وتعالى، وإن من أهم هذه الحقوق والحريات، ما يتعلق بالقضايا السياسية والتي من ضمنها الحقوق والحريات الممنوحة للناس سياسيا في تنظيم شئونهم السياسية والذي يعد من مقومات اصلاح أحوالهم في دينهم ودنياهم، كون الحرية السياسة المنضبطة هي في حقيقة الأمر تعد من الأنظمة الفاعلة في ترتيب وتنظيم العلاقة بين الشعوب وحكامهم من خلال إتاحة الحقوق والحريات السياسية اختيار من يرونه مناسبا لإدارة شئونهم في كافة المجالات الحياتية سياسيا واقتصاديا واجتماعيا وغير ذلك من المجالات الحيوية، والتي تعبر عن منظور سياسي حضاري تحققه ضمان وجود الحقوق والحريات السياسية المنضبطة إلى ما يصلح أحوالهم في دنياهم وآخرتهم[2].

1.1 الحقيقية الثانية: الحقوق والحريات في الممارسة السياسية

الحقوق والحريات الشخصية بابها واسع، كونها أساس الحريات كلها تتعلق بجميع مناحي حياة الإنسان في كل الاتجاهات السياسية والاقتصادية، بيد أن الاقتصار على ما يتعلق

بحرية الفرد في تحديد حياته السياسية في المشاركة في العملية السياسية مرشحاً، أو مترشحاً هو بيت القصيد[3].

يتمتع الإنسان بحرية خاصة في الجانب السياسي في المجتمع، أو الدَّولة التي ينتمي إليها، بناءً على ما تقتضيه النظُم والدساتير لكل بلد، بيد أن النظُم الدُّستورية الإسلامية في عهد الخلفاء الراشدين، ضمنت الحرية والحقوق ونظمتها في هذا الجانب أكثر من غيرها من النظُم الأخرى. ولقد ضمنت النظُم الدُّستورية الإسلامية حق حرية الفرد في المشاركة في تكوين وإيجاد السلطة الحاكمة في الدولة، أو المجتمع الذي يعيشه، وضمان النظُم الدُّستورية الإسلامية ذلك للفرد والمجتمع من أجل الوصول إلى المشاركة الحقيقة في إدارة شئون الدولة[4].

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[2] انظر: منير حميد البياتي، **النظام السياسي الإسلامي مقارنا بالدولة القانونية: (دراسة دستورية شرعية قانونية)** (عمان: دار البشير، ط2، 1414هـ/1994م)، ص112؛ انظر: محمد عبد الفتاح الخطيب، "حرية الرأي في الإسلام مقاربة في التصور والمنهجية" عن **مجلة الأمة** (الدوحة: وزارة الأوقاف والشئون الإسلامية، ط1، د.س)، ع/ 122، ص32.

[3] انظر: المصدر السابق، ص120.

[4] انظر: منيب محمد ربيع، **ضمانات الحرية بين واقعية الإسلام وفلسفة الديمقراطية** (الرياض: مكتبة المعارف، ط1، 1408هـ/1988م)، ص110؛ انظر: عبد المتعال الصعيدي، **حرية الفكر في الإسلام** (د.م: دار الفكر العربي، د.ط، د.ت.)، ص7.

2.1 الحقيقة الثالثة: أُسس مبدأ الحقوق الحريات السياسية

يعتمد نظام الحقوق والحريات في الدُّستورية الإسلامية على عدة قضايا مهمة: تتكون منها الأسس الأصيلة في حق الفرد في ممارسة حريته السياسية في العمل السياسية ممارسة أو ترشيحاً أو ترشحاً، وتتمثل هذه الأسس في الآتي:

أولاً: الدُّستورية الإسلامية تعتبر الحقوق والحريات من الأسس الطبيعية للإنسان التي وهبها الله عز وجل للإنسان في ممارسة حقه الدستوري والقانوني في كل الجوانب الحياتية ومن ضمنها الجانب السياسي، ولذلك فإن الفرد هو المكون الفعلي للمجتمع، وعضو فعال فيه. وبناءً على ذلك، فإن له دوراً أساساً في أي نشاط سياسي، أو انتخابي، ولا يجوز تهميش الفرد بأي حال من الأحوال؛ لأن هذا يعتبر انتقاصاً من حقوقه وحريته، ولذلك فإنه يجب على الدَّولة الاعتراف بحق الفرد وحريته السياسية في الممارسة والعمل السياسية المنضبط سواء كان الفرد في الدولة وفي سلك المسؤولية، او كان الفرد من عامة الناس، ولا فرق في ذلك بينهم في اكتساب الحقوق والحريات السياسية بأي شكل من الاشكال، إلا إذا كان هناك موانه دستورية وقانونية معينة، تحول دون ممارسة البعض لحقوقهم وحريتهم السياسية، نظرا لبعض المخالفات أو الجرائم التي كانت سببا للحضر القانوني والدستوري، فهذه قضية استثنائية لها مستند دستوري وقانوني، لكن من حيث الأصل فإن مبدأي الحقوق والحريات حق إنساني لا يسقط عنه لجنسه أو لونه أو لغته[5].

ثانياً: مبدأ الحقوق والحريات في الدُّستورية الإسلامية تعتبر الفرد جزءاً من المجتمع، وعليه فإن من حقوقه المشاركة الفعلية في صناعة الحياة السياسية، وحرمانه من ذلك يعد تعدياً على حقه الدُّستوري في ممارسة حريته السياسية، وإهدار لحقه في هذا الجانب لفقدانه جانب التمثيل الفعلي في السلطة[6].

ثالثاً: مبدأ الحقوق والحريات في الدُّستورية الإسلامية تضمن للفرد والمجتمع على حد سواء الحق الكامل في مراقبة السُّلطة الحاكمة ورئيس الدَّولة، لضمان أداء أفضل من خلال التقييم الفعال والمستمر من جانب الفرد والمجتمع، من خلال الحقوق الدُّستورية التي تضمن حرية الفكر والرأي المنضبطين بالقانون والدُّستور، بناءً على ما تقتضيه المصالح الوطنية العليا[7].

رابعاً: مبدأ الحقوق والحريات في الدُّستورية الإسلامية تضمن للفرد والمجتمع على حد سواء الحق في المعارضة البناءة التي تجمع ولا تفرق وتعطي ولا تمنع وتبني ولا تهدم وتقوي ولا تضعف، وتصنع المستقبل المزدهر الواعد بالخير والبناء والازدهار. فإذا توفرت هذه الصفات الإيجابية في المعارضة السياسية للحاكم

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[5] انظر: وهبة الزحيلي، **حق الحرية في العالم** (دمشق: دار الفكر، ط1، 1421هـ/200م)، ص17.

[6] انظر: أحمد شوقي الفنجري، **الحرية السياسية في الإسلام** (د.م: د.ن، ط2، 1403هـ/1983م)، ص53.

[7] انظر: ربيع، **ضمانات الحرية بين واقعية الإسلام وفلسفة الديمقراطية**، ص135.

والسُّلطة الحاكمة؛ فإنه لا شك أنها ستكون عامل بناء لا هدم، ومساعد كبير في إيجاد الحلول المناسبة في إيجاد الشخصية المناسبة للقيادة والحكم[8].

2. المحور الثاني: ضوابط الحرية السياسية

لما كانت الحرية السياسية تكريم وتشريف من الله سبحانه وتعالى للبشرية جمعاء، فإن الله سبحانه وتعالى لم يترك الناس هملا يمارس كل إنسان حريته على حسب ما تمليه عليه نفسه وهواه، وإنما جعل لذلك ضوابط جامعة مانعة، تجعل من الحرية ذات قيمة إنسانية عالية؛ حيث يتحرر الانسان من أهوائه ونوازع نفسه التي قد تضر ولا تنفع، ومن ذلك الحرية السياسية وممارسة العمل السياسي.

1.2 ضابط الفضيلة

عندما تتجاوز الحرية المعاني الأخلاقية الشريفة التي تميز الإنسان عن غيره من الكائنات، وتجعل منه إنساناً مكرماً ذا قيمة؛ فإن ذلك يعني أنه يجب عليه أن يتحلى بالفضيلة، ويتجنب كل معاني الرذائل التي تسلب من الإنسان إنسانيته التي كرمه الله سبحانه وتعالى بها. وإن الحياة السياسية العارية عن معاني الفضيلة، تعتبر حياة سياسية مظلمة؛ ولذلك فإن الحرية السياسية حينما تحوطها وتحرسها الفضيلة، فإنه مما لا شك فيه أن تنعم الإنسانية بسياسة تحمل في طياتها كل المعاني الأخلاقية والمبادئ السامية، فالحرية التي تحوطها الفضيلة حرية لا تنحرف إلى الرذائل ومساوئ الأخلاق، ويكن نتاجها على الدول والمجتمع نتجا إنسانيا وحضاريا فاعلا، ويكون تأثيرها إيجابيا في كل القضايا والملفات الإنسانية والسياسية والاقتصادية وغير ذلك من المجالات الأخرى التي تلامس حياة الناس[9].

فضابط الفضيلة، تكمن فيه فاعلية الحقوق والحريات السياسية الإيجابية، كما تكمن فيه استقامة العمل السياسي بشكل إنساني وحضاري، وهذا ما كان علية الصدر الأول من الرعيل الأول لصحابة الكرام، حينما تحلّوا بالفضيلة في مشاركاتهم السياسية عمروا الأرض بالخير والأمن والرخاء والازهار والاستقرار، وعليه فإن ضابط الفضيلة من الضمانات الأساسية التي يجب أن تكون مصاحبة للحرية السياسية كحقيقة موجودة لا تنفك عنها، وإلا لأصبحت الحرية السياسية مصدرا للقلق والفوضى والعبث والصراع والاقتتال.

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[8] انظر: وهبة الزحيلي، **حق الحرية في العالم**، ص135.

[9] انظر: شوكت محمد عرسان عليان، **النظام السياسي في الإسلام** (الرياض: مكتبة الملك فهد الوطنية، ط1، 1420هـ/1999م)، ص44؛ انظر: محمد عبد الفتاح الخطيب، "حرية الرأي في الإسلام مقاربة في التصور والمنهجية"، **عن مجلة الأمة** (الدوحة: وزارة الأوقاف والشئون الإسلامية، ط1، د.س)، ع/ 122، ص160.

2.2 ضابط العدل

الحرية السياسية البعيدة عن العدل تكون مصدر للظلم والجور والطغيان، سواء كان ذلك من قبل الشعب، أو من قبل السلطات، فالحقوق ولحريات السياسية من المبادئ التي حرص عليها الإسلام، كونها مصدراً للعدالة؛ لكن إذا خلت هذه الحرية من ضابط العدل، تحولت الحقوق والحرية إلى مصدر من مصادر التعسف والظلم والطغيان، فالعدل ليس محصوراً في أن يكون من الحاكم للمحكومين، بل إن الشعوب الحرة مطالبة بأن تكون حريتها عادلة لا ضيم فيها ولا ظلم، إذا ما أرادت أن تتحقق العدالة الاجتماعية فيها. فالشعوب الظالمة تبوء بإثمها فيحكمها حكام ظالمون، لأن الشعوب الحرة العادلة لا تختار الظالمين ليتحكموا في رقابها، فإن الله إنما يولي الظالمين بعضهم على بعض[10].

قال تعالى: {وَكَذَٰلِكَ نُوَلِّي بَعْضَ الظَّالِمِينَ بَعْضًا بِمَا كَانُوا يَكْسِبُونَ} [الانعام: آية129].

قال سيد قطب في هذه المناسبة: (نجعل بعضهم أولياء بعض بحكم ما بينهم من تشابه في الطبع والحقيقة وبحكم ما بينهم من اتفاق في الوجهة والهدف، وبحكم ما ينتظرهم من وحدة في المصير)[11].

من هذا المنطلق فإن الحرية السياسية المضبوطة بالعدل في الدُّستورية الإسلامية، لا يمكن أن توصل إلى مقاليد الحكم إلا إنساناً فاضلاً عادلاً فاعلاً، يقوم على شئون رعيته بالعدل والفضل، ولو تعدى ذلك إلى كون الشعب اختار رئيساً ظالماً، فإنه إنما يكون قد اختار من صنفه، ولا يلام الظالم في ظلمه إذا مكنته الشعوب من رقابها وبمحض إرادتها، فليذوقوا جزاء اختيارهم.

ومن جهة أخرى فإن ضابط العدالة في الحرية السياسية يستدعي أن يكون الشعب بكل فئاته حكومة ومعارضة على قدر كبير من التحلي بالعدل في ممارساتهم وتعاملهم ومعارضتهم، لأن المشاهد والواقع المعاش أن الحرية السياسية البعيدة عن ضابط العدل خرجت معارضات سياسية جعلت من الحرية السياسية وسيلة إلى التعسف في معارضتها، حتى تحولت الحرية السياسية إلى نوع من أنواع التعسف والظلم في ممارسات بعض المعارضات السياسية ضد أنظمتها الحاكمة، مما أدى إلى انتشار الفوضى وانفصام عرى الدولة والمجتمع وضياع الحقوق بحجة الحرية السياسية التي ابتعدت عن ضابط العدل في منهجية التطبيق في الساحة السياسية.

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[10] انظر: عماد محمد عمارة يس، **النظام الرقابي في الإدارة الإسلامية وأثره في الدعوة إلى الله** (المنصورة: دار اليقين للنشر، ط1، 1424هـ/2003م)، ص117.

[11] انظر: سيد قطب، **في ظلال القرآن** (القاهرة: دار الشروق، ط17، د.ت.)، ج3، ص1208.

3.2 ضابط الحق

الحقوق والحريات حق دستوري فطري ضمنته الشريعة الإسلامية لكل فرد من أفراد المجتمع في شتى المجالات السياسية والاقتصادية والاجتماعية والفكرية، وغير ذلك من المجالات الحياتية، بيد أن هذا الحق في الحقوق والحريات السياسية يجب أن يكون منضبط بالحفاظ على حقوق الآخرين، وممارسة الحرية السياسية حق دستوري مضمون، شريطة ألا يكون في ممارسة هذا الحق تعسف، أو اعتداء، سواء كان هذا التعسف فيه أضرار بالدين، أو الوطن، أو الشعب، أو الأفراد، أو الجماعات. فالتعسف في استخدام حق الحرية السياسية ممنوع ومرفوض في الشريعة الإسلامية، لقول النبي صلى الله عليه وسلم (لا ضرر ولا ضرار)[12]. وهذا الحديث يعد من القواعد الأساسية في حماية الحقوق والحريات بشكل عام والحقوق والحريات السياسية بشكل خاص، ومحاربة التعسف في استخدام الحقوق للتعدي على الآخرين، ومن ذلك التزام المسلم بقواعد الحرية الفكرية التي تتيحها الدُّستورية الإسلامية؛ حيث يخضع المسلم دوماً إلى التصحيح الفكري المستمر المبني على هدى من الدين والشرعة، حتى لا يقع في التعدي والتعسف المضر للفرد والمجتمع[13].

وإن من أبرز التعسف في استخدام حق الحرية السياسية والفكرية، هو التعدي على مقدرات الأمَّة الدستورية والقانونية والأخلاقية بحجة الحرية السياسية والفكرية؛ فالحرية السياسية أو الفكرية مضبوطة بحفظ الحقوق، وعدم التعسف فيها للإضرار بالآخرين.

ومن أبرز التعسف في استخدام حق الحرية، هو الجنوح إلى الفوضى السياسية والتعسف السياسي والتعدي السياسي تحت مظلة الحقوق والحريات السياسية، كما أنه من صور التعسف في ممارسة الحرية السياسية أن تتصدر جماعة أو حزب أو طائفة إلى التعدي على الدولة أو الأمة من خلال مجابهة الدَّولة والأمة في دينها وفكرها ومعتقداتها وما تؤمن به، فالذين يريدون أن يتسلط على الأمَّة المسلمة وشعوبها المؤمنة أناس لا يؤمنون بما تؤمن به الأمَّة، ولا يتبعون الشريعة الإسلامية، ولا يبالون بالدُّستورية الإسلامية، وإنما يجنحون للعمل بدساتير لا تمت إلى الأمَّة المسلمة في دينها وعقيدتها وشريعتها وعاداتها وتقاليديها، إنما يكون قد وقع منهم التعسف في استخدام حريتهم السياسية للأضرار بالأمَّة المسلمة ودينها وشريعتها ومنهجها الرباني[14].

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[12] انظر: أحمد بن حنبل الشيباني، **مسند الإمام أحمد** (القاهرة: دار الحديث، ط1، 1416هـ/1995م)، ج3، ص267، ح/2866. صححه الألباني، وقال عنه: ورد مرسلا، وروي موصولا عن أبي سعيد الخدري، وعبد الله بن عباس، وعبادة بن الصامت، وعائشة، وأبي هريرة، وجابر بن عبد الله، وثعلبة بن مالك رضي الله عنهم. انظر: **سلسلة الأحاديث الصحيحة وشيء من فقهها وفوائدها**، ج1، ص 250.

[13] انظر: ابن عاشور، **أصول النظام الاجتماعي في الإسلام**، ص97.

[14] انظر: محمد عبد الفتاح، الخطيب، "حرية الرأي في الإسلام مقاربة في التصور والمنهجية"، عن **مجلة الأمة**، ع 122، ص172.

4.2 ضابط المصلحة

الحقوق والحريات السياسية، إنما جعلت لتحقيق المصلحة للبشرية عامة، ولذلك فإن المنظور الدَّستوري للحقوق والحريات السياسية هو تحقيق المصلحة العليا للشعوب، من خلال ممارسة الشعوب للحرية في كافة المجالات، شريطة أن تكون هذه الممارسة مشتملة على تحقيق المصالح ودرء المفاسد، ومن ذلك العمل السياسي وفقا للدستور والقانون الذي يضمن الحقوق والحريات السياسية بضوابطها المشروطة باعتبار أن لكل بلد دستوره وقانونه الذي يراعي خصائص كل بلد. فالشخصية التي تمثل خطراً على الأمة في دينها وصلاحها وقوتها واقتصادها وشأنها كله، يجب أن تُستبعد، حتى لا يكون ذلك مصدر استبداد لشعبه، وحتى تكون الشعوب حرة تمارس حقها الدُّستوري بحرية، فإنه يجب أن تنضبط هذه الممارسة المشروعة بما يعود عليها بالنفع ويدفع عنها الضرر، فالمصالح، هي الميزان الحقيقي التي يجب على الناس مراعاته عند ممارسة حقهم الدُّستوري في العمل السياسي[15].

ولا يمكن أن يتذرع الناس بحقهم الدستوري الفطري في الحرية السياسية في القيام بأعمال تضر الدولة في أمنها واستقرارها السياسي والاجتماعي والاقتصادي، فالحرية السياسية هي مبدأ وهي وسيلة لتحقيق مصلحة ودفع مفسد، فإذا ما كانت الحرية السياسية للبعض وسيلة لنشر الفساد في الأرض وتمزيق المجتمعات واهلاك الدولة في قوتها واقتصادها وسياستها وفي علاقاتها الخارجية والدبلوماسية، فإن المصلحة تقتضي أن يمنع من هذا شأنه من ممارسة حريته السياسية، وذلك للضرر العظيم الذي تؤول اليه الأمور إذا ما مكن بعض الأشخاص والجماعات والأحزاب من العمل السياسي بحرية.

5.2 ضابط المسئولية

عندما يُمارس الشعب حقه في الحرية السياسية، فإنه يجب عليه قبل ذلك أن يعي أن الحرية السياسية ليست مجرد حرية تمارس من أجل إشباع الرغبات النفسية المزاجية، وإنما هي مسئولية عظيمة وأمانة ملقاه على عاتقه، باءت بحملها السموات والأرض، وتحملها الإنسان لجهله وضعفه، ولذلك فلابد للشعوب أن تعي مسئوليتها في حريتها السياسية في العملية السياسية، فلو أن الشعب مارس حريته السياسية في اختيار قادته بمسؤولية؛ فإنهم لن يخيبوا في الوصول إلى الشخصية المناسبة التي تتحمل مسؤولياتها تجاه دينها ووطنها وشعبها، وأنه حين تمارس الشعوب حريتها دون مسؤولية، فإن نتاج ذلك يكون سلطة تمارس حكمها بغير مسؤولية تذكر جزاءً وفاقاً، كون ذلك نتاج حرية سياسية غير ناضجة مارست حريتها في بعد عن المسؤولية التي ينبغي أن تكون في محط الاهتمام[16].

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[15] انظر: المصدر السابق ص145.

[16] انظر: صادق مكي، **حرية الإنسان بين الواقع والشريعة** (بيروت: دار الفكر اللبناني، ط1، 1992م)، ص170.

قال صلى الله عليه وسلم (كلكم راع وكلم مسؤول عن رعيته....)[17]، والشعب هو الراعي الأساس لمصالحه، سواء الدينية، أو الدنيوية. فإذا كانت الشعوب لا تتحمل مسؤولياتها تجاه نفسها؛ فإن ضياعها على يد غيرها سيكون أولى. فالشعوب التي تمارس الحرية السياسية بشكل مسؤول، وتتحمل المسؤولية في المشاركة السياسية الإيجابية والفاعلة يكون نتاجها إيجابياً في الملفات السياسية والاقتصادية والاجتماعية وغيرها من الملفات المهمة واللصيقة بالعمل السياسي كحق ومسؤولية ومصلحة مجتمعية ووطنية.

3. المحور الثالث: المجتمع ومبدأ لحقوق والحريات السياسية

النُّظُم الدُّستورية الإسلامية في مجال الحقوق والحريات السياسية، تعتبر من أفضل النظُم الدُّستورية في ضمان الحقوق والحريات السياسية لجميع فئات المجتمع، على اختلاف مذاهبهم وديانتهم وأفكارهم؛ لأن أساس الديانة في الإسلام قائمة على الإيمان الجازم بالقلب والتصديق الذي لا يقبل الشك، ومن فقد هذه الخاصية يعتبر فاقداً للإيمان. ولذلك فإن المكره على شيء لا يمكن أن تتحقق فيه هذه الخاصية التي تعتبر شرطاً أساساً في أن يكون الفرد مؤمناً، ولذلك فإن النظام الدُّستوري الإسلامي أعطى المجتمع الحرية السياسية كما أعطاها للفرد في اعتناق ما يشاء من الأديان والأفكار، ولم يُكره أحداً على فكر، أو مذهب، أو دين معين، وهذا الضمان الدُّستوري للحقوق والحريات السياسية في هذا الجانب، جعل المجتمع الإسلامي يتمتع بتنوع كبير في الأديان والمذاهب والأفكار[18].

3.1. المعارضة السياسية في مبدأ الحقوق والحريات السياسية

إن من أهم الملامح التي حرص عليها الإسلام للبشرية جمعاء، هو الحرية في إبداء الرأي، والبوح بما يؤمن به الإنسان دونما ضرر، ما دام ذلك قائم على المبادئ الأخلاقية التي تحفظ الحقوق وتمنع الضرر، سواء كان ذلك على الأديان، أو المجتمعات، أو الأفراد. فنظام الحرية في الإسلام يضمن الحق للشعوب في إبداء آرائها السياسية بكل شفافية ووضوح، وليس هناك أي عقبات تذكر، مادام أن الآراء السياسية لا تتعارض مع المصالح الدينية والوطنية العليا، ولا تكون سبباً في إثارة النزاعات والعصبيات التي غالباً ما تؤدي إلى الفتن والهرج والمرج والصراعات الدموية المؤلمة[19].

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[17] محمد بن إسماعيل البخاري، **الجامع الصحيح المختصر** (بيروت: دار ابن كثير، ط3، 1407هـ/1987م)، ج1، ص304. ح/853.

[18] انظر: النبهان، **نظام الحكم في الإسلام**، ص230.

[19] انظر: محمد يوسف مصطفى، **حرية الرأي في الإسلام** (القاهرة: دار غريب للطباعة، د.ط، د.ت.)، ص44.

3.1.1 المعارضة وحرية التعبير في مبدأ الحقوق والحريات

لقد أقرت الشريعة الإسلامية الحرية الفكرية، ذلك أن طبائع الأفراد وملكاتهم تختلف وتتباين، وهذه طبيعة فطرية متجذرة في أصل الخليقة، ولا يمكن أن يكون الناس نسخ متكررة من بعضهم البعض، ومن هنا تعددت الآراء والأقوال في الفقه الإسلامي حتى بين الصحابة أنفسهم، ثم تطورت هذه الآراء إلى مذاهب إسلامية معروفة. غير أن هذه الحرية الفكرية محوطة بنطاق دستوري لا يسمح بالتجاوز والخروج إلى ما يعكر صفو الدِّيانة والشِّرعة والمنهج. كما أن هذه الحرية الفكرية مضبوطة بقواعد وشرائط، بحيث تبقى في طي التنوع الإيجابي الذي لا يفسد للود ولا للأخوة قضية؛ بحيث تبقى الأمَّة المسلمة آمنة من خطر الانقسام والفرقة والشتات[20].

لقد ضمنت الشريعة الإسلامية حق الحرية السياسية للشعوب في تقرير مصيرها السياسي، من خلال حرية اختيار الحاكم الذي يمثلهم في استهداف رعاية مصالحهم الدينية والدنيوية. ولقد مثلت النظُم الدُّستورية الإسلامية في عهد الخلفاء في حرية الاختيار للخلفاء الراشدين أرضية صلبة في الدُّستورية الإسلامية الحديثة؛ حيث إن من حق الشعوب أن تعبر عن رأيها من خلال التصويت للمرشح الذي يرونه مناسباً للاضطلاع بمهامه في قيادة الدَّولة إلى ما فيه صلاح لهم في دينهم ودنياهم[21].

3.1.2 حرية المعارضة السياسية

إن من لوازم الحرية السياسية والمعارضة البناءة في الدُّستورية الإسلامية هو ضمان الحرية في المعارضة البناءة، ولقد عارض بعض الصحابة الكرام اختيار أبي بكر خليفة، وعارض البعض اختيار عمر. كما كان هناك معارضة لاختيار عثمان وعلي رضي الله عنهم أجمعين، وهذه معارضة وحرية سياسية منضبطة ، ولذلك فقد مارس الصحابة عملهم السياسي وكانت هناك أصوات معارضة، ولم يمنع أحد تلك المعارضة البناءة المسؤولة، وإنما كانت وجها من أوجه الإصلاح والتقويم والاعتدال، وكانت كل المعارضات التي حصلت من صميم العمل السياسي المتعدد والمتاح وفقا للدستورية الإسلامية التي منحتهم حرية التعبير عن آرائهم السياسية بحرية كاملة ما دام أن تلك الحرية لم تصبح نوعا من أنواع التعصب والتأزم والتعسف في استعمال الحق لضرب استقرار المجتمع السياسي، وانما كان نوع من التنوع وتبادل وجهات النظر السياسي وفقا لحرية سياسية منضبطة ومتزنة وآيلة ودالة إلى المصلحة العامة[22].

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[20] انظر: رشاد حسن خليل، **نظرية المساواة في الشريعة الإسلامية** (الجيزة: دار الفاروق للنشر والتوزيع، ط1، 2007م)، ج1، ص392.

[21] انظر: محمود يوسف مصطفى، **حرية الرأي في الإسلام** (القاهرة: دار غريب للطباعة، د.ط، د.ت.)، ص93.

[22] انظر: عبد الإله بلقزيز، "أزمة المعارضة السياسية في الوطن العربي". (ورقة عمل مقدمة في مجلة مركز دراسات الوحدة العربية) (بيروت: مركز دراسات الوحدة العربية، ط1، 2001م)، ص28.

إن الحرية السياسية في المعارضة البناءة تعتبر ذات أهمية قصوى في تقويم الاعوجاج الذي قد يحدث من قبل السلطات، أو المؤسسات التشريعية المضلعة بالعمل السياسي؛ ولكن لابد للمعارضة السياسية أن تتحمل مسؤولياتها بأمانة، وأن تبتعد عن المراهنات والمناوشات السياسية التي تضر بمصلحة البلد، وأن تكون المعارضة ليست مقصودة لذاتها، وإنما مقصودة للمصلحة العامة، من خلال النصح والتقويم المستمر للعملية السياسية، وإلا لكان الأمر فوضى لا يمكن تخيلها، كما هو حاصل في البلاد العربية في عصرنا الحاضر[23].

الخاتمة:

احتوت هذه الدراسة على بعض المحاور المهمة والتي ناقش الحقوق والحريات السياسة بشكل مختصر ومقتضب وقد اشتملت على ثلاثة محاور أساسية وهي كالتالي: المحور الأول: أصالة مبدأ الحقوق والحريات السياسية، والمحور الثاني: ضوابط الحرية السياسية، والمحور الثالث: المجتمع ومبدأ لحقوق والحريات السياسية، وقد ناقش كل محور بشكل مختصر ومقتضب، وتوصلت الدراسة من خلال ذلك الى بعض النتائج كان من أهمها ما يلي:

1- الحقوق والحرية السياسية حق أصيل وفطر يجب أن يتمتع به كل إنسان دون استثناء.
2- للحقوق والحريات سياسية ضوابط مهمة، يجب أن يلتزمها الافراد والجماعات والأحزاب حتى لا تخر الحرية السياسية من اطارها الإيجابي الى اطار الفساد والفوضى.
3- المعارضة السياسية حق مكفول للأحزاب والافراد والطوائف والجماعات، ولكن وفقا لشروط وضوابط دستورية وقانونية يجب الالتزام بها، حتى لا تكون المعارضة السياسية مصدر قلق وتعسف وفساد للدول والمجتمعات.

التوصيات:

1- وصي الباحث بأهمية عمل برامج تثقيفية وعلمية تعنى بالحقوق والحريات السياسية وكيفية تطبيقها بشكل صحي منهجي.
2- يوصي الباحث بأهمية تبني مؤتمرات علمية لهذه القضية الحرية السياسية كون هذه القضية مع كونها من المسلمات لكن البعض يتخذها ذريعة للإضرار بالدولة والمجتمع.
3- يوصي الباحث بإدراج الحرية السياسية ضمن المناهج التعليمية بشكل منهجي وعلمي دقيق بحيث يراعى فيه الاهتمام بالضوابط والانضباط حتى يربى الناشئة على وعي سياسية ومجتمعي كبير.

[23] انظر: أحمد جلال حماد، **حرية الرأي في الميدان السياسي في ظل مبدأ المشروعية: بحث مقارن في الديمقراطية الغربية والإسلام** (المنصورة: دار الوفاء للطباعة والنشر، ط1، 1408هـ/1987م)، ص336.

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أحمد شوقي الفنجري، **الحرية السياسية في الإسلام** (د.م: د.ن، ط2، 1403هـ/1983م).

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سيد قطب، **في ظلال القرآن** (القاهرة: دار الشروق، ط17، د.ت.).

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قوانين الطوارئ وأثرها في تقيد حقوق الإنسان

Emergency laws and their impact on restricting human rights

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ملخص البحث

تعد قوانين الطوارئ تدابير إستثنائية قد تتخذها آي دولة نتيجة تعرضها لخطر يهدد أمنها وسلامتها، وقد تشمل هذه التدابير كامل الدولة أو جزء منها، بحيث تنتقل الصلاحية من السلطة المدنية إلى السلطة العسكرية أو زيادة صلاحيات السلطات المدنية. وقد شغلت حالات الطوارئ حيزاً كبير في عمل المنظمات الدولية والحقوقية، بهدف ضمان حقوق الإنسان وتحقيق العدالة، حيث تضمنت المعاهدات والمواثيق الدولية العديد من القوانين التي تنص على إحترام حقوق الإنسان، إلا أنها كانت غير مجدية في حالات قوانين الطوارئ في بعض الدول، مما نجم عن ذلك أثار سلبية نتيجة عدم تحقيق التوازن بين أمنها واستقرارها من جهة، وحماية حقوق الإنسان من جهة آخرى. لذلك تطلع الباحث من هذه الدراسة لمجموعة من الأهداف منها: تسليط الضوء على مدى تأثير قوانين الطوارئ على حقوق الإنسان ورصد أثاره السلبية، إضافة إلى إبراز دور وفعالية المنظمات الدولية والحقوقية في توفير الحماية الكفيلة بإحترام حقوق الإنسان في حالات قوانين الطوارئ. وقد إعتمد الباحث في دراسته لتحقيق الأهداف على المنهج الوصفي التحليلي من خلال وصف وتحليل مختلف القوانين ذات الصلة بموضوع الدراسة، إضافة للمنهج المقارن حيث قام بالمقارنة بين الدول في تطبيق قوانين الطوارئ و رصد التجاوزات. وفي الخاتمة توصلت الدراسة لمجموعة من النتائج من أبرزها: وجود تفاوت في تطبيق قوانين الطوارئ بين الدول وغالباً ما تعلق الامر بدوافع سياسية، كثرة الأثار السلبية التي تطال حقوق الإنسان مثل تقيد الحرية والتنقل وتعطيل الدستور، إنعدام دور المنظمات الحقوقية في توفير الحماية لحقوق الإنسان.لذلك آوصى الباحث بتفعيل الرقابة الدولية بحالات الطوارئ، وفرض العقوبات الصرامة في حال حدوث أنتهاكات.

الكلمات المفتاحية: *قوانين الطوارئ، تقيد، حقوق الإنسان.*

Abstract

Emergency laws are exceptional measures that may be taken by any State as a result of a threat to its security and safety. These measures may include the whole or part of the State, transferring power from the civilian to the military or increasing the powers of the civil authorities. Emergencies have occupied a large part in the work of international and human rights organizations, with a view to guaranteeing human rights and achieving justice. This has had negative consequences as a result of the lack of balance between its security and stability on the one hand, and the protection of human rights on the other. Therefore, the researcher looked at this study for a number of objectives, including: highlighting the impact of emergency laws on human rights and monitoring its negative effects, in addition to highlighting the role and effectiveness of international and human rights organizations in providing protection to respect human rights in cases of emergency laws. The researcher relied on the descriptive analytical method by describing and analyzing the various laws related to the subject of the study, in addition to the comparative approach where he compared countries in applying emergency laws and monitoring abuses. In conclusion, the study reached a number of results, including: the existence of disparities in the application of emergency laws between countries and often politically motivated; The researcher recommended activating international monitoring of emergencies and imposing severe penalties in case of violations.

المقدمة

قد تمر على الدول ظروف إستثنائية تهدد أمنها ونظامها العام بشكل جزئي أو كامل، وقد يكون هذا التهديد خارجي كالحروب أو داخلي كالإضطرابات أو نتيجة عوامل الطبيعة مثل الكوارث، مما ينجم عن ذلك خسائر مادية وبشرية، ونتيجة لتلك الاوضاع فقد تتجه الدول لمواجهة تلك التهديدات الطارئة بفرض حالة الطوارئ، من خلال إتخاذ عدة إجرائات إستثنائية لمواجهة هذه الحالات، وقد أجازت تلك الإجرائات جميع القوانين والمواثيق الدولية إضافة إلى دساتير الدول، بحيث يجوز للدول الخروج عن المؤلوف والإنتقال بالقوانين من الحالات العادية لتحل مكانها قوانين الطوارئ في حدود ما يفرضه الوضع الإستثنائي، وتزول هذه القوانين بزوال أسباب الظروف الإستثنائية المهددة لكيان الدولة، وفي ضل تطبيق هذه الحالات الإستثنائية الطارئة قد تمس حريات الأفراد وحقوقهم، من خلال تعرضها لإنتهاكات جسيمة قد تتفاوت بين دولة وأخرى، لذلك حرص المجتمع الدولي على حماية حقوق الأفراد في الدول التي تفرض حالات الطوارئ من خلال الإتفاقات والقوانين الدولية التي تدعو إلى إحترام وصيانة حقوق الإنسان، وعلى الرغم من أن المشرع الدولي أجاز للدول تقيد حقوق الإنسان في الحالات االإستثنائية، إلا أنه حدد جملة من الضوابط القانونية التي تكفل حماية حقوق الإنسان من الإجرائات التعسفية في حال فرض قوانين الطوارئ.

وسنحاول من خلال هذه الدراسة التطرق لتأثير قوانين الطوارئ على حقوق الإنسان ورصد أثاره السلبية، إضافة إلى إبراز دور وفعالية المنظمات والحقوقية في توفير الحماية الكفيلة بإحترام حقوق الإنسان

في حالات الطوارئ، حيث سنتناول في المبحث الاول: حالات الطوارئ وأثرها على حقوق الإنسان، أما المبحث الثاني: حالات الطوارئ في نطاق القوانين الدولية، وفي الخاتمة ستخلص الدراسة لاهم النتائج التي تم التوصل إليها، مع وضع المقترحات لما طرح خلال الدراسة .

المبحث الاول: قوانين الطوارئ وأثرها على حقوق الإنسان

أولاً – مفهوم حالات الطوارئ

1- المفهوم العام: تعد حالات الطوارئ بالمفهوم العام بانها نظام إستثنائي مشروط بتعرض كيان الدولة للخطر المحقق، من خلال فرض إجرائات قانونية محددة، تنتقل الصلاحيات بموجبها من السلطات المدنية للسلطات العسكرية، بهدف حماية الدولة أو جزء منها ضد الأخطار.

2- الطوارئ باللغة: هي جمع طارئة ومعناها (حادثة غريبة). أما الطارئ فهو الغريب، وجمعه طراء بمعنى (الحادث)، وقد جائت كلمة طارئ في قاموس المصطلحات العسكرية بمعنى (حدث مؤسف يتطلب المعالجة الفورية).

3- أما التعريف الإصطلاحي: فقد عرف بانه نظام قانوني مؤقت, يتقرر بمقتضى قوانين دستورية عادلة، لحماية المصالح الوطنية، في مواجهة ظروف إستثنائية، وتنتهي بإنتهائها.

ثانياً – الأثار السلبية لقوانين الطوارئ على حقوق الإنسان في ضل التطبيق التعسفي

في ضل فرض حالات الطوارئ وتطبيق قوانينها، فقد تعرضت حقوق الانسان لانتهاكات جسيمة في بعض الدول كان من أثارها السلبية :

1- تعطيل مؤسسات القضاء المدني من حيث صلاحيات أوامر الإعتقال والتحري والتحقيق وتنفيذ العقوبة أو الإفراج، وهذا يتعارض مع نص الفقرة الثالثة من المادة (90) من إتفاقية الحقوق المدنية والسياسية.

2- الحرمان من الحق بمطالبة القضاء للبت بالتوقيف، وهذا يتعارض مع الفقرة الرابعة من المادة (90) من إتفاقية الحقوق المدنية والسياسية.

3- منع المحامين من ممارسة حقوقهم، من حيث اللقاء بالموكلين أو الدفاع عن قضاياهم، وهذا يخالف الفقرة السابعة من المادة (14) من إتفاقية الحقوق المدنية والسياسية.

4- فرض الأحكام العرفية بدل الأحكام القضائية، مما منع المواطنين من ممارسة حقوقهم.

5- حرمان أسر المعتقلين من التواصل معهم.

6- فرض أحكام تعسفية قد تصل إلى إعدام ألاف المعتقلين من خلال المحاكم الميدانية، وهذا يتنافى مع الميثاق الدولي لحقوق الإنسان.

7- حرمان المعتقلين بجرائم جنائية من ممارسة حقوقهم المدنية بعد الإفراج، مما يمنع عودتهم للحياة الطبيعية بعد المعتقل.

8- إنتهاك الحرية الشخصية وإنتهاك السرية من خلال فرض رقابة شديدة على الإتصالات ووسائل التواصل كافة.

9- هروب عدد كبير من المواطنين لدولهم، نتيجة القمع المفروض بموجب قوانين الطوارئ، مما منعهم من حقهم في المواطنة، وهذا يخالف الميثاق الدولي لحقوق الإنسان.

10- تسلط المؤسسات الأمنية بموجب الصلاحيات الممنوحة لها في حالات الطوارئ، إضافة لإعطائها صلاحيات إتخاذ القرار بدل السلطة القضائية.

11- تولد العنف والكراهية نتيجة الأحكام التعسفية، مما تسبب بزرع الإرهاب في الدول التي غابت فيها العدالة نتيجة لإنتهاك حقوق الإنسان خارج إطار شرعية حالات الطوارئ.

المبحث الثاني: حالات الطوارئ في نطاق القوانين الدولية

أولاً – أنواع حالات الطوارئ

أ- من حيث التطبيق المشروع : تقسم حالات الطوارئ من حيث المشروعية الى قسمين .

1- حالات الطوارئ الحقيقية: وتعلن في حالات الحروب، حيث يفرض من خلالها الأحكام العرفية في كامل الدولة، وتنتقل الصلاحيات من السلطة المدنية إلى السلطة العسكرية بشكل تلقائي، ويعطى الجيش صلاحيات واسعة في ضل غياب القانون، ويتم الإعلان عن هذا النوع من الطوارئ في حال نشوب الحرب مع دول أخرى، ويشترط في إعلانها وقوع الظرف الإستثنائي بشكل فعلي لا مجرد تكهنات بوقوع حدوثها، أي وقوع الحرب بشكل فعلي، ويمكن في حال الإعلان عنها أن تفرض داخل حدود الدولة أو خارجها من خلال الدول الواقع تحت سيطرتها، ولكنها تبقى أقل تقيد خارج حدود الدولة نظراً لخضوعها لإشراف القانون الدولي.

2- حالات الطوارئ الصورية:وتعلن في حالة الكوارث الطبيعية أو الإضطربات الداخلية أو إنتشار الأمراض والأوبئة، حيث تفرض من خلالها الأحكام العرفية على كامل الدولة أو جزئ منها من قبل السلطة التنفيذية، ولكن بشكل أقل تشدد من النوع الاول، حيث تمنح الأحكام العرفية من خلالها صلاحيات واسعة للسلطة التنفيذية على حساب السلطتين التشريعية والقضائية، بشكل يمكنها من فرض القيود على حقوق الإنسان إلى الحد الذي تراه ملائم للمواجهة الخطر وتجاوزه، وتختلف الطوارئ الصورية عن الحقيقية بأنها قد تفض لمجرد الشعور بالخطر دون إشترط حدوثه.

ب- من حيث التطبيق الغير مشروع: وتقسم حالات الطوارئ من حيث عدم مشروعيتها إلى أربعة أقسام.

1- الحالات المعلنة والغير مخطر عنها دولياً: وتتلخص هذه الحالة بأعلان دولة ما حالة الطوارئ وفرض الأحكام العرفية وفق قوانين هذه الدولة ودستورها دون إخطار الدول الأخرى التي تواجهها نفس التهديدات، متجاهلة بذلك الإتفاقيات الدولية التي نصت على هذا الإخطار وإعتبرته أساساً في قوانينها، بهدف معالجة الظروف الإستثنائية الدولية مثل الكوارث، ونتيجة لذلك فقد أعتبر إهمال هذه الإجرائات سبباً صريحاً في عدم مشروعية حالة الطوارئ المفروضة في هذه الدولة على المستوى الدولي حتى لو كانت مستوفيى للشروط الدستورية على المستوى الداخلي.

2- الحالات المعلنى طويلة الامد: وتتجلى هذه الحالة في الواقع الدولي، عند ما تمتد حالة الطوارئ في دولة ما بشكل تلقائي ومستمر لفترات طويلة، من خلال سعي الحكومات في بعض الدول على تكريس قوانين الطوارئ، ومن الأسباب التي تجعل هذه الحالة غير مشروعة في المجتمع الدولي، هو إنحرافها عن القاعدة الأساسية القائمة على حالة الإستثناء المؤقت، حيث طفى عليها طابع الديمومة، فأصبح الإستثناء نتيجة لذلك هو الأصل وأهملت القوانين الطبيعية عبر السنين، كما هو الحال في دول العالم الثالث.

3- الحالات المعلنة مع زوال ظرف الإستثناء: تستند هذه الحالة إلى لجوء الحكومات الغير شرعية والتي إستولت على السلطة بالعنف أو الإنقلاب في بعض الدول إلى إعلان حالة الطوارئ بمجرد تعرضها إلى أزمات بسيطة، إضافة لإبقائها على

الحالة من خلال فرض الأحكام العرفية، بالرغم من عدم وجود مسببات لفرضها، وذلك بهدف تمكين سلطتها الغير شرعية على شعوبها، كما هو الحال في دول العالم الثالث، وتتبلور عدم مشروعية هذه الحالة في القانون الدولي، نظراً لما تشكله من إنتهاك صارخ لحقوق الإنسان، ويرجع ذلك لإنحرافها عن قاعدة الظرف الإستثنائي المعتمدة بالأصل على الظرف المؤقت، وديمومت الحالة هنا جعل منها قاعدة أصلية بدل قاعدة الإستثناء.

4- الحالات الغير معلنة: وهي نوع من حالات الطوارئ، تسعى الدول من خلالها إلى فرض إجرائات إستثنائية دون مبرر ينتج عنها تقيد وإنتهاك لحقوق الإنسان من دون الإعلان عنها، ويعد هذا الإجراء مخالفاً لدستور الدولة نفسها، وتفقد هذه الحالة شرعيتها من ناحيتين، الأولى على المستوى الدولي لمخالفتها قوانينه، والثانية على المستو الداخلي لمخالفتها لدستور الدولة.

ثانياً – الضوابط الدولية لحماية حقوق الإنسان في حالات الطوارئ

لقد كفل العهد الدولي حماية حقوق الغنسان في حالات الطوارئ، وقد تضمن القانون الدولي الصادر عام 1966 الضوابط والموانع الأساسية التي تشترط لفرض حالات الطوارئ ومنها:

1- وجود خطر حقيقي وإستثنائي يهدد كيان ووجود الدولة .

2- الإعلان عن حالة الطوارئ والقوانين المرافقة لها بشكل رسمي وصريح تجنباً للمساس بالحريات.

3- عدم معارضت الإجرائات والتدابير المتخذة من الدولة مع إلتزامها بالتعهدات والقوانين الدولية.

4- عدم إتخاذ أي إجرائات وتدابير طارئة تقوم على العنصرية مثل العرق والدين والجنس واللون.

5- أكد العهد الدولي للحريات المدنية والسياسية على الموضوعية والدقة وعدم المبالغة في الإجرائات المعلنة في حالات الطوارئ.

6- كفل العهد الدولي ضمان حقوق الأفراد الأساسية مثل حق الإعتقاد وحق الحياة وحق التعلم وحق التفكير.

7- شدد القانون الدولي على أن لا تكون حالات الطوارئ حجة للنيل من كرامة الإنسان أو ضطهادها أو إسترقاقها أو تعذيب الأفراد.

الخاتمة

نتيجة لما سبق فقد توصل الباحث لمجموعة من النتائج نوردها في ما يلي: هناك إختلاف واضح بين الدول في تطبيق الإجرائات المتخذة في حالات الطوارئ، كما تبين في مستهل الدراسة وجود بعد كبير بين التطبيق وبين القانون سواء على مستوى الدولة نفسها أو على المستوى الدولي، إضافة لإرتباط حالات الطوارئ في دول العالم الثالث بدوافع سياسية وشخصية صبغت بالطابع القانوني، وجود أثار سلبية تمس حقوق الإنسان في حالات الطوارئ، عدم فعالية الإتفاقات والقوانين الدولية بتوفير الحماية لحقوق الإنسان بسبب عدم وجود عقوبات رادعة في حال إنتهاك حقوق الإنسان.

وعلى ضوء ما سبق من نتائج يوصي الباحث بإتخاذ بعض النقاط الهامة بشكل وبنية التدابير المتخذة لحماية حقوق الإنسان في حالات الطوارئ ومنها : تفعيل دور الرقابة الدولية بشكل ملزم في ضل إعلان الدول حالات الطوارئ، فرض عقوبات دولية رادعة على الدول والشخصيات الإعتبارية في حال الإنتهاك الجسيم لحقوق الإنسان عند فرض قوانين الطوارئ، إعادة صياغة الإتفاقيات الدولية بحيث تتضمن نصوص ملزمة ورادعة تحت البند السابع في ميثاق الأمم المتحدة وإستخدام القوة في حالات الطوارئ الغير معلنة والغير مبررة.

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فقه المعاملات المالية: دراسة تحليلية وصفية لنظرية الملكية في الإسلام

Fiqh of Financial Transaction: Descriptive and Analytical Study on Ownership Concept in Islam

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ملخص البحث

إن الملكية ظاهرةٌ من ظواهر المجتمع لا تنفكُّ عنه أبدا وتعتبر لازمةً من لوازم الحياة. وقد جاء الإسلام بمنهج شامل للحياة كلها ومن ذلك ما يتعلق بالملكية. وحبّ التملُّك غريزةٌ فُطر الإنسان عليها. والمال محور النشاط الاقتصادي في كل مجتمع وحجر الزاوية في بنيانه الاجتماعي، لذا، فقد تناول الإسلام الملكية من كافة جوانبه ونظَّمه تنظيمًا دقيقًا حتى لا يؤدي إلى التعدِّي بين الناس. تحاول هذه الدراسة أن تلقي الضوء على نظرية الملكية في الفقه الإسلامي من خلال بيان تعريفها، وحقيقتها، وأنواعها، وما يرد عليها من قيود. وباستخدام المنهج التحليلي من خلال الدراسة المكتبية، تم جمعُ أهمِّ الموضوعات التي تتعلق بالملكية من بعض الكتب والأبحاث التي كتبها المؤلفون من الفقهاء وغيرهم، وجَعْلُها في صورة التنظير الفقهي جمعاً للمتفرقات، وتيسيرًا لتناوُل نقاطها المتشعِّبة، واختصارا لمطولاتها التي قد تؤدي إلى صعوبة القراءة وفهمها. ومن نتائج هذه الدراسة أن نظام الملكية في الإسلام جعل معاملات الناس تسير وفق تعاليمه بشكل صحيح بحيث لا يكون هناك ظلمٌ واعتداءٌ فيما بينهم. أن الإسلام أباح أَخْذَ أنواع وسائل الكسب والتملُّك التي لم يرد فيها نهي أو تحريم من الشرع من خلال أسباب الملكية المشروعة وحرَّم أسباب الملكية غير المشروعة. ولأجل المحافظة على صلاح الناس في معاملاتهم وإزالة الضرر منهم وضع الإسلام قيوداً على أسباب التملك وأقرَّ جواز نزعِ الملكية الخاصة جبراً في حالة الضرورة.

الكلمات المفتاحية: نظرية، الملكية، التملك، المعاملات، المصالح

مقدمة

إن الإسلام دينٌ كامل ومتكامل لا يترك أمرا من الأمور الدنيوية أو الأخروية إلا وقد جاء لها ببيانٍ واضحٍ ومُفصَّلٍ للناس لأجل سعادتهم في الدينا والآخرة. ولذا، فإنه يمدنا بمجموعةٍ من النظم الفاضلة التي تكون الحياة بها صحيحة طيبة صالحة. فللتعبّد نظام، وللمعاملات نظام، ولإقامة الأسرة ونموّها وانقضائها وما يترتب على ذلك نظام. وبما أن الملكية ظاهرةٌ من ظواهر المجتمع، لا تنفكُّ عنه أبدا، بل هي تعتبر لازمة من لوازم الحياة،جاء الإسلام بمنهج شامل للحياة كلها. من المعلوم أن أن حبّ التملُّك في الإنسان غريزةٌ فطر الإنسان عليها وهي في قوتها تفوق غيرها من الغرائز إلا غريزة حب البقاء والحياة. وأن المال محور النشاط الاقتصادي في كل مجتمع وحجر الزاوية في بنيانه الاجتماعي. من أجل هذا، تناول الإسلام الملك من كافّة جوانبه ونظَّمه تنظيما دقيقا حتى لا يتعدّى الملاك ولا يتعدى أحدٌ عليهم.

مفهوم المال في الإسلام

إنّ الإنسان مدنيٌّ بالطبع، لا يستطيع أن يعيش وحده، وهو دائما في حاجة إلى آخرين. فطبيعته أنه يعيش في جماعات، يتعاون معها وتتعاون معه، ويتبادل مع الآخرين ما هو في غنى عنه بما هو محتاج له مما في أيديهم. فهذا التبادل هو نوعٌ من المعاملات بين الفرد وغيره، وهذه المعاملات يكون موضوعها في الغالب "المال".[1]

أولاً: تعريف المال

المال في الأَصل ما يُملك من الذهب والفضّة، ثم أُطلِق على كل ما يُقْتَنَى ويملَك من الأَعيان، وأَكثر ما يُطلق المال عند العرب على الإبل لأَنها كانت أَكثر أَموالهم. ويقال: مالَ الرجل يَمُول و يَمَالُ مَوْلاً و مُؤولاً إذا صار ذا مال.[2] ويُعرّف أيضا بأنه ما كان له قيمة مادية بين الناس وجاز شرعا الانتفاع به في حال السعة والاختيار. والشيء لا يكون مالا إلا إذا

[1] د. عيسى عبده وأحمد إسماعيل يحيى، الملكية في الإسلام، دار المعارف القاهرة، د.ط، ص:122 (بتصرف)

[2] ابن منظور، جمال الدين بن مكرم. لسان العرب. بيروت: دار صادر، 1419هـ/ 1999م، ج11/ص636

توفر فيه عنصران، الأول أن يكون له قيمة مادية بين الناس مطلقا سواء أكان عينا أم منفعة.[3] والثاني أن يكون قد أباح الشرعُ الانتفاعَ به في حالة السعة والاختيار دون حالة الضرورة. والمال أيضا هو كل ما يمكن أن يملكه الإنسان وينتفع به على وجه معتاد. ولا يقع اسمُ مالٍ إلا على ما له قيمة يباع بها، ويلزم مُتْلِفه وإن قلت قيمته، وما لا يطرحه الناس مثل الفلس وما أشبه ذلك. ومنافع الأعيان، مثل: سكنى الدور وركوب السيارات، تعدُّ من المال لأن مصادرها – الدور والسيارات- يجري عليها الإحراز والحيازة فعلاً، ولأن الأعيان لا تقصد لذاتها بل لمنافعها.[4]

ثانياً: أقسام المال

ينقسم المال إلى عقار ومنقول. العقار هو الثابت الذي لا يمكن نقلُه مثل الأراضي سواء كانت زراعية أو غير زراعية، وأملاك مبنية. أما المنقول فهو: ما أمكن تحويلُه ونقلُه من مكان إلى آخر – فهو عكس العقار-. ومثاله: ما كان على الأرض من زرعٍ وشجرٍ وبناء وحيوانٍ ومتاعٍ. ونستفيد من خلال هذا التقسيم معرفة أن العقار يصحُّ أخذُه بالشفعة بخلاف المنقول، وأنه لا خلاف في جواز وقف العقار، أما في صحة وقف المنقول ففيها خلاف بين العلماء، وأنه يجوز بيع العقار قبل قبضه بخلاف المنقول، وأنه يباع ما يملك المدين من منقول أوَّلاً لوفاء دينه، ثم يباع العقار إذا لم يَكْفِ المنقول للسداد، وغير ذلك من مسائل.

وينقسم المال أيضا إلى مِثْلِيّ وقِيَمِيّ. أما المثلي فهو ماله نظير في السوق بلا تفاوت. وأما القيمي فهو ما لا نجد له مثيلا في الأسواق أو يوجد ولكن مع تفاوت كبير. وفائدة هذا التقسيم تظهر في مسائل، منها: أنه إذا تعدّى إنسانٌ على مال مثلي لآخر، يكون عليه مثل ما أتلف حتى يكون التعويض على أكمل وجهٍ. أما في المال القيمي فيضمن قيمته ما دام لا مثل له. ومنها أيضا: أنه يصح في البيع أن يكون المثلي ثمنا، لأنه يتعين تماماً، كما يصح طبعا أن يكون مبيعا، أما القيمي فلا يصح أن يكون ثمناً.

[3] د. عيسى عبده وأحمد إسماعيل يحيى، الملكية في الإسلام، ص: 122، د.محمد يوسف موسى، الأموال ونظرية العقد في الفقه الإسلامي، ص: 161

[4] أحمد فراج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، دار النهضة العربية، بيروت، لبنان، 1992م.

وتقسيم آخر، متقوَّم وغير متقوَّم. يقصد بالمتقوم ما كان مُحْرَزًا فعلا ويجوز الانتفاع به في حالة الاحتراز مثل العقارات والمنقولات والمطعومات على اختلاف أنواعها، إلا ما كان مُحَرَّمًا منها. وأما غير المتقوم فهو: ما لا يحرز بالفعل مثل السمك في الماء، والطير في الهواء، أو كان لا يباح الانتفاع به إلا في حالة الاضطرار، مثل الخمر والخنزير – بالنسبة للمسلم–. وتتجلَّى فائدة هذا التقسيم في أن المال المتقوم إذا أتلفه شخصٌ لزمه الضمان لأنه أتلف مالاً اعترف الشارع بقيمته الذاتية وأباح الانتفاع به فهو مضمون بخلاف غير المتقوم فلا ضمان على متلفه إذ لا حرمة ولا حماية له لأنه عديم القيمة، مثل لو أراق أحدٌ خمر المسلم أو أعدم خنزيرا له. وكذلك أن المال المتقوم يرد عليه البيع والهبة والوصية وسائر المعاوضات المالية، بينما غير المتقوم لا يصلح أن يكون محلا للبيع ونحوه.

وهناك تقسيم آخر للمال وهو التقسيم بالنسبة لقابلية التملك وعدمها. ومن هذه الناحية ينقسم المال إلى ثلاثة أقسام، الأول ما لا يقبل التمليك ولا التملك بحال من الأحوال، وهو ما خصص للمنافع العامة كالطرق العامة والجسور والسككك الحديدية والأنهار العظيمة والحدائق العامة ونحوها. فهذه الأشياء لا تملك ولا تملك ما دامت مخصصة للمناعة العامة، فإن زالت عنها تلك الصفة عادت إلى حالتها الأصلية وهي قابليتها للتملك والتمليك. فالنهر العظيم إذا حول عن مجراه إلى مجرى آخر وأصبحت الأرض التي كان يجري فيها غير مخصصة للمنافع العامة فإنه في هذه الحالة يكون قابلا للتمليك والتملك.[5] والثاني ما لا يقبل التملك إلا بمسوّغ شرعي، وهو يشمل العقارات الموقوفة والأملاك التابعة لبيت المال، أو وزارة المالية الآن. فالوقف لا يجوز بيعه إلا إذا تهدم أو أصبحت نفقاته أكثر من إيراده وأملاك بيت المال لا يصح بيعها إلا إذا اقتضت بذلك الضرورة أو المصلحة الراجحة كاحتياج بيت المال إلى ثمنه أو الرغبة فيه بضعف ثمنه وما أشبه ذلك، لأن أموال بيت المال تحت يد ولي الأمر كأموال اليتيم تحت يد الوصي يناط التصرف في كلا النوعين بدافع الحاجة أو المصلحة الراجحة. و الثالث ما يجوز تملكه وتمليكه وهو ما عدا القسمين السابقين.[6]

[5] أحمد فراج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 43

[6] أحمد فراج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 43

ويتلخّص من خلال العرض السابق أن المال هو العروض والمنفعة وأنه من خصائصه أن تكون حيازته ممكنة. والتفرقة بين أقسام المال والمنفعة هي من قبيل الأدوات العلمية التي يستعان بها على تقدير مفهوم الملكية. وسيتم بيان "الملكية" مفصلا في الفصل التالي.

تعريف الملكية

أولا: تعريف الملكية عند علماء اللغة

قال الرازي: "مَلَكَهُ يَمْلِكُه بالكسر مِلْكًا بكسر الميم وفتحه. مَلَكَ المرأة تزوجها والمِمْلُوكُ العبد و مَلَّكَهُ الشيء تَمْلِيكاً جعله مِلكا له يُقال مَلَّكَه المال والمُلْك فهو مُمَلَّكٌ. والإمْلاَكُ التزويج وقد أَمْلَكْنا فُلانا فلانة أي زوَّجناه إياها وجِئنا به من إمْلاكِه، و المِلَكُوتُ من المُلْك. يُقال له ملكوت العِراق وهو الملك والعِز فهو مَلِيكٌ ومَلْكٌ ومَلِكٌ مثل فَخْذٍ وفَخِذٍ كأن المُلْك مُخفف من مَلِك والمِلك مقصور من مَالِكٍ أو مَلِيكٍ والجمع المُلُوكُ و الأَملاكُ والاسم المُلْكُ والموضع مَمْلَكَةٌ و تَمَلَّكَهُ ملكه قهرا. ويقال ما في مَلْكِهِ شيء وما في مِلْكِهِ شيء وما في مَلَكَتِهِ شيء بفتحتين أي لا يملك شيئا وفُلان حسنُ المِلَكَةِ أي حسنُ الصنيع إلى مَمالِيكهِ وفي الحديث لا يدخل الجنة سيءُ المِلَكَةِ، ومَلاَكُ الأمر بفتح الميم وكسرها ما يُقوم به يُقال القلب مِلاك الجسد، وما تَمَالَكَ أن قال كذا أي ما تماسك. [7] وقال الفيروزآبادي: "إن الملك احتواء الشيء والقدرة على الاستبداد به والتصرف بانفراد. والملك بكسر الميم اسم من [ملك] والفاعل : مالك، والجمع: ملاك مثل (كافر وكفار).."[8]، أما ابن منظور فقال في لسان العرب: "الملكية نسبة للملك والملك في اللغة حيازة الإنسان للمال مع الاستبداد والانفراد بالتصرف فيه.[9]

ثانياً: تعريف الملكية عند الفقهاء

[7] الرازي، مختار الصحاح، ص: 264

[8] مجد الدين محمد بن يعقوب الفيروز آبادي، القاموس المحيط، نشر مؤسسة الرسالة، بيروت، ط2، 1407هـ/1987م، ج4/ص281.

[9] ابن منظور، لسان العرب، ج10/ص492

من تعريفات الملكية اصطلاحا هو هو حكم شرعي مقدر في العين أو المنفعة يقتضي تمكّن من يضيف إليه من انتفاعه بالملوك والعوض عنه من حيث هو كذلك"[10]، أو قدرة يثبتها الشارع ابتداءً على التصرف"[11]، أو هو القدرة الشرعية على التصرف في الرقبة بمنزلة القدرة الحسية"، [12] أو هو اختصاص حاجز شرعاً يسوغ صاحبه التصرف إلا لمانع. [13]، أو " هو اختصاص الإنسان بالشيء على وجه يمنع الغير فيه ويمكن صاحبه من التصرف فيه ابتداءً إلا لمانع شرعي يمنع ذلك".[14]

ويترتب على هذا التعريف أن الشخص الذي يحوز المال بطريق مشروع يصبح مختصا به وكان له بمقتضى هذا الاختصاص أن ينتفع به كيفما شاء وأن يتصرف فيه بكل التصرفات المشروعة، إلا إذا وجد مانع شرعي يمنعه من التصرف كالجنون والعته. ويُمنع الغير من أن ينتفع بذلك الشيء ولا أن يتصرف فيه إلا إذا كانت له صفة شرعية تبيح له التصرف فيه كالوكالة والوصاية والولاية. وأنّ الذي يملك التصرف بالنيابة عن غيره كالولي والوصي والوكيل لا يعتبر مالكا لما يتصرف فيه، لأن قدرته على التصرف لم تثبت له ابتداءً من ذات نفسه بل تثبت له بطريق النيابة. ومن ملَك التصرف ابتداءً ولكن أهليته للتصرفات ليست كاملة أو معدومة كالصغير والمجنون والسفيه يعتبر مالكا وإن حرم من التصرفات لذلك المانع الطارئ.[15]

أقسم الملكية

أولا: ملكية العين، تسمى ملك ذات الشيء ومادته، كملك العقار المنقول من الأموال أو الأعيان. ولا يقبل الملك في الشريعة من الأعيان إلا ما كان له منفعة لم يحرمها الشارع. فما ليست له منفعة كالخشاش من حشرات الأرض و له منفعة لكنها محرمة شرعا كالميتة والخنزير

[10] السيوطي. الأشباه والنظائر. بيروت: دار الكتب العلمية، ط1، 1403هـ، ص: 342.

[11] الكمال بن الهمام، فتح القدير، 74/5

[12] شيخ الإسلام ابن تيمية، مجموع الفتاوى، 178/29.

[13] مصطفى الزرقا، المدخل الفقهي العام، ح1/ص241

[14] أحمد فراج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 43

[15] أحمد فراج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 43

فلا تقبل الملك ولا تعتبر مالا محترماً. والأصل في هذا قوله صلى الله عليه وسلم: " قاتل الله اليهود إن الله لما حرم شحومها جملوه ثم باعوه فأكلوا ثمنه ".[16]

ثانيا: ملكية المنفعة، وهي الملك الواقع على منافع العين دون رقبتها، أو أن يملك الإنسان حق الانتفاع والاستفادة فقط مع المحافظة على عين ما يستفيد منه كقراءة الكتب وسكنى الدور بالإجارة أو الإعارة. وتستفاد في الغالب من أربعة أشياء هي: الإجارة، والعارية، والوقف، والوصية لأحدٍ بالمنفعة.[17]

ثالثا: الملكية الخاصة، وهي ما كانت لصاحب خاص، واحداً كان أو متعددا له الاستئثار بمنافعها والتصرف في محلها.

رابعا: الملكية العامة، وهي ما كانت لمجموع أفراد الأمة أو ما كانت لجماعة من الجماعات التي تتكون منها أمة بوصف أنها جماعة، وذلك كالأنهار والطرق وأفنية المدن والحصون. وإقرارها للملكية العامة يتمثل في المساجد وفي الأعيان الموقوفة على جهات الخير العام.

خامسا: الملكية المتميزة، وهي ما يتعلق بشيء معين ذي صور تفصله عن سواه مثل أن يملك الإنسان رأسا من الغنم أو دارا بأكملها.

سادسا: الملكية الشائعة، وهي ما يسمى بـ"المشاع" وهو الملك المتعلق بجزء شائع في أرضه ويسمى بالحصة الشائعة في الشيء المشترك. [18]

سابعا: الملكية التامة، وهي ما يثبت على رقبة الشيء ومنفعته معًا بحيث يثبت معه الملك فيهما جميع الحقوق المشروعة. أو يقال: أن الملك التام أن تكون فيه العين مملوكةً لصاحبها رقبة ومنفعة.

ثامنا: الملكية الناقصة، وهي ما ثبت في ذات الشيء وحدها أو في منفعته وحدها أي إن المالك يملك العين بدون منفعتها، أو يكون مالكا للمنفعة دون العين.

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[16] رواه البخاري في صحيحه، كتاب البيوع، حديث رقم: 2082.

[17] مصطفى الزرقا، المدخل الفقهي العام، ص112.

[18] الجنيدل، د. أحمد عبد الرحمن، نظرية التملك في الإسلام، مؤسسة الرسالة، ط2، 1403هـ/1983م، ص:21

الملكية التامة

الملكية التامة ما يثبت على رقبة الشيء ومنفعته معا بحيث يثبت معه الملك فيهما جميع الحقوق المشروعة. أو يقال: أن الملك التام أن تكون فيه العين مملوكةً لصاحبها رقبة ومنفعة. ولا يقبل الملك في الشريعة من الأعيان إلا ما كان له منفعة لم يحرمها الشارع. فما ليست له منفعة كالخشاش من حشرات الأرض و له منفعة لكنها محرمة شرعا كالميتة والخنزير فلا تقبل الملك ولا تعتبر مالا محترماً. والأصل في هذا قوله صلى الله عليه وسلم: " قاتل الله اليهود إن الله لما حرم شحومها جملوه ثم باعوه فأكلوا ثمنه ".[19] ولهذه الملكية خصائص أربع، وهي: (1) حرية التصرف، ويقصد به أن المالك له أن يتصرف في العين ومنافعها بكافة التصرفات المشروعة من بيع وإجازة وغيرها من التصرفات المشروعة التي لا تتنافى مع مبادئ الشريعة وقواعدها. (2) شمول الملكية للعين والمنفعة أي أن للمال حق الانتفاع بالشيء المملوك بأي وجه من وجوه الانتفاع ما لم يكن ذلك محرما شرعا كأن يجعل داره ناديا للقمار. (3) دوام ملكية الأعيان أي أن هذا الملك يكون دائما غير مؤقت، فليس له زمن معين ينتهي بانتهائه، حيث أنه لا يقبل التقييد بالزمان والمكان ولا ينتهي هذا الملك إلا بهلاك العين المملوكة أو بانتقاله إلى غيره بالوراثة إذا مات المالك، أو بتصرف شرعي على ناقل الملكية كالبيع والهبة. (4) عدم مطالبة المالك ملكا تاما بضمان العين ولا بقيمتها إذا أتلفها هو بغير موجب لأن الضمان لا يستحقه إلا المالك، ولا يكون الإنسان مدينا لنفسه، ولكن هذا لا يعفيه من توقيع عقوبة عليه إن كان متعدِّياً كالحجر عليه مثلاً، لأن المحجور عليه يمنع من التصرف في ماله ويتولاه عنه غيره.[20]

أسباب الملكية التامة

إن الله تعالى فطر الإنسانَ على حبِّ التملُّك حتى يحتفظ بنوعه لعبادة الله وكسب رضاه. من أجل هذا كانت غريزة التملك نعمةٌ منحها الله عباده ومنة منه حتى يستقيم الكون وتعمر الأرض. وقد جاء الإسلام بأحسن الطرق والوسائل التي تعمر الكون تحيل الحياة حركة

[19] رواه البخاري في صحيحه، كتاب البيوع، حديث رقم: 2082.

[20] أحمد فرج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 45

دائبة جادة، وسائل ليس فيها غش أو خداع وليس فيها تلاعب أو إخافة سبيل، وهي وسائل تضمن للفر الحياة الكريمة وتدفعه إلى ميدان العمل بكل شوق ولهفة. وفي الصفحات الآتية سوف أتعرض لذكر طرق ووسائل التملك الشرعية والوسائل التي نهى عنها الشرع. ومن الأسباب للملكية التامة ما يلي:

الأسباب المشروعة للملكية التامة

إن الأصل في الأشياء قبل حيازتها الإباحة ثم بعد حيازتها تقوم بين الشء وبين من حازه علاقة اختصاص تمنع غير حائزه من أخذه والانتفاع به وتتيح لحائزه الانتفاع به والتصرف فيه بكافة أنواع التصرفات. وبناءً على هذا، فالملك طارئٌ على الأشياء، وهذا الملك قد يثبت ابتداءً كما في الاستيلاء على المباح، وقد ينتقل من مالك إلى مالك آخر، وقد يثبت خلافه، أي أن يخلف شخص فيما كان يملكه. وأسباب هذه الملكية أربعة، وهي: حيازة المباح، والعقود الناقلة للملكية، والإرث، والشفعة.

حيازة المباح أو وضع اليد عليها.

وهو سبب منشئ للملكية، فيوجدها بعد أن لم تكن، بخلاف بقية الأسباب، فإن الملكية تكون ثابتة قبل تحقق السبب وبسببه تنتقل من شخص إلى آخر. فالبيع مثلا ينقل من ملك البائع إلى ملك المشتري، وكذلك الميراث، والشفعة. أما التملك بوضع اليد على المباح فإنه يثبت ابتداءً بوضع اليد، وقد كان المال قبل الاستيلاء عليه غير مملوك لأحد، وبه صار ملكا للمستولي عليه. ومثال ذلك الصائد، فإذا صاد سمكة ملكها بالصيد ولم تكن قبل الصيد ملكا لأحدٍ. فالحيازة أساس لكل ملكية وجدت ابتداءً في هذا الوجود.

وهو أيضا سبب مختصٌّ بالأموال المباحة وهي جميع ما خلقه الله تعالى في الأرض لينتفع به الناس أجمعين مما لم يحزه أحد كالأشجار التي تنبت في الجبال أو الصحراء والغابات وليست مملوكة لأحد، وكالسمك في البحر والمعادن في باطن الأرض. [21]

بالإضافة إلى أنه سبب فعلي لا يتحقق إلا بالفعل، ولهذا صح من كل من يستطيعه ويقدر عليه ولو لم يكن أهلا للإلزام والالتزام كالصبي، والسفيه، والمجنون. فمن استولى منهم

[21] علي الخفيف، أحكام المعاملات الشرعية، ص: 27

على مال مباح أصبح باستيلائه عليه مالكا له وإن لم يستطع أن يتملك مثله بشرائه من مالكه بغير واسطة. والاستيلاء على المباح يشمل أربعة أضرب، هي: (1) إحياء الموات، (2) الاستيلاء على المعادن والكنوز، (3) حيازة الأشياء المباحة، (4) الصيد.

إحياء الموات

يراد به الأرض الموات وهي الأرض التي لا يملكها أحد، ولا يتعلق بها حق لأحد، ولا يتنفع بها بأي وجده من وجوه الانتفاع لسبب من الأسباب المانعة من الانتفاع كانقطاع الماء عن الأرض أو لغلبته عليها أو لسوء تربتها أو غير ذلك من الأسباب. وسميت الأرض التي لا ينتفع بها مواتا لشبهها بالحيوان الذي بطلت منافعه بموته، فإذا انتفع بها حيت.[22] وعلى ذلك، فالأرض المملوكة لا تعد مواتا، وكذلك إذا كان ينتفع بها بوجه من الوجوه ولو بغير الزراعة، كالأرض التي يتخذها الناس مكانا لإلقاء القمامة أو وضع الأتربة. من شروط إحياء الموات: أن لا تكون الأرض مملوكة لأحد، فإن كانت مملوكة فلا يصح تملكها بالإحياء، وأن تكون الأرض خارجة عن العمران، فلو كانت داخل العمران فلا تعتبر مواتا ولا يجوز لأحد أن يتملكها حتى ولو كانت غير منتفع بها، وألا يتعلق بالأرض حق لأهل البلد، فإن تعلق بها حق لأهل البلد لم تكن مواتا ولم يجز لأحد أن يتملكها بالإحياء، وإذن الإمام كما ذهب إليه أبو حنيفة[23] خلافاً للشافعي وابن حنبل.[24]

كيفية تحقّق إحياء الأرض

إحياء الأرض وجعلها صالحة للزراعة أو للانتفاع يتحقق بإزالة المانع من الانتفاع بها. فإن كان مواتها بسبب غمر المياه لها، فإحياؤها يكون بتخفيف الماء وإقامة السدود حولها،

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[22] أحمد فرج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 48. حمد عبد الرحمن الجنيدل، نظرية التملك في الإسلام، ص: 34.

[23] محمد بن إسماعيل الصنعاني، سبل السلام شرح بلوغ المرام، دار إحياء التراث العربي، ط4، 1379هـ، ج3/ص 75. و انظر: أحمد فرج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 50

[24] أحمد فرج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 50. قُلْتُ: إن رأي أبي حنيفة أولى بالأخذ به من رأي الإمام الشافعي في هذه المسألة، ذلك لقطع المنازعات بين الناس الذين جُبِلوا على حب التملك. ومع فساد الزمان، شاع فيما بين الناس التحاسد ، وعدم الرضى بالقليل، والعداوة وغيرها من الصفات المذمومة. وقطعا وتفاديا لوقوع هذه الأمور يحتاج إلى تدخل الإمام (ولي الأمر) وإذن في قضية إحياء الموات. ثم إنه من الجدير بالذكر أن التعامل بإحياء الموات كاد أن يتلاشى في هذا الزمان ولم يعد للناس القدرة على القيام به. وذلك، لأن القوانين والنظم الحديثة في جميع الدول تعترف بأن الأراضي بما فيها من مياه ومعادن وكنوز وغيرها ملكٌ للدولة، ليس لأحدٍ التصرف بها إلا بإذن الدولة (الحكومة).

وإن كان السبب في مواتها عدم وصول المياه إليها يكون إحياؤها بتوصيل الماء إليها إما بحفر بئر أو شق ترعة. وإن كان السبب فساد تربتها فإحياؤها يكون بحرثها وسقيها وإصلاح هذه التربة الفاسدة. أما إذا كانت الأرض تقصد للبناء فإحياؤها يكون بالبناء عليها إو إنشاء سور حولها وما شاكل ذلك. [25]

الاستيلاء على المعادن والكنوز

المعادن جمع معدن، والمعدن هو ما يوجد في باطن الأرض بخلق الله تعالى سواء كان سائلا كالنفط أو صلبا كالذهب والحديد. والكنوز جمع كنز، والمراد بالكنز هو ما دفنه الناس وأودعوه في باطن الأرض من الأموال سواء أكان في الجاهلية أم في الإسلام. وقد اختلف العلماء في حكم الاستيلاء على المعادن على قولين:

الأول: رأى المالكية أن المعادن بجميع أنواعها مثل البترول، والذهب، والنحاس، والماس وغيرها لا تعتبر من الأموال المباحة، فلا يملكها من وجدها واستولى عليها، ولا يملك تبعا لملكية الأرض، بل تكون ملكا للدولة يتصرف ولي الأمر فيه على حسب ما تقتضي به المصلحة. فله أن يستغلّها بماله لمصحلة الدولة، وله أن يقطعها للأفراد أو للشركات نظير مال أو مجانا إذا رأى المصلحة في ذلك. واستدل المالكية بأدلة، منها: أن الأرض إنما تقصد للانتفاع بظاهرها للزراعة أو البناء، ولا تقصد لما فيها من المعادن. لذا، يبقى ما في باطنها من المعادن على ملك المسلمين يتولاه عنهم ولي أمرهم ويستغله لمصالحهم. ومن الأدلة أيضا: أن المعادن قد يجدها شرار الناس، فإن تركت لهم أفسدوا، ولأنها على العموم مدعاة إلى التحاسد والتقاتل وسفك الدماء، فجعلت لولي الأمر درءا لكل هذه المفاسد وما ماثلها. [26]

والثاني: ذهب الحنفية والشافعية والحنابلة إلى أن المعدن بجميع أنواعه إن وجد في أرض مملوكة لشخص كان ملكا لذلك الشخص، وإن وجد في أرض مملوكة للدولة كان ملكا للدولة، لأن المعادن تابع للأرض لكونه جزءا منها، والأرض إذا ملكت ملكت بجميع أجزائها. أما إذا وجد في أرض مباحة غير مملوكة كان ملكا للواجد، لأنه مباح تبعا للأرض،

[25] أحمد فرج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 50-52.

[26] الدسوقي، حاشية الدسوقي، 485/1.

فيملك بالاستيلاء عليه. وإن وجد في أرض موقوفة كان وقفا تبا للأرض، فيصرف في مصالح الوقف ولا يعطى المستحقون منه شيئا لأنه ليس من غلات الارض. [27]

وأما حكم الكنز، فهناك نوعان من الكنوز الكنز الإسلامي، وهو ما وجدت به علامة تدل على أنه دفن بعد ظهور الإسلام. والكنز الجاهلي، وهو ما وجدت به علامة تدل على أنه دفن قبل الإسلام. [28] والكنز الإسلامي لا يعد من الأموال العامة المباحة، فلا يتجوز لمن عثر عليه أن يتملكه، بل يأخذ حكم اللقطة فيعرفه، فإن وجد صاحبه أو وارثه سلم إليهم، وإن لم يوجد تصدق به على الفقراء. أما الكنز الجاهلي فإنه إذا عُثر عليه يكون خُمُسُه للخزانة العامة، والباقي للواجد إذا كانت الأرض غير مملوكة – على خلاف في ذلك[29]

حيازة الأشياء المباحة

ومن أسباب الملكية حيازة الأشياء المباحة التي تشمل: الماء والكلأ (الحشائش) والغابات. كل هذه الأشياء مباحة وحيازتها سبب لملكيتها.

وفي الماء اتفق الفقاء على أن مياه البحار والأنهار والعيون في الجبال منفعة عامة يحق للناس جميعا الانتفاع بها، لقول الرسول صلى الله عليه وسلم: "الناس شركاء في ثلاثة، الماء، والكلأ، والنار". وإذا أخذ شخص جزءا من هذه المياه وأحرزها بوضعها في إناء ونحوه، فتكون ملكا له، ولا حق لأحد غيره فيه لأنه وإن كان مباح الأصل، فقد صار بالاستيلاء عليه مملوكا خاصا لمحرزه. وأما الكلأ فهو الحشائش التي تنبت بغير زرع أحد. فحكمه أنه إذا نبتت في أرض غير مملوكة لأحد كالجبال والصحاري أو نبتت في أرض مملوكة ملكا خاصا ولم يكن صاحب الأرض أعدها وهيأها لإنباته أو لم يقم بسقيه والعناية به، فإن ذلك مباح للناس جميعا من غير تخصيص أحد، للحديث السابق. ولا تزول هذه الإباحة إلا بالاستيلاء عليه وإحرازه. وأما الصيد، فيعتبر وسيلة أولى في حياة البشرية وإن كانت لا تزال حتى الآن موردا اقتصاديا هام للإنسان كالسمك واللآلئ والمرجان وما شابه ذلك. والأصل في حل

[27] النووي، المجموع شرح المهذب، 77/6. ابن عابدين، حاشية ابن عابدين، 63/3. ابن حزم، المحلى، 238/3.

[28] أحمد فرج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 52.

[29] أحمد فرج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 53.

الصيد القرآن والسنة. فالقرآن قوله تعالى: " يسألونك ما ذا أحل لهم قل أحل لكم الطيبات وما علمتم من الجوارح مكلبين..." الآية [30]. وقال تعالى: "وإذا حللتم فاصطادوا"[31]. ومن السنة: أن أبا الثعلبة قال: قلت يا رسول الله إنا بأرض صيد أصيد بقوسي أو بكلبي الذي ليس بمعلم أو بكلب معلم فما يصلح لي؟ فقال رسول الله صلى الله عليه وسلم: "ما صدت بقوسك فذكرت اسم الله عليه فكل، وما صدت بكلبك المعلم فذكرت اسم الله عليه فكل، وما صدت بكلبك غير المعلم فأدركت ذكاته فكل. (رواه البخاري) [32]

والصيد هو اقتناص الحيوان المباح الممتنع عن الإنسن وأخذه بحيلة ودقة نظر، إما لطيرانه في الهواء أو اعتصامه بالتلال والجبال، أو بفراره في الغابات أو بسباحته في الماء. وحيوان الصيد من قبيل المباح الذي لا مالك له، فكل إنسان الحق في أن يمتلكه بالاستيلاء عليه وصيده إلا صيد الحرم، فإنه لا يملك بالاستيلاء عليه. [33]

العقود الناقلة للملكية

يعتبر سبباً أعظم من أسباب الملكية شأنا وأكثرها وقوعا لأنها الطريق الطبيعي لتلبية حاجات الناس وإشباع رغباتهم. وهذه العقود كثيرة، منها: البيع، والهبة، والصدقة، والوصية، وغير ذلك. ولا يكون هذا السبب إلا في الأموال المتقومة، وهي الأموال التي يجوز الانتفاع بها، فتنتقل به ملكيتها من شخص إلى آخر بناءً على التراضي بينهما. فالبيع مثلا ينقل الملك من البائع إلى المشتري الجديد.

الملكية سببها الإرث

وهو أن يحل الوارث محل مورثه فيما كان له من أموال أو حقوق مالية عند وفاته. ويعتر هذا السبب للتملك جبريٌّ. وذلك أن الله تعالى قد قسم الله الميراث في القرآن الكريم

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[30] سورة المائدة، آية: 4

[31] سورة المائدة، آية: 2

[32] العسقلاني، أحمد بن علي بن حجر. فتح الباري شرح صحيح البخاري. تحقيق: محمد فؤاد عبد الباقي، بيروت: دار المعرفة، 1379هـ، ج12/ص14

[33] أحمد فرج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 55

بآيات سورة النساء، منها قوله تعالى: ﴿ لِّلرِّجَالِ نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالأَقْرَبُونَ وَلِلنِّسَاء نَصِيبٌ مِّمَّا تَرَكَ الْوَالِدَانِ وَالأَقْرَبُونَ مِمَّا قَلَّ مِنْهُ أَوْ كَثُرَ نَصِيبًا مَّفْرُوضًا﴾[34]، ويقول تعالى: ﴿يُوصِيكُمُ اللّهُ فِي أَوْلاَدِكُمْ لِلذَّكَرِ مِثْلُ حَظِّ الأُنثَيَيْنِ فَإِن كُنَّ نِسَاء فَوْقَ اثْنَتَيْنِ فَلَهُنَّ ثُلُثَا مَا تَرَكَ وَإِن كَانَتْ وَاحِدَةً فَلَهَا النِّصْفُ وَلأَبَوَيْهِ لِكُلِّ وَاحِدٍ مِّنْهُمَا السُّدُسُ مِمَّا تَرَكَ إِن كَانَ لَهُ وَلَدٌ فَإِن لَّمْ يَكُن لَّهُ وَلَدٌ وَوَرِثَهُ أَبَوَاهُ فَلأُمِّهِ الثُّلُثُ فَإِن كَانَ لَهُ إِخْوَةٌ فَلأُمِّهِ السُّدُسُ مِن بَعْدِ وَصِيَّةٍ يُوصِي بِهَا أَوْ دَيْنٍ آبَآؤُكُمْ وَأَبناؤُكُمْ لاَ تَدْرُونَ أَيُّهُمْ أَقْرَبُ لَكُمْ نَفْعاً فَرِيضَةً مِّنَ اللّهِ إِنَّ اللّهَ كَانَ عَلِيما حَكِيمًا﴾[35]

إن الإرث[36] ناقل للملكية، وليس منشئا لها، كما أنه يتميز عن غيره من الأسباب بأنه ناقل للملكية جبرا عن الوارث والموروث حتى لو أن الوارث رفض نصيبه لا يقبل رفضه. فإذا توفي شخص وكان له ابن أو أب أو أم، فإن كلا من هؤلاء يحل محله في جميع ما يتولاه من مال عقارا كان هذا المال أو منقولا. ويثبت للوارث فيما تركه له مورثه، ملك تام باعتباره خليفة عنه، ولذا لا يحتاج في ثبوت هذا الملك إلى قبول. ولا يكون الميراث إلا في مال مملوك أو حق ملحق به ولا يكون إلا فيما بقي منه بعد تجهيز الميت ودفنه وإخراج الديون على الميت وتنفيذ وصاياه في حدود الثلث ثم يقسم الباقي على الورثة طبقا لأحكام المواريث. [37]

الملكية سببها الشفعة

الشفعة هي تملك العقار المبيع كله أو بعضه جبراً عن مشتريه بما قام عليه من الثمن والمؤن رضي أم أبى. ودليل ثبوت الشفعة ما رواه جابر بن عبد الله رضي الله عنه قال: جعل رسول الله صلى اللهم عليه وسلم الشفعة في كل مال لم يقسم فإذا وقعت الحدود وصرفت الطرق فلا شفعة ".[38] ولكن إذا تمت الشفعة بالتراضي فإنه يملك العقار في تلك الحالة

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[34] سورة النساء، آية: 7

[35] سورة النساء، آية: 11-13

[36] من حكم تشريع الإرث: أنه من العوامل التي تنشط الإنسان في العمل وتدفعه إلى الكسب كما تدفعه إلى الإبداع فيه وعلى حسن الإنتاج في الحياة، لأن الإنسان يدرك أن ما يحصل عليه من ثروة في الحياة، فإنه يستخدمها في طاعات الله تعالى وتوفير راحته وأن جهده الذي بذل في سبيل ذلك سوف لا يذهب سدىً، وإنما سيحصل عليه أولاده ومن له علاقة به من محارمه. وفي ذلك الخير له ولهم حيث لم يترك ورثته ضياعا عالة يتكففون الناس. (د.حمد العبد الرحمن الجنيدل، نظرية التملك في الإسلام، ص: 48-49).

[37] أحمد فرج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 59

[38] الحديث رواه البخاري في صحيحه، كتاب البيوع، حديث رقم: 2061.

بالتراضي، أما إذا لم يحصل تراضي فإنه يملكه بحكم القاضي. وتسقط الشفعة بسبب من الأسباب منها التنازل عن الشفعة بعد ثبوت البيع، ورضا الشفيع بمشاركة المشتري له في الحوار، وتأخير طلب الشفعة بلا عذر، وقيام الشفيع بجزء من العقار، وموت الشفيع قبل تملكه العقار المشفوع فيه.[39]

أسباب الملكية غير المشروعة

هناك أسبابٌ لا يجوز للشخص أن يتخذها وسيلةً لكسب المال (للتملّك). والسر في النهي عنها ما فيما من الظلم والخداع والإجحاف بالمسلمين، وهذا ينافي قواعد الشارع "المسلم للمسلم كالبنيان يشد بعضه بعضاً. ففي مقارنة هذه الوسائل تباعد الناس وتنفير بعضهم من بعض ونشر للفوضى وقلة الأمن بين الناس وحبس الحريات وإهانة الكرامات. كل هذه الوسائل التي تحمل هذه السيئات لحظها الشارع وحرمها.

ومن أبرز هذه الوسائل للكسب المحرم في الشرع ما يلي: بعض العقود المنهي عنها، الاحتكار، التسعير، الربا، الرشوة، قطع الطريق وغيرها من الوسائل المحرَّمة. ففي تحريم هذه الوسائل كبحٌ لجماح العابثين وحفظٌ لأموال المسلمين.

والشرع عند نهيه عن بعض العقود، فإنه يحرص على أن يزيل ويبعد الظلم بأنواعه في أهم ما تقوم به حياة الناس مثل: المبادلة، والانتفاع، والمعاوضات المالية بينهم. وهذا ما يعبر عنه في الفقه الإسلامي بالمعاملات، ومن أكبر المعاملات: البيع والشراء والإجارة. ولأجل هذا، نظّم الشرع ما يكفل للناس بقاءهم، فنظم البيع المبرور الصادق، الخالي من الغش، والدغل، واعتبر ما عدا ذلك من البيوع القائمة والعقود المبنية على الغرر والجهالة ما شابه ذلك منه عنها.

ومن العقود ما هو منهيٌ عنه لذاته؛ مثل الخمر، والخنزير، ومهر البغي، وحلوان الكاهن. فهذا الذي وقع النهي عنه لعلة في ذات العقد لا تتصل بالثمن ولا بالمتعاقدين. ففي بيع الخمر والخنزير والميتة، علة تحريم هذه البيوع هو نجاسة عينها، ولأنها محرمة في ذاتها. وفي

[39] الخفيف، الشيخ علي، المعاملات الشرعية، ص: 39.

مهر البغي – الذي هو ما يعطى ثمنا لبيع عرضها- محرّم من أي طرفز فهو حرام من المعطي وحرام على الآخذة، وذلك لما فيه من مضرة المجتمع إذ فيه فشو الزنى وانحطاط المجتمعات وانتشار الفوضى واختلاط الأنساب. وفي حلوان الكاهن – الذي هو ما يُدفع للكاهن (المدعي معرفة الغيب وما لا يطلع عليه ويموّه على الناس أمورهم) على ما قدمه من خدمة لمن جاء له إما لمعالجة أو نحوها. ويحرم هذا لما ينطوي عليه الكاهن من غش وكذب واحتيال وقد يصل أحيانا إلى أن يشرك بالله.

ومن العقود أيضا ما هو منهي عنه لاشتمال العقد على الغرر والجهالة. ويرجع سبب تحريم هذه العقود لما فيها من الغرر والجهالة المؤديين إلى الشقاق والنزاع بين المتعاقدين، وهو كثير، من أمثلته: بيع حبل الحبلة وهو أن تنتج الناقة ما في بطنها ثم تحمل التي نتجت، وقيل أنه بيع ولد الناقة الحامل في الحال. ويرجع سبب التحريم إلى وجود الغرر، إذ إن الناقة قد لا تنتج، فيحصل بذلك الغبن والجهالة في المبيع. و منها أيضاً: بيع المنابذة والملامسة والحصاة، وبيع المضامين والملاقيح.

ومن العقود ما هو منهي عنه لاقترانه بوصف يضر أحد المتعاقدين، مثل: بيع التصرية، وبيع التدليس، وبيع الغين، وبيع النجش. فهذه البيوع لها ضرر إما بالثمن كالنجش، لأنه زيادة البيع كبيع التصرية، أو بالعاقد كالغبن ونحوه.

ومن العقود ما هو منهي عنه لوصف خارج عن العقد والمتعاقدين، ومن أمثلته: البيع بعد نداء الجمعة، فنُهي عنه لما فيه من الصد عن ذكر الله، وإلا فالعقد صحيح والبيع ليس فيه أي غش أو حيلة. ومنها: بيع السلاح للحربي، وبيع العصير لمن يتخذه خمرا. [40] فهذه بعض المعاملات – وهي وسائل للكسب والتملك – التي نهى عنها الشرع وحرّمها لأجل مصلحة الناس. فكل وسيلة أو معاملة أدّت إلى الضرر، والظلم، والجهالة مثل الربا، والرشوة، والسرقة، وقطع الطريق، القمار والميسر جاء الشرع بتحريمها. [41]

الملكية الناقصة

[40] أحمد فرج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 53-59 (بتصرف)

[41] أحمد فرج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 67 وما بعدها.

هي ما ثبت في ذات الشيء وحدها أو في منفعته وحدها أي إن المالك يملك العين. للملكية الناقصة ثلاثة أنواع، النوع الأول: أن يكون المالك مالكا للعين دون المنفعة، وهذا النوع أقل أنواع الملك الناقص وجودا، لأنه جاء على خلاف الأصل، لأن المقصود م الملك هو الانتفاع بالعين بها. كان ذلك خلاف الأصل وقد أجيز تشجيعا لأعمال البر حيث لا يثبت إلا في الصورتين، الأولى: أن يوصي المالك بمنفعة عين مملوكة له لشخص طوال حياته أو لمدة معلومة ثم يموت فينتقل إلى الورثة دون المنفعة، وللموصى له المنفعة طوال حياته أو المدة المحددة، وعلى الورثة تسليم العين إلى الموصى له بالانتفاع، فإن امتنعوا أجبرهم الحاكم[42]، والثانية: أن يوصي شخص بأرضه لشخص ويوصي بمنفعتها لشخص آخر، فإذا مات الموصى له بالأرض يصبح مالكا للعين وحدها، ويصبح الموصى له بالمنفعة مالكا للمنفعة وحدها، وكلاهما ملك ناقص ويجب تسليم العين لمالك المنفعة. ولهذا النوع من الملك الناقص أربع خصائص منها أن مالك العين ليس له الانتفاع لا بنفسه ولا بغيره، فلا يمكن غيره منه بأجر أو بدون أجر، وأن مالك العين لا يجوز له التصرف في العين تصرفا يضر مالك المنفعة، وأن مالك العين إذا أتلفها ضمن المنفعة لمالكها، وأن مالك العين إذا مات انتقلت العين إ لى ورثته، وأن نفقات العين اللازمة لاستيفاء المنفعة والضرائب المقررة عليها يكون على مالك المنفعة.[43]

أما النوع الثاني فهو مالك المنفعة وحدها.[44] من خصائص هذه الملكية أنها تقبل التقيد ابتداءً بالزمان والمكان والصفة حسب الشروط أو المتعارف عليه أيا كان السبب، مثل الإجارة حيث تعتبر المدة عنصرا أساسيا فيها. ومنها: أن مالك المنفعة يضمن العين إذا تعدى عليها لأنه تعدى على ملك غيره، وأن نفقات العين وصيانتها على مالك المنفعة وذلك إذا ملكها بدون عوض كالإعارة والوصية. وتنتهي الملكية في هذا النوع بواحد من هذه الأمور وهي : انتهاء المدة المحددة، أو هلاك العين المنتفع بها، أو وفاة المؤجِّر والمعير لزوال صفة التمليك، أو وفاة من له حق الانتفاع عند الحنفية.

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[42] أحمد فرج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 65

[43] أحمد فرج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 65

[44] أو حق الانتفاع الشخصي.

أسباب الملكية الناقصة

أسبابها أربعة وهي: الوقف، والوصية، والإجارة، والإعارة. أما الوصية فإن الموقف عليه له أن ينتفع بالموقوف إما بالاستغلال أو بالاستعمال إن نص عند إنشائها على أن له أن ينتفع كيف شاء. وإن نص على واحد منهما ومنع من الآخر كأن ينص على الاستعمال ويمنع من الاستغلال أو بالعكس، فليس هي التي تنظم طريق الانتفاع وبمقتضاها يتمكن المنتفع من الموقوف. ولذا، ورد عند كثير من الفقهاء أن شرط الواقف كنص الشارع لأن الوقف يأتي من قبله فيلزم العمل بشرطه.[45] وأما الوصية فهي من خلال الطريقتين وهما أولا: أن يوصي شخص بمنفعة عين من أعيان تركته مدة معلومة أو مطلقا ويوصي برقبتها لشخص آخر فيملك الموصى له منفعة العين بالوصية في حين يملك الآخر رقبتها دون منفعتها حتى انتهاء المدة فتصبح العين ومنفعتها ملكا له. وثانيا: أن يوصي شخص بمنفعة عين من أعيان تركته مدة معلومة لواحد على أن يبقى ملك الرقبة للورثة، ففي هذه الحالة يستحق الموصى له بالمنفعة الانتفاع طلية المدة وبعدها تعود المنفعة للورثة ويصبح ملكهم لها ملكا تاماً.[46]

وأما الإجارة فإن المستأجر يملك منفعة العين المؤجرة خلال مدة الإجارة، وله أن يستوفي المنفعة بنفسه وبغيره. فإن استأجر دارا ليسكنها فله أن يسكنها مثله ومن هو دونه في الضرر. أما إسكان من هو كثر منه ضررا فلا يجوز. ويجوز للمستأجر أن يؤجر العين التي استأجرها لأن المنفعة أصبحت مملوكة له، فيجوز ان يستوفيها بنفسه أو نائبه.[47]

وأما الإعارة فهي بأن المستعير يملك المنفعة، لأن المنافع قابلة للملك كالأعيان، والتمليك نوعان بعوض وبغير عوض، ثم الأعيان تقبل النوعين، فكذا المنافع، والجامع دفع الحاجة إلا أن المستعير وإن كان مالكا للمنفعة إلا أنه لا يملك أن يؤجر لأن الإجارة لازمة بخلاف العارية. [48] أما الشافعية والحنابلة فيرون أن الإعارة إباحة

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[45] أبو زهرة، محمد، الملكية ونظرية العقد، دار الفكر العربي، القاهرة، ص: 80-81

[46] عبد اله عبد العزيز المصلح، الملكية الخاصة في الشريعة الإسلامية، آلة كاتبة، 1396هـ.، ص: 38

[47] عدنان خالد التركماني، ضوابط الملكية، ط1، 1404هـ/1984م.، ص: 19

[48] القرطبي، يوسف بن عبد الله. الكافي في فقه أهل المدينة المالكي. بيروت: دار الكتب العلمية، ط1، 1407هـ، ص: 811/2. ابن جزي، محمد بن أحمد الغرناطي. القوانين الفقهية. بيروت: عالم الفكر للطباعة والنشر والتوزيع، د.ط، ص: 321

للمنافع وليست تمليكا لها، ولهذا، فإن المستعير لا يملك أخذ العوض عليها، فلا يملك نقلها إلى غيره.[49]

قيود الملكية

إن الإسلام حين أقر الملكية واعترف بحق المالك في الانتفاع بملكه وحق التصرف فيه طوال حياته وبعد مماته، لم يتركه حرا بلا حدود وقيود، وإنما قيده ببعض القيود، منها: قيود أسباب الملكية وقيود الاستعمال والتصرف ونزع الملكية الخاصة[50]

من المعلوم أنّ الإسلام حدّد أسباب اكتساب الملكية والطريقة التي يحصل بها الإنسان عليها، وأنه بدون هذه الأسباب لا ينتقل الملك إليه، وعلى هذا، فإن المال لا ينقل بالوسائل المحرمة كالربا، والغصب، والسرقة، والغش، والخداع وما إلى ذلك، لأن الله تعالى حذر من اكتساب المال الحرام وهدّد الرسول صلى الله عليه وسلم من يفعل ذلك بقوله: "كل لحم نبت من حرام فالنار أولى به". ولما كان الهدف والمقصد من تملك الأموال هو ما تحققه من فوائد لأصحابها والانتفاع بها من أجل هذا، قيّد الإسلام الاستعمال وجعله محصورا في الفوائد التي تعود على الفرد والمجتمع ونظمه بأمور، منها:

بإحسان الانتفاع والتصرف في الأموال. وذلك لأن الشريعة الإسلامية دعت المالك إلى إحسان الانتفاع والتصرف في أمواله، فلا يضيعها ولا يتلفها ولا ينفقها فيما لا خير فيه ولا طائل تحته. والشريعة حين أقرت حق امتلاك الأموال من أجل الانتفاع بها دعت المالك إلى أن يمارس هذا الحق باعتدال وتوسط بعيدا عن السرف والخيلاء والتقتير. وفي الاعتدال في الإنفاق يقول الله تعالى: ﴿وَلاَ تَجْعَلْ يَدَكَ مَغْلُولَةً إِلَى عُنُقِكَ وَلاَ تَبْسُطْهَا كُلَّ الْبَسْطِ فَتَقْعُدَ مَلُومًا مَّحْسُورًا﴾ [51]، ويقول في آية أخرى: ﴿ وَالَّذِينَ إِذَا أَنفَقُوا لَمْ يُسْرِفُوا وَلَمْ يَقْتُرُوا وَكَانَ بَيْنَ ذَلِكَ قَوَامًا﴾ [52]. فهذه الآيات تدل على أن الإنسان يكون وسطا في الإنفاق، لأن التقطير يؤدي إلى حبس المال ويحول دون نشاط التداول النقدي،وفي ذلك تعطيل لوظيفته. وأما

[49] الشيرازي، إبراهيم بنالفت علي بن يوسف. المهذب. بيروت: دار الفكر. د.ت، 371/1. ابن قدامة، المغني، 237/5

[50] أحمد فرج حسين، النظريات العامة في الفقه الإسلامي وتاريخه، ص: 64

[51] سورة الإسراء، آية: 29

[52] سورة الفرقان، آية: 67

التبذير والإسراف في ألوان الترف يولد في نفوس الفقراء الحقد والبغضاء، وفي ذلك خطر بالمجتمع ما بعده خطر. يقول تعالى:﴿وَإِذَا أَرَدْنَا أَن نُّهْلِكَ قَرْيَةً أَمَرْنَا مُتْرَفِيهَا فَفَسَقُواْ فِيهَا فَحَقَّ عَلَيْهَا الْقَوْلُ فَدَمَّرْنَاهَا تَدْمِيرًا﴾.[53] والشريعة الإسلامية قد قررت مبدأ الحجر على الشخص الذي لا يحسن التصرف في أمواله استعمالا واستغلالا وإنفاقا أو يسبب في تصرفه ضررا للغير، فمنتعه من التصرف وأناطت ذلك بوليه أو وصيه في حالات معينة واقتصرت على منعه من التصرف في حالات أخرى. [54]

وبضرورة استثمار المالك لأمواله وعدم جواز تعطيلها. وذلك لأن الإسلام يحث أصحاب الأموال على تنميتها بالطرق المشروعة وعدم تعطيلها، لأن تعطيل المال يؤدي إلى فقر صاحبه، وبالتالي إلى فقر المجتمع، والإسلام يحارب الفقر ويبغضه. ومن مظاهر الحث على ضرورة استثمار الأموال: الحث على العمل، ومباشرة مرافق الإنتاج المختلفة التي تحتاجها الأمة، وإعداد القوة، وفريضة الزكاة، ومنع تعطيل الأرض دون استغلالها في أراض الإقطاع والإحياء.

وبأن لا يكون في الاستعمال ضرر بالغير. وذلك لأن الإسلام أعطى المال للإنسان وجعل له حق استعماله، ولكنه قيّد هذا الاستعمال بألا يضر بأحدٍ، لأن مصلحة الجماعة مقدمة على مصلحة الفرد، والرسول صلى الله عليه وسلم قال: "لا ضرر ولا ضرار".[55] إن المال من الضروريات الخمس التي اجتمعت الشرائع السماوية على وجوب حفظها وقررت احترامها وحرمتها. وقد كفل الإسلام حرية الملكية بأحكام شرعها فجعل التراضي والرضا أساسا للمبادلات المالية. هذا هو الأصل، ولكن هناك أحوال استثنيت من هذا الأصل فتزول الملكية جبرا عن المالك، وذلك في حالة الضرورة مثل إذا دعت إلى ذلك مصلحة عامة، كإنشاء الطرق والمصارف وتوسيع دور العبادة ونحو ذلك، فإنه في مثل هذه الحالات يجوز نزع الملكية إذا أبى المالك بيعها، أو إذا كان على المالك دين لآخر وامتنع عن أدائه.

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[53] سورة الإسراء، آية: 16

[54] عدنان خالد التركماني، ضوابط الملكية في الفقه الإسلامي، ص142-143

[55] رواه الإمام مالك في موطأه، كتاب الأقضية، حديث رقم: 1234.

ففي هذه الحالة يجوز بيع أمواله جبرا لسداد ديونه، أو إذا احتكر شخص أو فئة من الناس الطعام وامتنعوا عن بيعه، فإن الحاكم يبيعه جبرا عن صاحبه.

الخاتمة

وتلخّص من خلال العرض السابق أنَّ الإسلام قد جاء بنظامٍ كاملٍ ومتكاملٍ تسير معاملاتُ الناس عليه بشكل صحيح، وتستقيم الحياة الإنسانية بهذا النظام حيث لا يكون هناك ظلمٌ واعتداءٌ فيما بينهم. ولأجل أن حبَّ التملك غريزةٌ في الإنسان، وفطرةٌ فطر اللهُ الإنسانَ عليها، وأن المال هو محور النشاط الاقتصادي في كل مجتمع وحجر الزاوية في بنيانه الاجتماعي، فقد تناول الإسلامُ موضوع الملك من كافَّة جوانبه، فنظَّمه تنظيما دقيقا حتى لا يتعدّى أصحاب المليكة ولا يتعدى أحدٌ عليهم. ولما كان لبيان موضوع الملكية أهمية كبرى في الفقه الإسلامي، فقد وردت تفاصيل حول الملكية من خلال تعريفها، أنواعها، خصائصها وأسبابها – المشروعة وغير المشروعة-. وتَلَخَّصَ من ذلك أن الملكية أنواعٌ، منها تامّ وناقص، خاصٌّ وعامّ، متميز وشائع. ففي الملكية التامة أسبابها وخصائصها، وكذا الناقصة.

لقد أباح الإسلام أَخْذَ أنواع وسائل الكسب والتملُّك التي لم يرد فيها نهي أو تحريم من الشرع، وذلك من خلال أسباب الملكية المشروعة مثل: حيازة المباح، العقود الناقلة للملكية، الإرث، والشفعة. وفي جانبٍ آخر نهى الإسلام عن أسباب الملكية غير المشروعة. فحرّم كل الوسائل المؤدية إلى الغش، والخداع، والظلم، وما يسبّب الفوضى وعدم الاستقرار في المجتمع، مثل البيوع التي فيها غرر وجهالة، والسرقة، وقطع الطريق، والربا وما إلى ذلك من معاملات غير شرعية.

ولأجل المحافظة على صلاح المجتمع في معاملاتهم، وإزالة الضرر من الناس في مصالحهم الدنيوية والأخروية فيما يتعلق بحق التملُّك، فقد وضع الإسلام قيوداً على أسباب هذا التملك. ومن هذه القيود: إحسان الانتفاع والتصرف في الأموال، ضرورة استثمار المالك لأمواله وعدم جواز تعطيلها، وعدم استعمال الملكية لإضرار الغير. ولأجل حفظ المصالح العامة أقرَّ الإسلام جواز نزعِ الملكية الخاصة جبراً في حالة الضرورة. وبهذا يُعرف العدل الإلهي في تحقيق مصالح العباد.

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قضايا فقهية معاصرة في الوقف النقدي المؤقت

تحليل حالة الصكوك الوقفية المؤقتة

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ملخص البحث

يعد الوقف أحد اهم المؤسسات الفاعلة في النظام الاقتصادي الاسلامي، وقد لعب الوقف دورا كبيرا في تحمل عبء كبير عن الدولة ورفد المجتمعات الاسلامية بمعظم الخدمات الاجتماعية من التعليم والصحة والرعاية الاجتماعية والبنية التحتية. وقد برزت اهميته مؤخرا مع تزايد الاهتمام العالمي بالتنمية المستدامة. ويشكل الوقف النقدي احد اهم انواع الوقف وذلك لمرونته وفاعليته في تعبئة الموارد المالية للمشاريع الخيرية والانمائية. تناقش هذه الورقة البحثية بعض القضايا الفقهية المعاصرة المتعلقة بالوقف النقدي المؤقت مع التركيز على حالة الصكوك الوقفية المؤقتة. تكمن اهمية البحث في تسليطه الضوء على عدد من المسائل الفقهية المتعلقة بالصكوك الوقفية والتي يختلف حكمها باختلاف التأصيل الفقهي لها من حيث اعتبار هذه الصكوك قرضا ام وقفا. وعلى رأس تلك المسائل ملكية الأصول الوقفية وأحكام الزكاة والاعسار والرجوع عن الوقف وتلف العين الموقوفة في يد الناظر أو الموقوف عليهم والتصرف بالمال الموقوف دون إذن الواقف أو خلافا لشرطه الى غير ذلك. تناقش هذه الورقة أهم تلك المسائل وتبين حكمها الفقهي مع التفصيل ماامكن وضمن الحدود البحثية لهذه الورقة. تختم هذه الورقة بدعوة المجامع الفقهية والمجالس الشرعية لايلاء الاهتمام الواجب بتلك المسائل واصدار القرارات الشرعية الخاصة لتوضيحها وتوحيد العمل بموجبها في المؤسسات الوقفية والمالية ذات الصلة.

الكلمات المفتاحية: الوقف النقدي، الوقف المؤقت، الصكوك الوقفية، التنمية المستدامة

المقدمة

زاد مؤخرا الاهتمام بالوقف الخيري ودوره في التنمية الاقتصادية والاجتماعية كجزء من الاهتمام العالمي المتزايد بالتنمية المستدامة للشركات والافراد إلى جانب النمو السريع لمفاهيم استثمار المسؤولية الاجتماعية

واستثمارات صديقة البيئة والاستثمارات المستدامة. ويعد الوقف النقدي او وقف النقود واحداً من اهم الاساليب الوقفية الجديرة بالاهتمام نظراً لمرونته واهميته الكبيرة في تعبئة الموارد المالية وتوجيهها لدعم المشاريع الاجتماعية و الخيرية. ومن أهم صور الوقف النقدي مايعرف بالصكوك الوقفية التي يمكن تعريفها بأنها "وثائق أو شهادات خطية متساوية القيمة قابلة للتداول، تمثل المال الموقوف، وتقوم على أساس عقد الوقف".[1] تمثل الصكوك الوقفية شكلا من أشكال الصكوك الاجتماعية التي لا تهدف للربح المادي، بل تهدف لسد حاجات المجتمع الأساسية التي أثقلت كاهل الدول، الى جانب كونها أداة لتطوير الوقف النقدي وتفعيل دوره في التنمية المستدامة التي يمكن أن تشمل قطاع التعليم والمرافق العامة ومشاريع البنية التحتية [2].

وقد برزت مؤخرا بعض الدعوات لاستثمار الصكوك الوقفية كأداة فعالة في تعبئة الموارد المالية اللازمة لدعم مشاريع التنمية الاقتصادية والاجتماعية وكذلك لسد الفجوة الكبيرة في المجال الاغاثي والانساني[3]

وفي نفس السياق يعد مشروع اوقاف نيوزيلاند من اهم المشاريع الكبيرة الواعدة التي تستخدم الوقف النقدي لجمع الاموال اللازمة للمشروع. وتقوم فكرة المشروع حالياً التي تعد وتنسق له مؤسسة اوقاف نيوزيلاند بالتعاون مع الأكاديمية الدولية للبحوث الشرعية في التمويل الإسلامي في ماليزيا (إسرا) والبنك الاسلامي للتنمية من خلال إصدار صكوك وقفية يتم استخدام حصيلة الاكتتاب فيها لإنشاء مزارع وقفية لتنمية الماشية والاغنام. وعبر هذه المزارع سيتم توفير خدمة (قرباني) التي تشير إلى الأضحية للمسلمين. وسوف يتم الاستفادة من جميع مخلفات الحيوانات في المزارع الوقفية تلك من جلود واصواف وغيرها وتستخدم لأغراض خيرية في جميع أنحاء العالم.[4]

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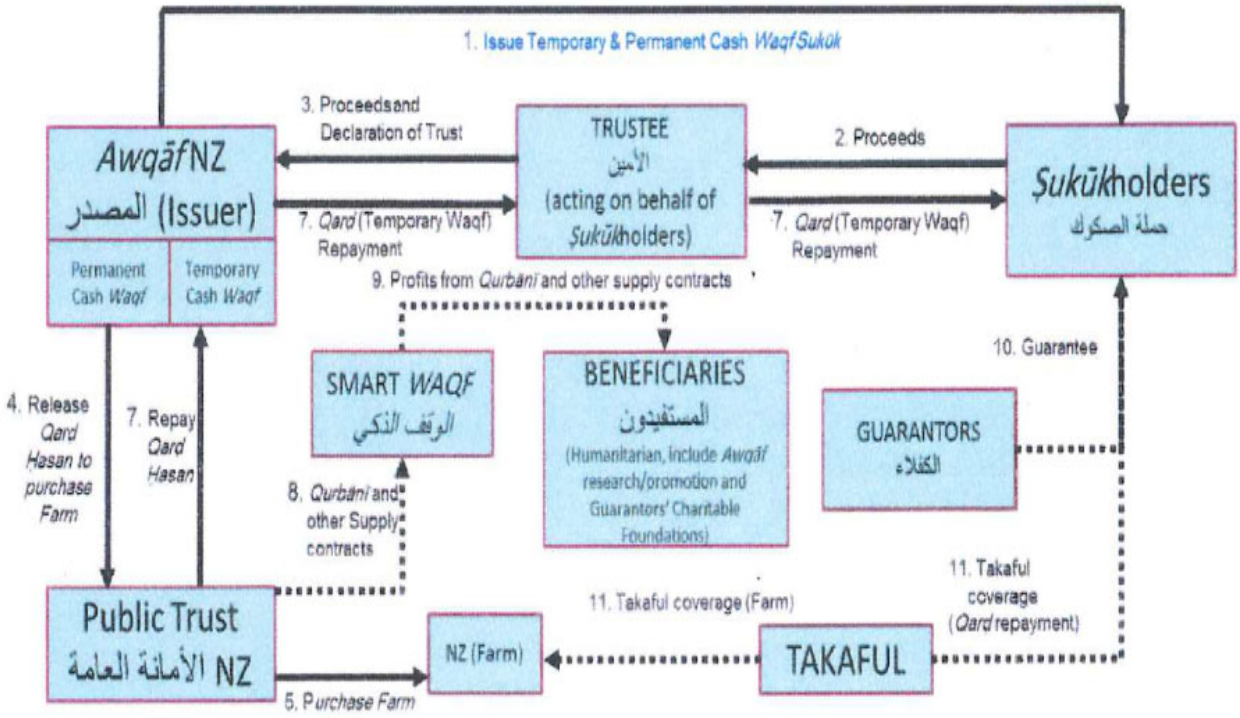
[1] نقاسي, محمد إبراهيم, ليبا، محمد. الصكوك الوقفية واهميتها في تمويل مجال التعليم http://irep.iium.edu.my/48004/

[2] نقاسي, محمد إبراهيم, الصكوك الوقفية ودورها في التنمية الاقتصادية من خلال تمويل برامج التأهيل وأصحاب المهَن والحرَف, 2011 ص 2,

[3] Kasri، Noor Suhaida، Waqf and sukuk: addressing the humanitarian funding gap. GAP.http://giem.kantakji.com/article/details/ID/918#.Wbn57LIjHIX.

[4] Husain Benyounis, (2018) Smart Waqf Engineering the Awqaf Industry World 1st Awqaf Sukuk. 6 global waqf conference 19 – 22 November 2018 – Bangkok, Thailand https://gwc2018.mediu.edu.my/full-paper/

موذج الصكوك الوقفية المقترحة في مشروع اوقاف نيوزيلاند



المصدر: حسين بن يونس 2017[5]

كما هو موضح في الرسم التمثيلي ستقوم مؤسسة اوقاف نيوزيلاند باصدار الصكوك الوقفية الدائمة والمؤقتة لحملة الصكوك الذين يمثلهم الامين او الناظر وستقوم المؤسسة باستخدام تلك الاموال الوقفية بانشاء مزارع وقفية يعود ريعها الى المستفيدين من المؤسسات والافراد. وتشبه عملية اصدار الصكوك الوقفية الى حد بعيد عملية اصدار الصكوك التجارية الاستثمارية الا ان الصكوك الوقفية قد تختلف عن الصكوك التجارية الاستثمارية من ناحية غرض الاصدار وغرض حملة الصكوك وكذلك قد يختلف الحكم الشرعي لبعض المسائل الشرعية كوجوب الزكاة واستخدام الرهن والتداول في سوق الاوراق المالية الى غير ذلك.

ويمكن تلخيص عملية اصدار الصكوك الوقفية من خلال الخطوات التالية[6]:

[5] Brunei Darussalam Islamic Investments Summer2-3 august indera Samudra grand hall the empire hotel and country club. https://cibfmbrunei.com/wp-content/uploads/2017/05/Smart-WAQF-BIIS-August-2017-v3.pptx

[6] نقاسي، محمد إبراهيم، **الصكوك الوقفية ودورها في التنمية الاقتصادية من خلال تمويل برامج التأهيل وأصحاب المهن والحرف**، ص8.

1- تحديد الأصول السائلة التي يُحتاج إليها لتنفيذ المشروع الوقفي فمثلاً قد يكون المبلغ المطلوب عشرة مليون دولار مثلاً؛

2- تقوم المؤسسة الوقفية بإنشاء شركة ذات غرض خاص (Special Purpose Vehicle) لها مهام متعددة من بينها إصدار الصكوك الوقفية، وإدارة محافظ الصكوك والمشروع الوقفي نيابة عن المؤسسة الوقفية، وإعداد نشرة الإصدار التي تضم وصفاً مفصلاً عن الصكوك الوقفية وأهدافها والموقوف عليهم وشروط الاكتتاب،وتكون هذه الشركة ذات الغرض الخاص في نفس الوقت وكيلاً عن حملة الصكوك؛

3-تقوم الشركة الـ SPV بإصدار الصكوك الوقفية المتساوية القيمة، وتكون حصيلتها تعادل المبلغ المطلوب لإنشاء المشروع الوقفي، وقد تكون هذه الصكوك دائمة او مؤقتة.

4- تقوم SPV بطرح الصكوك للاكتتاب العام، وبعد الاكتتاب فيها تتسلم المبالغ النقدية حصيلة الاكتتاب من المكتتبين، فالمكتتبون هم الواقفون، والمال المتجمع من الاكتتاب هو المال الموقوف. فالأطراف الأصلية في عملية الإصدار هي:

1.المؤسسة الوقفية- 2. والشركة ذات الغرض الخاص- 3. والمكتتبون.-4. محفظة التصكيك الوقفي وهي الوعاء الاستثماري الذي يضم المال المتجمع من الاكتتاب، كما توجد أحياناً أطراف أخرى مساعدة مثل (Credit Rating Agency) وكالة التصنيف الائتمانية (Servicer) ومدير خدمة الصكوك (Trustee) الوصي (Underwriter) الضامن متعهد الاكتتاب.

أهمية البحث

تكمن اهمية البحث في طرحه أسئلة شرعية مهمة تتعلق بالتاصيل الفقهي للوقف النقدي المؤقت مع التركيز على صورة الصكوك الوقفية المقترحة كما اسلفنا في مشروع نيوزيلاند للمزارع الوقفية. حيث تختلف الاجابة عن تلك الأسئلة وحكمها الشرعي باختلاف التاصيل الفقهي للوقف النقدي المؤقت والصكوك الوقفية. فمثلا من بين تلك الاسئلة، هل يمكن اعتبار الوقف النقدي المؤقت قرضا حسنا؟ وماهي الأثار المترتبة على اعتباره كذلك؟ كذلك يناقش البحث الأثار المترتبة على اعتبار الوقف النقدي المؤقت وقفا والآثار الفقهية المترتبة على ذلك من حيث الملكية وأحكام الزكاة والاعسار والرجوع عن الوقف وتلف العين الموقوفة في يد الناظر أو الموقوف عليهم بخلاف تلف القرض في يد المقترض وتغير قيمة العملة (التضخم) واثره على الوقف النقدي المؤقت وغيرها من الاحكام.

نطاق البحث

نظراً لتشعب المسائل المتعلقة بموضوع الوقف النقدي المؤقت، سيتم التركيز في هذا البحث فقط على اهم المسائل الفقهية الجوهرية وهي ملخصة فيما يلي:

1. الزكاة في الوقف المؤقت
2. تداول الصكوك الوقفية
3. الرهن في الصكوك الوقفية

وقبل ذلك سيبدأ البحث بتقديم عام ومختصر عن تعريف الصكوك الوقفية وحكمها ومسألة الوقف النقدي والوقف النقدي المؤقت من خلال سرد سريع لأراء الفقهاء وآخر القرارات المجامع الفقهية والفتاوى المتعلقة بالموضوع. وسيختم هذا البحث بمناقشة التداعيات المترتبة على اعتبار الوقف النقدي المؤقت قرضا ام وقفا وخاصة عند استخدام الوقف النقدي المؤقت اداة لجمع الاموال واستخدامها في تمويل المشاريع الوقفية الخيرية والاجتماعية كما هو الحال في الصكوك الوقفية في مشروع المزارع الوقفي لاوقاف نيوزيلاند.

أولاً: ماهي الصكوك الوقفية؟

ظهر مصطلح الصكوك الوقفية حديثاً كأداة من أدوات التمويل الإسلامي، وقد وضح الدكتور كمال توفيق حطاب أن الصكوك الوقفية ظهرت في بدايات التاريخ الإسلامي، وهي تمثل وثائق أو شهادات لإثبات حق يقصد منها تنفيذ شرط الواقفين وحفظ حقوقهم، ولا يقصد منها الاستثمار أو التداول[7]. وتمثل تلك الصكوك سندات ملكية يتم حفظها دفعاً للنزاع وحفظاً لحقوق الفقراء وجهات الوقف الأخرى. أما المعنى الحديث للصكوك الوقفية فهو يشمل بالإضافة لما سبق معاني أخرى عديدة تتنوع بتنوع صيغ التمويل الاستثمارية الإسلامية، ويتم تداولها في السوق المالية وتصرف عوائدها على أوجه البر والخير[8]. وكما ذُكر سابقاً أن فكرة الصكوك الوقفية كانت بذورها الأولى عندما اقترح الدكتور سامي حمود فكرة سندات المقارضة كأسلوب تمويلي شرعي ومناسب لإعمار الممتلكات الوقفية وتطويرها. ويمكن تعريف الصكوك الوقفية بانها وثائق أو شهادات خطية متساوية القيمة قابلة للتداول تمثل المال الموقوف، وتقوم على أساس عقد الوقف. سواء كانت هذه الأموال أصولاً ثابتة كالعقارات أو أصولاً منقولة كالنقود أو حقوقا معنوية كحقوق التأليف وبراءة الاختراع. كما عرف البعض الصكوك الوقفية

[7] النووي، يحيى بن شرف، **مسلم بشرح النووي**، بيروت: دار إحياء التراث العربي، 1992،ط 2.

[8] حطاب، كمال توفيق، **الصكوك الوقفية ودورها في التنمية**، 2006م، ص 9.

بأنها وثائق محددة القيمة، يتم اصدارها بأسماء مموليها، لصالح الجهة الموقوف عليها، أو من يمثلها قانوناً، وذلك لتغطية الحاجات المنوطة بها، مع الالتزام بأحكام الشريعة تمويلاً واستثماراً وانفاقاً[9].

ولا بد هنا من الاشارة الى وجوب التمييز بين شكلين للصكوك الوقفية [10]:

الأول: صكوك استثمارية لتطوير العقارات الوقفية كما هو الحال في صكوك برج زمزم في السعودية وصكوك سنغافورة (MUIS). فهي صكوك إجارة وصكوك انتفاع، فلقد صدرت هذه الصكوك لتطوير الاراضي الوقفية ولكن الصكوك ليست وقفية بل استثمارية تهدف لتطوير الوقف. وبالتالي فحملة الصكوك مستثمرون وليسوا بواقفين. لأنهم يستفيدون من عوائد الصكوك الاستثمارية، ولكن الاستثمار كان على أراضي وقفية بهدف تطوير الوقف في نهاية الأمر.

والثاني: الصكوك الوقفية الخالصة التي يكون فيها حملة الصكوك واقفين لا يستفيدون من عوائد الصكوك ولا يقوقعون اي عائد على المبالغ التي يدفعونها او يتبرعون بها بشكل دائم اومؤقت. وخير مثال على هذا النوع من الصكوك الوقفية هو الصكوك الوقفية المقترحة لاوقاف نيوزيلاند. والى الان حسب اطلاع المؤلف لم يتم اصدار اي صكوك وقفية من هذا النوع مع وجود محاولات وبوادر بالتعاون مع اوقاف نيوزيلاندا والبنك الاسلامي للتنمية.

مشروعية الصكوك الوقفية

إن الصكوك الوقفية تأخذ مشروعيتها من مشروعية كل من الوقف والصكوك، لأنها مصطلح مركب من كل منهما، فلا بد أنها تأخذ المشروعية من مشروعية كل من الصكوك أولاً والوقف ثانياً ،كما وضحنا في فصول سابقة. ثم إن مشروعية إصدار الصكوك الوقفية (طرحها للاكتتاب العام) يرتكز على شرطين مهمين:

1- توافر أركان الوقف خلال عملية إصدار الصكوك الوقفية: ومن خلال التدقيق في خطوات الإصدار نلاحظ وجود:

أ-الواقفون: حملة الصكوك (المكتتبون).

ب- الموقوف عليهم: (أي من وجوه البر والخير) وهو منصوص عليه في نشرة الإصدار.

ج- المال الموقوف: وهي محفظة التصكيك الوقفي.

د- صيغة الوقف وينص عليها في نشرة الإصدار.

هـ- مشروعية وقف النقود الذي سنتناوله في المناقشة التالية.

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[9] عمر جالو, محمد صالح بن ألفا, **الأسهم وأحكامها في الفقه الإسلامي**, سلسلة الرسائل والدراسات الجامعية, دار الكتب العلمية,بيروت, 2015, ص 266.

[10] http://www.alarabiya.net/ar/aswaq/financial-markets/2016/11/23.

مشروعية الوقف النقدي والوقف النقدي المؤقت

مشروعية الوقف النقدي

اختلف فقهاء الشريعة في مشروعية وقف النقود نظرا لاختلافهم في وقف المنقول والانتفاع به مع بقاء العين؛ فذهب الامام أبو حنيفة والامام أبو يوسف، والشافعية في الوجه الصحيح، والحنابلة في المختار عندهم، وابن شاس من المالكية لعدم الجواز، حيث يشترطون في صيغة الوقف التأبيد، وقد نصوا على أن تكون العين الموقوفة مما يمكن الانتفاع بها مع بقاء عينها، والنقود لا يمكن الانتفاع بها إلا باستهلاك عينها، لذلك لم يجوزوا وقف النقود. (الموسوعة الفقهية الكويتية، 193/41). من جهة أخرى ذهب طائفة من فقهاء الشريعة الى الجواز من بينهم الامام محمد بن الحسن والامام زفر في رواية عنه ، والأنصاري تلميذ زفر من الحنفية والمالكية، الى جواز وقف النقود وهو وجه أيضا قول مرجوح عند الشافعية، ورواية مرجوحة عند الحنابلة، كذلك اختار الجواز ابن تيمية، و ابن شهاب الزهري والبخاري. والقول بجواز وقف النقود هو كذلك مذهب ابن سيرين ، فقد نقل البخاري عنه : " فيمن جعل ألف دينار في سبيل الله ، ودفعها إلى غلام له تاجر يتجر بها ، وجعل ربحه للمساكين والأقربين ، هل للرجل أن يأكل من ربح تلك الألف شيئاً ... قال : ليس له أن يأكل منها (صحيح البخاري مع الفتح 5-405)كما أ ن أبا السعود من الحنفية له مؤلف خاص لبيان جواز وقف النقود سماه: "رسالة في جواز وقف النقود" . وقد أباح المتأخرون من الحنفية وقف النقود بناء على العرف. قال ابن عابدين في حاشيته: قلت إن الدراهم لا تتعين بالتعيين فهي وإن كانت لا ينتفع بها مع بقاء عينها لكن بدلها قائم مقامها لعدم تعينها فكأنها باقية ولا شك في كونها من المنقول فحيث جرى فيها تعامل دخلت فيما أجازه محمد .... قال في الفتح إن بعض المشايخ زادوا أشياء من المنقول على ما ذكره محمد لما رأوا جريان التعامل فيها وذكر منها مسألة البقرة الآتية ومسألة الدراهم والمكيل حيث قال: ففي الخلاصة وقف بقرة على أن ما يخرج من لبنها وسمنها يعطى لأبناء السبيل قال إن كان ذلك في موضع غلب ذلك في أوقافهم رجوت أن يكون جائزا. وعن الأنصاري وكان من أصحاب زفر فيمن وقف الدراهم أو ما يكال أو ما يوزن أيجوز ذلك قال نعم قيل وكيف قال يدفع الدراهم مضاربة ثم يتصدق بها في الوجه الذي وقف عليه (ابن عابدين). ونص ابن عابدين أن المفتى به الذي عليه المتون جواز وقف المنقول المتعارف(4/390).

وقد أجاز مجمع الفقه الإسلامي الدولي وقف النقود ونص على ذلك في جلسته 15 المنعقدة في مسقط عمان 2004:

1- وقف النقود جائز شرعاً، لأن المقصد الشرعي من الوقف وهو حبس الأصل وتسبيل المنفعة متحقق فيها ؛ ولأن النقود لا تتعين بالتعيين وإنما تقوم أبدالها مقامها.

2- يجوز وقف النقود للقرض الحسن، وللاستثمار إما بطريق مباشر، أو بمشاركة عدد من الواقفين في صندوق واحد، أو عن طريق إصدار أسهم نقدية وقفية تشجيعاً على الوقف، وتحقيقاً للمشاركة الجماعية فيه.

3- إذا استثمر المال النقدي الموقوف في أعيان كأن يشتري الناظر به عقاراً أو يستصنع به مصنوعاً، فإن تلك الأصول والأعيان لا تكون وقفاً بعينها مكان النقد، بل يجوز بيعها لاستمرار الاستثمار، ويكون الوقف هو أصل المبلغ النقدي. (مجمع الفقه الاسلامي، 2004)

وكذلك أقرت الجواز هيئة المحاسبة والمراجعة للمؤسسات المالية الإسلامية (2010) في المعيار الشرعي رقم 33 عن الوقف 2/4/4/3 الذي ينص على مايلي:

"يجوز وقف النقود، ويكون الانتفاع بها بما لا يؤدي إلى استهلاكها مع الانتفاع بها مثل: الإقراض لمشروع أو باستثمارها بالطرق المشروعة المأمونة غالباً مثل المضاربة بها، و يُصرف نصيب الوقف من الربح في الموقوف عليه." وقد نص المعيار في الملحق (ب) عند الحديث عن مستند الاحكام الشرعية "مستند صحة وقف النقود أنه الاصل. وهو قول محمد بن عبد الله الأنصاري صاحب الإمام زفر، واختاره ابن تيمية. ونحوه وقف الأسهم والصكوك." (ص 545)

التأقيت في الوقف

اختلف الفقهاء في تأقيت الوقف، فذهب الحنفية والشافعية – في الصحيح عندهم – والحنابلة – في أحد الوجهين – إلى أن الوقف لا يقبل التأقيت، ولا يكون إلا مؤبدا. وذهب المالكية والشافعية – في مقابل الصحيح عندهم والحنابلة على الوجه الآخر – إلى جواز تأقيت الوقف، كل ما يجوز التصرف به في غير الموقوف. إلا ان المالكية استثنوا المسجد من جواز التأقيت حتى لو نص الواقف على التأقيت في المسجد وقع الوقف مؤبدا.[11] ولقد جاء قرار مجمع الفقه الإسلامي رقم 181 في دورته التاسعة عشرة في 26 / 4 / 2009 مؤيدا للمذهب المالكي القائل بالجواز حيث نص القرار على ما يلي: "يقصد بالتوقيت أن تكون للوقف مدة ينتهي بانقضائها، ويجوز التوقيت بإرادة الواقف في كل أنواع الموقوفات". ومثله نص المعيار الشرعي رقم 33 لهيئة المحاسبة والمراجعة للمؤسسات المالية الإسلامية على الجواز، حيث ورد في الفقرة 4/1/3 "الأصل أن يكون الوقف مؤبدا ويجوز أن يكون مؤقتا لمدة إذا نص الواقف على توقيته بحيث يرجع الموقوف بعدها إلى المالك"[12].

التاصيل الفقهي للوقف النقدي المؤقت (هل الوقف النقدي المؤقت وقفا ام قرضا)

[11] الموسوعة الفقهية ج 10

[12] http://waqfuna.com/waqf/?p=2758

من خلال النظر في الوقف النقدي المؤقت نرى انه يحمل سمات الوقف الخيري المعروفة في الفقه الاسلامي كتسبيل المنفعة وتحبيس العين. فالمتبرع بالمبلغ الموقوف ينوي حبس ذلك المبلغ وهبة العائد المستثمر لجهة خيرية يتفق عليها مع الجهة المنفذة للمشروع الوقفي وبذلك يمكن اعتباره وقفا خيريا. إلا أن الوقف النقدي المؤقت يتقاطع مع العديد من سمات القرض الحسن وخاصة في خاصية التاقيت حيث يطلب المتبرع استرداد المبلغ بحلول أجل معين متفق عليه، وهذا اشبه مايكون بالقرض الحسن وليس بالوقف الذي ورد الشرع به أصلا على سبيل التأبيد وأباحت تأقيته المجامع الفقهية المعاصرة والقوانين الوقفية للحاجة ولفتح أبواب الخير على المحسنين الذين يرغبون بالمساهمة المؤقته في المشاريع الخيرية والاجتماعية الا انهم في نفس الوقف يريدون استرداد نقودهم مستقبلا. من ناحية أخرى يفترق الوقف النقدي المؤقت عن القرض الحسن في العديد من المسائل الجوهرية كالاشتراط في استخدام العين الموقوفة.حيث يجب على الجهة المنفذة للمشروع الوقفي الالتزام بشرط الواقف ولو وقفا مؤقتا حسب القاعدة المعروفة "شرط الواقف كنص الشارع" ولا يجوز الاشتراط في القرض وخاصة تلك الشروط التي تعود بالنفع على المقرض بخلاف الشروط التي تعود على الواقف. هناك بعض المسائل الشرعية الأخرى التي تختلف باختلاف التكييف الفقهي للوقف المؤقت كما هو معمول به في الصكوك الوقفية كزكاة العين الموقوفة، وتلف العين الموقوفة وكذلك الاعسار في رد الوقف النقدي المؤقت بالاضافة الى العديد من المسائل الفرعية الاخرى كتحديد الاجل في القرض والوقف وطبيعة يد المقترض او الموقوف عليه ومسالة الاشهاد والرهن وغيرها. ويتجلى الفرق بين القرض والوقف النقدي المؤقت في مسألة الضمان عند تلف العين،حيث يجب الضمان في القرض ولا يجب في الوقف إلا في حالات التعدي والتقصير إلى غير ذلك. يبين الجدول التالي أوجه الشبه والاختلاف بين القرض والوقف من خلال بعض العقود والمفاهيم الفقهية في المعاملات الاسلامية.

العقد/المفهوم الفقهي	القرض يتفقان	الوقف يفترقان
الضمان	مضمون على المستفيد	غير مضمون الا بالتعدي والتقصير وماشابه
الملكية	ملك للمقرض مع حق الاستخدام	خلاف بين الفقهاء حول المالك بعد الوقف
الزكاة	تجب الزكاة على حامل الصك مع الخلاف وتجب على المقترض ان ملك النصاب	لا تجب الزكاة في الوقف
الرهن	يجوز استخدام القرض كرهن	لا يجوز رهن الوقف

الاشتراط	لا يجوز للمقرض الاشتراط بنفع له	يجوز الاشتراط للواقف
الحوالة	تجوز الحوالة	لا ينطبق
الاعسار	يندب الانظار	لا ينطبق
الاشهاد	يندب الاشهاد	لا ينطبق
الوكالة	تجوز	يجوز
الكفالة	تجوز	لا ينطبق
الوصية	تجوز	تجوز
التنازل	يجوز	لا ينطبق
الحوالة	تجوز	لا ينطبق
التاقيت	يكره	يجوز
الاستبدال	يجب رد المثل لا العين	يجوز بشروط
الانتفاع بالعين	يجوز للمقترض بدون اذن	للمستفيدين حسب شرط الواقف
القبول	يشترط القبول	لا يشترط القبول
ضع وتعجل	يجوز للمدين حالا	لا ينطبق
لزوم العقد	يجوز الرجوع	لا يجوز الرجوع

المسائل الفقهية الجوهرية المتعلقة بالوقف النقدي المؤقت (دراسة حالة الصكوك الوقفية)

كما اسلفنا في المناقشة السابقة، يتشابه الوقف النقدي المؤقت في كثير من الاحكام مع القرض الحسن، ومع ذلك فلا يمكن اعتباره قرضا خالصا لاعتبارات شرعية وفقهية عدة سبق بيانها في مقدمة هذا البحث. والذي يعنينا في المناقشة التالية محاولة التوصل لجواب شرعي فقهي حول بعض الاسئلة الفقهية من مثل وجوب الزكاة على الصكوك الوقفية وجواز تداول الصكوك الوقفية واستخدام الرهن من قبل الناظر او الواقف.

المسألة الأولى: الزكاة في الوقف النقدي المؤقت

أ- زكاة العين الموقوفة (المبالغ الموقوفة في الصكوك الوقفية المؤقتة باعتبارها وقفا)

إن خلاف الفقهاء في زكاة العين الموقوفة ينبني على خلافهم في ملكية العين الموقوفة. فعند الحنفية والشافعية في الأصح لا زكاة فيها . فالحنفية قالوا: إلى أن الزكاة تمليك والتمليك في غير الملك لا

يتصور[13]. والشافعية قالوا: إن كان الوقف على جهة غير معينة فلا زكاة فيها بلا خلاف، لأنه ليس لها مالك معين. أما إن كان الوقف على معين – سواء كان واحدا أو جماعة – فبناء على القول الأصح عند الشافعية_ وهو أن ملكية العين الموقوفة لله تعالى فلا زكاة فيها كالوقف على جهة عامة، وبالأخذ بالقول المقابل للأصح – وهو أن ملكية العين الموقوفة تكون للموقوف عليه — فهناك قولان: أصحهما لا تجب الزكاة على الموقوف عليه ، لأن ملكه ملك ضعيف بدليل أنه لا يملك التصرف في رقبته ، والثاني أنها تجب عليه ، لأنه يملكه ملكا تاما مستقرا فأشبه غير الموقوف[14].

وذهب المالكية: أنه تجب زكاة الوقف على الواقف بناءً على رأيهم أن الموقوف يكون على ملك الواقف[15]

وقال الحنابلة : تجب الزكاة على الموقوف عليه إن كان الموقوف عليه معينا كزيد مثلا فإنه يجب عليه زكاة بناءً على رأيهم في أن الملك في الموقوف يكون للموقوف عليه.واختار بعض الحنابلة عدم وجوب الزكاة لضعف الملك . وإن كان الموقوف عليه غير معين كالفقراء مثلا فلا تجب الزكاة في الموقوف[16].

ب – زكاة ريع وغلة الوقف

هناك اتجاهان في زكاة الريع وغلته

أولاً:ذهب الحنفية والمالكية والشافعية والحنابلة: أنه إن كان الوقف على قوم معينين فحصل لبعضهم من الثمار أو الحبوب نصاب ففيه الزكاة، لأن الموقوف عليهم يملكون الثمار والغلة ملكاً تاماً ويتصرفون فيه بجميع أنواع التصرف.

ثانياً:وروي عن طاوس ومكحول: أنه لا زكاة في ذلك لأن الأرض ليست مملوكة لهم فلا تجب عليهم زكاة في الخارج منه.

ذهب الحنفية والمالكية – وهو ما حكاه وابن المنذر عن الشافعي: أنه إن كان الوقف على جهة غير معينة كجهة عامة كالمساجد والفقراء فتجب الزكاة إذا بلغت نصاباً لعموم قوله تعالى : { وآتوا حقه يوم حصاده }[17]، ولأن العشر يجب في الخارج لا في الأرض فكان ملك الأرض وعدمه بمنزلة واحدة ،

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[13] بدائع الصنائع 2 / 9 .

[14] المجموع شرح المهذب 5 / 339 . 340 ، ومغني المحتاج 2 / 389 .

[15] حاشية الصاوي على الشرح الصغير ط مصطفى الحلبي, 1 / 229.

[16] ابن قدامى, المغني المطبوع مع الشرح الكبير, ط الكتاب العربي4 / 502. المغني لابن قدامة, ط الرياض الحديثة, 4 / 499.

[17] سورة الأنعام / 141 .

كما يقول الحنفية فلذلك تخرج الزكاة أولاً بمعرفة ناظر الوقف أو من يلي الوقف ثم يفرق الباقي على الموقوف عليهم بالاجتهاد كما يقول المالكية[18].

وعند الحنابلة وهو الصحيح المشهور من نصوص الشافعي أنه لا زكاة في غلة الموقوف على غير معين كالفقراء ولا فيما يحصل في أيديهم ، سواء حصل في يد بعضهم نصاب من الحبوب والثمار أو لم يحصل ، لأن الوقف على الفقراء والمساكين لا يتعين لواحد منهم بدليل أن كل واحد منهم يجوز حرمانه والدفع إلى غيره[19]

ثانياً:زكاة القرض الحسن[20] المبالغ الموقوفة في الصكوك الوقفية المؤقتة باعتبارها قرضا

للفقهاء في زكاة القرض الحسن أقوال كثيرة واتجاهات مختلفة يمكن أن نلخصها كما يلي:

الاتجاه الأول: كون القرض الحسن على ملئ باذل قادر على أدائه

1- إذا كان القرض على ملئ باذل قادر على أدائه وكان القرض حالاً فإن زكاة القرض تكون على المقرض؛ لأنه مالك حقيقي حينئذ للمال المقرض، وهو قادر على تحصيله. ويطبق نفس الحكم إذا كان المقترض هو الدولة أو القطاع العام(صكوك القرض الحسن السيادية تكون الدولة هي المقترض). وهذا بخلاف ما اذا كانت الدولة هي المقرض فإن الدولة لا تزكي هذه القروض، ولو كانت حالة؛ لأن أموال الدولة مرصدة للنفع العام فلا تزكى.

2- كون القرض على ملئ باذل قادر على أدائه وكان القرض مؤجلاً كأن يكون القرض مؤجلاً مدة خمس سنوات مثلاً فزكاته تكون على المقترض في هذه المدة لأن عقد القرض عقد إرفاق، ومنفعته للمقترض في هذه المدة، وذلك عملاً بالقاعدة الفقهية " الغنم بالغرم". وكذلك إذا كانت الدولة هي المقرض وكان القرض مؤجلاً فالزكاة في حال التأجيل تكون على المقترض، وهذا بخلاف ما إذا كان المقترض هو الدولة أو القطاع العام وكان القرض المؤجل لتمويل حاجات أساسية، ونفع عام؛ فإنه لا زكاة في المال العام.

الاتجاه الثاني: أن يكون القرض على معسر أو جاحد أومماطل

1- فإذا كان القرض الحسن على معسرٍ وكان حالاً فإن المقرض يزكيه لعام واحد إذا قبضه سواء قبضه كاملا أو مجزءاً. فإذا كانت الدولة هي المقرض، وكان حالاً وتعسر الدين، ولو لعدة سنين، ثم قبضته

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[18] بدائع الصنائع, ط المكتبة العلمية , بيروت,2/ 56. شرح منح الجليل على مختصر العلامة خليل, ط دار صادر, 4/ 77.

[19] ابن قدامة, المغني, ط مكتبة القاهرة, 6/ 33. المجموع شرح المهذب, ط دار الفكر,5 / 339. الموسوعة الفقهية, مرجع سابق, ج44, ص174.

[20] منصور, محمد خالد, زكاة القرض الحسن دراسة فقهية, عمادة البحث العلمي/ الجامعة الأردنية. دراسات علوم الشريعة والقانون، المجلد, 43 , ملحق 2, 2016.

الدولة، فلا زكاة فيه؛ لأنه مال الدولة مرصود للنفع العام. كذلك الحال لو كانت الدولة هي المقترض، وكانت الدولة معسرة فلا زكاة في المال المقترض على الدولة سواء كان حالاً أم مؤجلاً ، وعلى المقرض أن يزكيه في حال قبضه عاماً واحداً.

2-أما إذا كان القرض الحسن على معسرٍ وكان مؤجلاً فلا زكاة على المقترض، فإذا أيسر المقترض في أي وقت فيزكيه في المدة التي يكون فيها موسراً لقدرته على أداء الزكاة.

وجاء في قرار مجمع الفقه الإسلامي الدولي المنبثق عن منظمة المؤتمر الإسلامي في دورة انعقاد مؤتمره الثاني بجدة من 10 – 16 ربيع الآخر 1406هـ الموافق 22 – 28 كانون الأول (ديسمبر) 1985م، قرر ما يلي:

أولاً: تجب زكاة الدين على رب الدين عن كل سنة إذا كان المدين مليئاً باذلاً.

ثانياً: تجب الزكاة على رب الدين بعد دوران الحول من يوم القبض إذا كان المدين معسراً أو مماطلاً[21].

ثالثاً: زكاة الصكوك الوقفية الدائمة والمؤقتة

- زكاة الصكوك الوقفية الدائمة

يرى الباحث أن الصكوك الوقفية الدائمة أقرب ماتكون الى الوقف المؤبد، بخلاف الصكوك الوقفية المؤقتة التي ربما تكون اقرب الى القرض الحسن، وبالتالي يمكن تطبيق احكام الزكاة على الموقوف عليهم ومراعاة خلاف الفقهاء والمذاهب الفقهية كما مر آنفاً ويميل الباحث إلى عدم فرض الزكاة على الموقوف عليهم وخاصة أن الصكوك الوقفية هي في الغالب تهدف الى تعزيز المشاريع التي تعود بالنفغ على العامة ولاتكون ربحية وهو رأي الجمهور كما سلف.

وهذا القول أخذت به هيئة المحاسبة والمراجعة للمؤسسات المالية الإسلامية في المعيار الشرعي رقم (35) بشأن الزكاةً حيث نص المعيار في البند رقم 6/1/3 على أنه: "لا تجب الزكاة في الأموال الموقوفة وقفا خيرا"

- زكاة الصكوك الوقفية المؤقتة

يقصد بالصكوك الوقفية المؤقتة المبالغ التي يتبرع بها الافراد او المؤسسات بشكل مؤقت على سبيل القرض الحسن على ان يستردو هذه المبالغ عند حلول اجل معين متفق عليه مع الجهة الموقوف عليها او المنفذة للمشروع الوقفي. ويرى الباحث أن هذا النوع من الصكوك الوقفية أقرب مايكون للقرض الحسن وبالتالي يمكن تطبيق احكام القرض او الدين التي سلف ذكرها. والذي يميل إليه الباحث عدم وجوب

[21] مجمع الفقه الاسلامي الدولي,http://www.iifa-aifi.org/1548.html.

الزكاة على حامل الصك لتشجيع المساهمين على القرض الحسن والوقف المؤقت وخاصة في الحالات التي يتم فيها اصدار تلك الصكوك بالعملات المحلية وحيث تكون معدلات التضخم مرتفعة وتكون العملات المحلية غير مستقرة. في مثل تلك الحالات قد يتحمل حملة الصكوك بعض الخسارات ويكون فرض الزكاة عليهم اجحافا في حقهم وقد لا يكون مشجعا لهم الاستمرار في المساهمة او معاودتها. واما فرضها على المستفيدين من تلك الصكوك الوقفية كما في حالة اوقاف نيوزيلاند فيرى الباحث ان فرض الزكاة على ريع تلك القروض هو تحصيل حاصل لان المستفيدين من المشاريع الخيرية غالبا مايكونون من المستحقين للزكاة المشمولين بمصارف الزكاة من الفقراء والمساكين وغيرهم وبالتالي لايرى الباحث فرض الزكاة على الريع الحاصل من المبالغ المتجمعة من الصكوك الوقفية على المستفيدين او المنفذين للمشاريع الوقفية. وينطبق هذا على الريع الحاصل من الصكوك الوقفية الدائمة والمؤقتة.

المسألة الثانية: تداول الصكوك الوقفية

بعد أن تحدثنا عن مشروعية وقف الصكوك يظهر أمام الباحث سؤال مهم وهو هل يمكن تداول الصكوك الموقوفة؟ ويمكن لتسهيل تداول الصكوك الوقفية أن تفتح بابا كبيرا من أبواب الخير من حيث توسيع المشاركة في الوقف والمشاريع الوقفية. حيث يمكن ذلك شريحة أكبر من أصحاب البر المساهمة بما تيسر من فضل مالهم وبشكل مؤقت في ابواب الخير. ويمكن تطبيق ذلك على المشاركين الافراد والمؤسسات. بمعنى أنه بعد اصدار الصكوك الوقفية تصبح الاصول وقفا وعند اتاحة تلك الصكوك للتداول متمثلة بالصكوك يتمكن المساهمون في المساهمة قدر المستطاع في حيازة تلك الاصول الوقفية ولو بشكل مؤقت طلبا للثواب بشكل رئيسي. كما يمكن ان تكون مساهمتهم بدوافع أخرى كالمسؤولية الاجتماعية للافراد والشركات. إضافة لذلك يمكن ان تشجع السلطات المشاركين بمنحهم بعض الاعفاءات الضريبية على مساهماتهم.

وقبل الاجابة على حكم تداول الصكوك الوقفية لابد من التفكر قليلا في الامور التالية:

ماذا تمثل الصكوك الوقفية؟ هل تمثل المبالغ النقدية الموقوفة أم الاصول النقدية الموقوفة؟

كيف ستتم مبادلة تلك الصكوك؟ هل ستتم مبادلتها باموال أكثر أم أقل أم بنفس القيمة الاسمية للصك؟

بالنسبة للسؤال الاول بالطبع في بداية المشروع تمثل الصكوك في الغالب المبالغ النقدية الموقوفة. وهنا عند تداول هذه الصكوك لابد من الاحتراز من الوقوع في الربا عند مبادلة المال بالمال تماما كما هو الحال في الصكوك العادية التي تمثل ديناً كصكوك المرابحة وغيرها. واما لو جرى تداول الصكوك الوقفية في مرحلة متقدمة بعد بداية المشروع الوقفي بحيث تحولت تلك الاموال الى عقار اوبناء او مزرعة كما هو الحال في

مشروع المزارع الوقفية لاوقاف نيوزيلاند فهنا لابد من النظر في مسالة استبدال الوقف في المقام الاول ويليه في الاهمية مسالة الرجوع في الوقف.

من المعلوم أن القاعدة الأصلية في الشريعة عدم جواز التصرف في العين الموقوفة بالبيع أو الهبة، فلذلك حتى نجيب على هذا السؤال لا بد من الاعتماد على قاعدة الاستبدال للإجابة عن هذا السؤال، ونعني بالاستبدال هنا تغيير العين الموقوفة بالبيع وغيره، ولقد ذكر الدكتور علي محي الدين القره داغي أن القاعدة الكلية في الشريعة هو عدم الاستبدال إلا لمسوغ مشروع؛ وتظهر أمامنا ثلاث حالات في موضوع استبدال الوقف بشكل عام[22]:

الأولى: أن يشترط الواقف الاستبدال لنفسه فقط أو لغيره فقط، أو لهما معاً، ففي هذه الحالة يكون الاستبدال جائزاً لمن شرط له على الصحيح. وذلك التزاماً بالضابط الفقهي المعروف (إن شرط الواقف كنص الشارع)، أي في الفهم والدلالة وفي وجوب العمل به[23]. فينبغي العمل بموجب شرط الواقف إلا أن هذا الضابط ليس على العموم، لأن بعض الشروط تكون صحيحة ومقبولة يجب احترامها والعمل بموجبها، وبعضها مردود باطل لا اعتبار له وهذا ما تدل عليه القاعدة الفقهية: أن كل شرط وافق مقتضى العقد ولم ينافه، ولم يخالف نصاً شرعياً فإنه صحيح[24]. ولقد اختلف الفقهاء في تطبيق هذه القاعدة، فالأحناف وسعوا في هذا الأمر فذهبوا إلى أن كل شرط فيه تفويت لمصلحة الوقف أو المستحقين فهو شرط باطل[25].

الثانية: أن يشترط الواقف عدم الاستبدال، وفي هذه الحالة ذهب الأحناف وبعض متأخري المالكية وبعض الشافعية وبعض الحنابلة وعلى رأسهم شيخ الإسلام ابن تيمية إلى أنه يجوز للقاضي الاستبدال إذا كان أصلح للوقف[26]. ولقد أخذ بهذا الرأي قانون الوقف الكويتي. فجاء في المادة (14) " يجب العمل بشرط الواقف، ويجوز بقرار من اللجنة مخالفة الشرط الصحيح إذا أصبح العمل به في غير مصلحة الوقف، أو الموقوف عليهم، أو كان يفوت غرضاً للواقف، أو اقتضت ذلك مصلحة أرجح[27]".

والثالث: أن يسكت عن ذلك ولا يشترطه لأحد.

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[22] القره داغي، محي الدين، الموقع الرسمي للشيخ، **استبدال عين الوقف** .http://www.qaradaghi.com/chapterDetails.aspx?ID=539

[23] **حاشية ابن عابدين**، 366/4.

[24] **حاشية ابن عابدين**، 343/4، 350، 386، 389.

[25] **حاشية ابن عابدين**، 4/ 343، 350، 386، 389. **أحكام الوقف**، ص 144- 146.

[26] ابن نجيم، **الأشباه والنظائر**، ص 225، 226، **أحكام استثمار الموقوف وغلاته، دراسة فقهية مقارنة**،ص 22. **مغني المحتاج**، 2/ 385.

[27] **مشروع قانون الوقف الكويتي**، ص 172.

ففي الحالتين الأخيرتين يأتي الخلاف بين الفقهاء في جواز استبدال عين الوقف من غير المسجد أو بيعها.

إذاً فالرأي الفقهي في مدى جواز استبدال العين الموقوفة له تفصيلات كثيرة، أسهب العلماء في شرحها وتفصيلها. ولكن نذكر منها ما يتصل بالبحث، ففي حالة الوقف العامر، اتفق الفقهاء على أنه لا يجوز استبدال الوقف العامر باستثناء بعض الحالات التي قالوا فيها بجواز الاستبدال للوقف العامر، إذا كان في ذلك مصلحة حقيقية راجحة، وممن قال بذلك القاضي أبو يوسف ومن وافقه من الحنفية، وشيخ الإسلام ابن تيمية ومن وافقه، وذهب إلى أنه مذهب الإمام أحمد.

ومن خلال ما تقدم يمكن القول في هذه المسألة:

– إذا كان المقصود تغيير الأصل النقدي إلى غيره كالعقار على سبيل المثال، فإذا كان بقصد الاستثمار المؤقت في العقارات فلا إشكال في هذه المسألة، فهي جائزة بل نجد أن هناك توصيات من بعض الاقتصاديين تحث المسؤولين على إدارة الأوقاف النقدية والعمل قدر الإمكان على تحويل الأصول النقدية إلى أعيان، واستثمارها بشكل مباشر، لأن الاستثمار بالنقود مخاطره أكبر من الاستثمار في العقارات، ولقد جاء ذكر ذلك ضمن قرار مجمع الفقه الإسلامي 15/6/140، والصادر عام 1425هـ.

– أما إذا كان المقصود تغيير الأصل النقدي إلى أصل آخر، فهذا إذا شرطه الواقف لنفسه أو لغيره وجب العمل بمقتضاه كما ذكرنا سابقاً. أما إذا سكت عن ذلك أو شرط عدم الاستبدال ففي هاتين الحالتين اختلف الفقهاء في حالات عديدة، لسنا بصدد ذكرها، ولكن الذي يظهر من القول جواز استبدال الوقف ومخالفة شرط الواقف عند رجحان المصلحة أو لدرء مفسدة. وقد جاء في قرار مجمع الفقه الإسلامي الدولي المنبثق عن منظمة المؤتمر الإسلامي، المنعقد في دورته التاسعة عشرة في إمارة الشارقة، من 1 إلى 5 جمادى الأولى 30هـ، الموافق 26 – 30 نيسان (أبريل) 2009، قرار بشأن وقف الأسهم والصكوك والحقوق المعنوية "الأصل في الأسهم الوقفية بقاؤها واستعمال عوائدها في أغراض الوقف وليس المتاجرة بها في السوق المالية فليس للناظر التصرف فيها إلا لمصلحة راجحة أو بشرط الواقف فهي تخضع للأحكام الشرعية المعروفة للاستبدال.(ب) لو صفيت الشركة أو سددت قيمة الصكوك فيجوز استبدالها بأصول أخرى كعقارات أو أسهم وصكوك أخرى بشرط الواقف أو بالمصلحة الراجحة للوقف"[28].

[28] **مجمع الفقه الإسلامي الدولي، قرار بشأن وقف الأسهم والصكوك والحقوق المعنوية والمنافع**، قرار رقم 181 (19/7)، 2009، http://www.iifa-aifi.org/2307.html .

وخلاصة القول بعد استعراض الرأي الفقهي في موضوع استبدال العين الموقوفة نجد أن تداول الصكوك يمكن شريحة اكبر من الافراد والمؤسسات في المساهمة في المشاريع الوقفية وبالتالي نميل الى القول بإباحاته لنفس الادلة التي سيقت لاباحة الوقف النقدي المؤقت. وقد مال للاباحة ايضا النقاسي في بحثه عن الصكوك الوقفية أيضاً. (نقاسي، 2011) ولكن لابد لاباحة تداول الصكوك الوقفية من ضوابط واضحة وصارمة لتجنب الاضرار بالاصول الوقفية ولتجنب المحاذير الشرعية الاخرى التي قد تقع عند تداول الصكوك كالربا والغرر وسواه. ولعل موضوع تداول الصكوك يمكن إفراده ببحث خاص يتناوله بتفصيل يتعذر في الورقة الحالية. وهنا يدعو الباحث المجمعات الفقهية والمجالس الشرعية لتمحيص البحث في مسالة تداول الصكوك الوقفية واصدار القرارات اللازمة بذلك نظرا لاهمية الموضوع وضرورته الملحة.

المسألة الثالثة: استخدام الرهن في الصكوك الوقفية

يمكن ان يكون هناك ثلاثة مسائل تندرج تحت مسألة ورود الرهن في الصكوك الوقفية نسردها كمايلي:

- استخدام الناظر الاصول الموقوفة الدائمة كرهن لضمان حقوق حملة الصكوك المؤقتة
- استخدام الناظر الاصول الموقوفة الدائمة كرهن لتحمل ديون او مطاليب من جهة غير حملة الصكوك المؤقتة
- استخدام الواقف المبالغ الموقوفة كضمان او رهن لاخذ قروض او تحمل مطاليب

من خلال النظر في الحالات الاربعة المذكورة أعلاه يمكن التفريق بين الصكوك الوقفية الدائمة والمؤقتة ويمكن ملاحظة ارتباط الصكوك الوقفية الدائمة بشكل رئيسي بالناظر والصكوك المؤقتة بالواقف. فقد يفكر الناظر بانشاء دين او التزامات بناء على كون المبالغ غير مستردة من قبل الواقفين، بخلاف الحال في الصكوك المؤقتة التي يستبعد استخدامها كرهن وخاصة انها بحد ذاتها قريبة جدا من القرض الذي يستوجب غالبا تقديم رهن لضمانه لا ان يقوم مقام الرهن. من جهة أخرى بالنسبة للواقف او حامل الصك الوقفي المؤقت سواء كان مؤسسة ام فرادا قد يفكر بانشاء التزامات او ديون واستخدامه المبالغ الموقوفة مؤقتا رهنا نظرا لملكيته لتلك المبالغ وان كان غير قادرة على التصرف بها مؤقتا. هنا يبرز السؤال الشرعي حول امكانية استخدام تلك المبالغ كرهن مع كونها وقفا مؤقتا. لذلك ستركز المناقشة التالية بشكل رئيسي على:

1. مدى شرعية استخدام الناظر اموال الصكوك الموقوفة الدائمة رهنا سواء لضمان اموال الصكوك المؤقتة او لتحمل ديون او مطاليب من جهة ثالثة،

2. امكانية استخدام حامل الصك الوقفي المؤقت أو الواقف المبالغ الموقوفة مؤقتا لتحمل ديون او مطاليب من جهة ثالثة.

لكن قبل البدء بمناقشة المسالتين اعلاه تجدر الاشارة الى مسالة فقهية قريبة من مسالة رهن الموقوف الا انها معكوسة تعرف بوقف المرهون وقد اختلف أهل العلم في صحة هذا الوقف على أقوال:

القول الأول: قول الجمهور من المالكية والشافعية والحنابلة بأن وقف المرهون لا يصح،

قال ابن قدامة "وإن تصرف الراهن بغير العتق كالبيع, والإجارة والهبة والوقف, والرهن وغيره فتصرفه باطل لأنه تصرف يبطل حق المرتهن من الوثيقة" (المغني)

وبه أفتت اللجنة الدائمة للإفتاء في المملكة العربية السعودية، لقاعدة «المشغول لا يشغل»، ولكون تصحيح الوقف إبطال لحق المرتهن من وثيقة الوقف، وقد قال – صلى الله عليه وسلم -:» لا ضرر ولا ضرار.«

والقول الثاني: صحة وقف العقار المرهون إن فكها من الرهن ولو بعد مدة، فإن لم يفكها لم يصح الوقف، وهو قول الحنفية [29].

وفصل بعضهم بان الوقف

ب – وقف المرهون: إذا وقف الراهنُ الرهنَ بإذن المرتهن فلا خلاف في جوازه، لأن ذلك حق للمرتهن أسقط بالإذن بوقفه(51).

وأما إن وقفه الراهن دون إذن المرتهن، ففيه قولان:

الأول: المنع لأنه تصرف يبطل به حق المرتهن من الوثيقة، ويلحق الضرر به، وهو قول الجمهور.

الثاني: الجواز لأنه يلزم لحق الله أشبه عتق المرهون، وهو قول الحنفية [30].

فصَّل الحنفية في وقف المدين على النحو الآتي : رأي الحنفية في وقف المدين:

أ. إذا كان الدين غير مستغرق لماله، ووقف ما زاد على ما يفي دينه، فوقفه صحيح نافذ، لعدم مصادمة حق الدائنين.

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[29] **د. عبدالعزيز بن سعد الدغيثر في حديث حول الوقف وأهم أحكامه – 4 – . الوقف على النفس. ووقف العقار المرهون**

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https://www.amlak.net.sa/home/%D8%A3%D8%AD%D9%83%D8%A7%D9%85-%D9%88%D9%82%D9%81-%D8%A7%D9%84%D8%B9%D9%82%D8%A7%D8%B1/

[30] سليمان بن جاسر الجاسر 2014

http://almoslim.net/node/204024

ب . إذا كان الدين مستغرقاً لماله: توقف نفاذ وقفه على إجازة الدائنين، سواء حجر عليه أم لم يحجر عليه، وسواء في حال مرض الموت، أم في حال الصحة، (الفقة الاسلامي 7625/10)

وهذا موافق لما نص عليه القانون المدني المصري (م2/ 238) والقانون المدني السوري (م2/ 239) من أن تصرف المدين إذا كان تبرعاً، لا ينفذ في حق الدائن.

الحالة الأولى: استخدام الناظر الاصول الموقوفة رهنا لضمان حقوق حملة الصكوك أو لتحمل مطاليب

الذي عليه عامة الفقهاء وائمة المذاهب عدم جواز رهن الوقف خشية ضياعه وهلاكه. والواقع ان هناك خشية في حال تم رهن الاصول الوقفية من قبل الجهة المنفذة للمشروع ثم تعثر المشروع فان الناظر او الجهة المنفذة ستضطر حينها لبيع تلك الاصول الوقفية لسداد الديون وبذلك يضيع الوقف. قال ابن قدامة:" ولا يصح رهن ما لا يصح بيعه, كأم الولد والوقف والعين المرهونة لأن مقصود الرهن استيفاء الدين من ثمنه, وما لا يجوز بيعه لا يمكن ذلك فيه" (المغني)

ولنفس غرض حفظ العين الموقوفة لم يجز الفقهاء للناظر الاستدانه على الوقف وقد افتت هيئة الاوقاف الاسلامية في السودان بعدم جواز رهن الوقف معللة ذلك بأن "رهن الوقف سيؤدي – في حالة عجز الهيئة عن سداد التمويل – إلي بيع الأصول المرهونة . فتعارضت مصلحة زيادة المنفعة مع المصلحة في بقاء الأصل.. . ورجح الفقهاء بقاء الأصل على تنميته بتمويل من شأنه أن يفضي إلي بيع أصل الوقف [31]"

وقد نص القانون السوداني على عدم جواز رهن الوقف في قانون المعاملات المدنية حيث اشار في المادة (720) علي ما يمنع رهن أموال الوقف قائلاً " :بعد إتمام الوقف لا يوهب الموقوف ولا يورث ولا يوصي به ولا يرهن ويخرج عن ملك الواقف ولا يملك للغير (مرجع)

ومثله نص القانون رقم 14 لسنة 2017 في امارة دبي بشان تنظيم الوقف والهبة في امارة دبي على عدم جواز رهن الوقف حيث نص في المادة 15 الخاصة بلزوم الوقف على أنه " لا يجوز التصرف بالملك الموقوف طيلة مدة الوقف بأي نوع من انواع التصرفات الناقلة للملكية او المقيدة للانتفاع بعوائدة كالبيع او الرهن او الهبة"

[31] http://hssb.gov.sd/ar/content/%D8%B1%D9%87%D9%86-%D8%B9%D9%82%D8%A7%D8%B1%D8%A7%D8%AA-%D8%A7%D9%84%D9%88%D9%82%D9%81-%D8%A8%D8%BA%D8%B1%D8%B6-%D8%AA%D9%86%D9%85%D9%8A%D8%A9-%D8%A7%D9%84%D8%A3%D9%88%D9%82%D8%A7%D9%81-%D9%88%D8%AA%D8%B7%D9%88%D9%8A%D8%B1%D9%87%D8%A7

وهذا ايضا يتوافق مع القاعدة الفقهية العامة تقول : مالا يجوز بيعه لا يجوز رهنه. وقد أيد هذا المذهب معيار الوقف الذي أعدته هيئة المحاسبة والمراجعة للمؤسسات المالية الإسلامية تحت عنوان " مالا يجوز للناظر" رهن أصول الوقف بدين على الوقف والمستحقين" 33: 4/3/5

والخلاصة أن استخدام الاصول الوقفية كرهن لا يجوز من باب الحفاظ على الوقف في حال التعثر او الافلاس. إلا انه يمكن للناظر ان يرتب لكفالة طرف ثالث او لبرنامج تامين تكافلي لضمان حقوق حملة الصكوك. وهذا مااقترحته هيئة الاوقاف الاسلامية في السودان في فتواها على جواز وجود ضمان طرف ثالث لسداد الالتزامات الجهة المنفذة او الناظر في حالة العجز.

وقد صدر قرار مجلس القضاء الأعلى السعودي رقم (159) وتاريخ 7/15/ وفصل فيه الإجراءات المتبعة للاقتراض على أراضي الوقف ورهنها حيث يتقدم الناظر على الوقف إلى القاضي الذي يقع الوقف في بلده بطلب الإذن بالاقتراض والرهن وبعد تحقق المصلحة يأذن القاضي بالاقتراض بموجب صك يصدره، ثم بعد تحقق إنفاق مبلغ القرض كاملا في عمارة الوقف وأن البناء حسب المأذون به وثبوت ذلك بواسطة أهل الخبرة يوجه القاضي (إذنا خطيا) لكاتب العدل لتسجيل إقرار الناظر برهن الإنقاذ وفق صك الإذن فيكتمل بذلك الإجراء[32]

وقد استثنى قانون الوقف لامارة دبي الانف الذكر منع رهن الوقف بوجود المصلحة لكن حصرها بوجود موافقة الواقف او المحكمة المختصة كما في المادة 19 حول التزامات الناظر.

الحالة الثانية: استخدام الواقف المبالغ الموقوفة كضمان او رهن لاخذ قروض او تحمل مطاليب

في المسالة السابقة كان الحديث عن استخدام الاصول الوقفية كرهن مقابل انشاء التزامات او مطاليب، تناقش هذه المسالة استخدام الواقف نفسه سواء كان مؤسسة ام فردا للمبالغ الموقوفة مؤقتا كرهن للاستدانه او لتحمل التزامات او مطاليب. وكما اسلفنا تتعلق صورة هذه المسالة في حالة صكوك الوقف النقدي المؤقت. حيث يتوقع المتبرع او المقرض استرداد امواله بحلول الاجل المتفق عليه وربما يفكر بالاستدانه ريثما يسترد امواله. يرى الباحث ان صورة الوقف النقدي المؤقت اقرب ماتكون للدين بحيث

[32] **الاقتراض على الوقف والرهن عليه**
https://www.okaz.com.sa/article/362768

تعتبر الصكوك الوقفية المؤقتة ديناً مؤجلا لحامل الصك اي من بين اصوله في بيانات الميزانية. وبالتالي يرى الباحث انه من الناحية النظرية يمكن لحامل الصكوك الوقفية المؤقتة ان يستدين ويستخدم مبالغ تلك الصكوك كرهن للاستدانة. لكن السؤال هل يجوز ذلك من الناحية الشرعية وهل تعتبر تلك المبالغ وقفا لها حكم الوقف الدائم؟ بالطبع نظرا لكون صورة الوقف النقدي المؤقت من المسائل المعاصرة الجديدة فمن المستبعد الوقوف على نص شرعي من كتب الامهات تتناول حكمه. لذلك يتعين على مجالس الفتوى والمجامع الفقهية تناوله بالبحث واصدار الفتوى اللازمة. الا ان الباحث يرى ان صورته تنطبق على صورة الدين ليصبح السؤال كالتالي: هل يجوز للدائن الاستدانة واستخدام دينه الحال مستقبلا كرهن. أو هل يجوز استخدام الدائن دينه رهنا. وقد ذكر الفقهاء صورتين لرهن الدين الاولى هي رهن الدين لمن هو عليه كان يكون لزيد دين على عمرو؛ كثمن مؤجل، أو مسلم فيه، أو قرض، فيشتري زيد من عمرو سلعة بثمن مؤجل، فهل يجوز له أن يرهن به الدين الذي له يف ذمة عمرو، أم لا؟

والصورة الثانية هي رهن الدين من غير من هو عليه وصورتها أن يشتري زيد من عمرو سلعة بثمن مؤجل، ولزيد دين في ذمة عبيد، فهل يجوز له أن يرهن بهذا الثمن الدين الذي له في ذمة عبيد، أم لا؟ [33]

وبالنظر الى حالة الصكوك الوقفية المؤقتة تكون الصورة الثانية وهي رهن الدين من غير من هو عليه اقرب اليها لانه لا يتصور ان يستدين حامل الوقف من الناظر او الجهة المنفذة للمشروع الوقفي كي يجعل دينه رهنا بل يتوقع ان يقوم حامل الصك بالاستدانه من جهة ثالثة و جعل الدين الموثق بالصكوك الوقفية المؤقتة رهنا لوقت السداد، بناء عليه ستركز المناقشة التالية على الحكم الشرعي للصورة الثانية. وقد اختلفت اراء الفقهاء حول الجواز[34] نظرا لاختلافهم في بيع الدين وفقا للقاعدة الفقهية مالا يجوز بيعه لا يجوز رهنه ويمكن ملاحظة رايين لفقهاء الشريعة في المسالة: الراي الاول يقول بعدم جواز رهن

[33] انظر عياد بن عساف بن مقبل العنزي "رهن الدين وتطبيقاته المعاصرة" مجلة البحوث الاسلامية العدد 110 1438 ص 241 – 320

https://www.ssa.gov.sa/download/%d8%b1%d9%87%d9%86-%d8%a7%d9%84%d8%af%d9%8a%d9%86-%d9%88%d8%aa%d8%b7%d8%a8%d9%80%d9%8a%d9%82%d8%a7%d8%aa%d9%87-%d8%a7%d9%84%d9%85%d8%b9%d8%a7%d8%b5%d8%b1%d8%a9/?wpdmdl=8195&refresh=5d8880b3b95dd1569226931

[34] انظر الفقه الاسلامي وادلته (**6**:**232**) https://al-maktaba.org/book/33954/4217#p2وايضا كتاب فقه المعاملات باب رهن الدين ص745 – في المكتبة الشاملة الحديثة http://www.islamilimleri.com/Kulliyat/Fkh/4Hanbeli/pg_122_0012.htm

الدين من غير من هو عليه وقد ذهب لهذا الراي جمهور الفقهاء من الحنفية والشافعية على الاصح والحنابلة على المشهور في المذهب.[35]

واستدل اصحاب هذا المذهب بقوله تعالى في سورة البقرة 283 "فرهان مقبوضة" حيث وصف الله تعالى الرهان بكونها مقبوضة، فلا تصح بدون القبض، والقبض إنما يتأتى في الأعيان، والدين ليس بعين فلا يمكن قبضه فلا يصح رهنه أذ لو امكن قبضه لصار عينا[36]،

والمذهب الثاني يرى جواز رهن الدين من غير من هو عليه وهو مذهب المالكية ووجه عند الشافعية.[37]

وقد استدل اصحاب بعدة ادلة ابرزها:

أن الدين يجوز بيعه من غير من هو عليه فجاز رهنه لأن كل ما جاز بيعه جاز رهنه[38]

ان الدين المرهون من غير من هو عليه مال تحصل الوثيقة به لكونه مقبوضا حكما فجاز رهنه كالعين[39]

قاعدة:تنزل الديون في الذمم منزلة الأعيان [40] واذا كان الدين في الذمة بمنزلة العين جاز رهنه العين[41]

وجاء في مواهب الجليل للحطاب (5 / 4) : وذكر في التوضيح وغيره أن رهن الدين يصح ولو على غائب , ويكفي في حوزه الإشهاد , والظاهر هنا الصحة أيضا، والله أعلم

والراجح والله اعلم جواز رهن الدين من غير من هو عليه وقد رحج ذلك ايضا بعض الباحثين المعاصرين [42]

خاصة اذا كان ذلك الدين مضمونا لدى المدين وهو في حالة الصكوك الوقفية المؤقتة مضمونا باصول وموجودات وكذلك بشركات التكافل وبذلك ينعدم خطر عدم التسليم وهو من اهم الاسباب التي ساقها المذهب الذي يقول بحرمة رهن الدين من غير من هو عليه.

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[35] يراجع أحكام القرآن للجصاص 524/1 ،مختصر اختلاف العلماء 290/4 ،التجريد 2751/6 ، النتف في الفتاوى 607/2 المهذب 309/1 ،فتح العزيز 3/10 ،روضة الطالبين 38/4 ،مغني المحتاج 122/2 ، أسنى المطالب 144/2 المبدع 213/4 ،الإنصاف 359/12 ،كشاف القناع 307/3 ،321 ،شرح منتهى الإرادات 2/228 ،مطالب أولي النهى 255/4

[36] أحكام القرآن للجصاص 525/1.

[37] حلية العلماء للشاشي 424/4 ،المهذب 309/1 ،فتح العزيز 3/10 ،روضة الطالبين 4/38 ،مغني المحتاج 122/2

[38] أحكام القرآن للقرطبي 411/3 ،فتح العزيز 3/10 ،تصحيح الفروع 185/4 ،الإنصاف .12/298

[39] أحكام القرآن للقرطبي 411/3 ،مغني المحتاج 122/2.

[40] التمهيد 290/6 ،291 ،فتح العزيز 3/10 ،إعلام الموقعين 3/4 ،النجم الوهاج في شرح المنهاج 296/4 يراجع ايضا رهن الديون والسندات في الفقه الاسلامي ، د. نزيه حماد ص 292.

[41] عياد بن عساف بن مقبل العنزي "رهن الدين وتطبيقاته المعاصرة" مجلة البحوث الاسلامية العدد 110 1438 ص267

[42] عياد بن عساف بن مقبل العنزي "رهن الدين وتطبيقاته المعاصرة

وقد تبنى قانون الإمارات القول بالجواز واشار في القانون الخاص بتنظيم رهن الدين المستمد من الفقه المالكي ونص في المادة (1491) : (من رهن دينا له يلزمه أن يسلم إلى المرتهن السند المثبت لهذا الدين) . وكذلك أكد في المادة (1492) : (لا يكون رهن الدين نافذا في حق المدين إلا بإعلان هذا الرهن إليه أو بقبوله له.

ولا يكون نافذا في حق غير المدين إلا بحيازة المرتهن لسند الدين المرتهن. وتحسب للرهن مرتبة من التاريخ الثابت للإعلان أو القبول) .

وجاء في المذكرة الإيضاحية للقانون: والرأي بعدم جواز رهن الدين لاحتمال الغرر مردود , مع قيام النصوص بضرورة توثيق سند الدين , وإعلان المدين , ومع قيام ضمانات عدم التغرير , ومثال ذلك رهن سندات على الدولة , وهي الدين على الدولة , ولا خلاف في قوة ضمانها وانتفاء التغرير , وتقاس عليها الأسهم والسندات والديون المتداولة في المعاملات.[43]

ومثل ذلك نص القانون الاردني على جواز رهن الديون من قبل الدائن وجاء في قانون ضمان الحقوق بالأموال المنقولة رقم20 لسنة 2018 المادة 6 على الرغم مما ورد في أي تشريع آخر، يجوز رهن الأموال المنقولة والديون رهنا مجردا من الحيازة، ويستعاض عن الحيازة بإشهار الرهن وفقا لأحكام هذا القانون لتمام الرهن ولزومه ونفاذه في مواجهة الغير. [44]

وبذلك اخذت هيئة المحاسبة والمراجعة للمؤسسات المالية الإسلامية ونصت في المعيار رقم 39 في البند 2/2/3 الاصل ان يكون المرهون عينا ويجوز ان يكون دينا او نقدا او مالا مثليا او استهلاكيا." ونص المعيار ايضا في البند 11/2/3 مع مراعاة ما جاء في الفقرة (5) يجوز رهن الدين سواء أكان ذلك الدين على المرتهن أم على غيره؛ 12/2/3 يكون قبض الدين المرهون بقبض وثيقته، أو بالإشهاد عليه عند رهنه، ويترتب على الدين المرهون أثره، وهو أن يكون المرتهن أحق به من غيره."

[43] فقه المعاملات باب رهن الدين ص745 – في المكتبة الشاملة الحديثة http://www.islamilimleri.com/Kulliyat/Fkh/4Hanbeli/pg_122_0012.htm

[44] قانون ضمان الحقوق بالأموال المنقولة رقم 20 لسنة 2018 المنشور على الصفحة 2387 من عدد الجريدة الرسمية رقم 5513 بتاريخ 2018/5/2 http://www.adaleh.info/Art.aspx?Typ=2&Id=1182

نتائج البحث

ناقشت هذه الورقة البحثية بعض المسائل الفقهية في الوقف النقدي المؤقت مع التركيز على الصكوك الوقفية المؤقتة ومشروع اوقاف نيوزيلاند المقترح بانشاء المزارع الوقفية من خلال اصدار الصكوك الوقفية لتمويل المشروع. وقبل ذلك عرفت الورقة بالصكوك الوقفية وآلية اصدارها من خلال الهيكل المقترح لاوقاف نيوزيلاند. وبعدها اشارت باختصار الى الخلاف الفقهي المتعلق بالوقف النقدي والتأقيت في الوقف وتبنت الجواز مع ذكر قرارات المجمع الفقهي الدولي بهذا الخصوص. وقد ركزت هذه الورقة على ثلاث مسائل رئيسية تتعلق بالوقف النقدي المؤقت. واول تلك المسائل مسألة وجوب الزكاة على الوقف مع المقارنة بمسألة الزكاة على القرض نظرا للشبه الكبير بين الوقف النقدي المؤقت بالقرض الحسن. وتتعلق مسألة الزكاة بكل من 1. الواقف 2. الموقوف عليهم (المستفيدون من الوقف. وخلصت الورقة الى عدم وجوب الزكاة على اي من الواقف والموقوف عليهم، فبالنسبة للواقف ففرض الزكاة عليه قد لايشجع الكثيرين على المشاركة في المشاريع الوقفية لانهم قد يخسرون بعض اموالهم للزكاة وخاصة في حالات التضخم التي تكون قد اقتطعت جزء من اموالهم، واما بالنسبة للموقوف عليهم ففرض الزكاة عليهم هو تحصيل حاصل لانهم عادة يكونون من المشمولين في مصارف الزكاة والمستحقين لها في الاحوال العادية. والمسألة الثانية التي تناولتها الورقة بالبحث هي موضوع تداول الصكوك الوقفية المؤقتة وخلصت الورقة ان في فتح باب تداول الصكوك خيرا كثيرا لاشراك عدد اكبر من المساهمين من اهل الخير. لكن يجب ان يتم ذلك ضمن الضوابط الشرعية للتداول وخاصة عندما تمثل تلك الصكوك اموالا نقدية، حينها يجب تبادل تلك الصكوك بالقيمة الاسمية دون زيادة او نقصان. وهنا يدعو الباحث المجامع الفقهية والهيئات الشرعية لاصدار القرارات التي تبين تلك الضوابط الشرعية. بخصوص المسألة الثالثة فهي تتعلق برهن الاصول الموقوفة من قبل الواقف او من قبل الناظر. وقد خلصت الورقة الى عدم جواز رهن الاصول الوقفية من قبل الناظر لتحمل ديون او مطاليب لما في ذلك من تعريض الوقف للخطر، الا ان وجود المصلحة قد يجيز ذلك وعند لا بد من استصدار اذن خاص من السلطات المختصة او من القاضي بعد النظر في تلك الحالة وبعد ترتيب كفيل من طرف ثالث واخذ الاحتياطات اللازمة، وقد أخذ بذلك قانون الوقف لامارة دبي في المادة 19 حيث حصر الجواز بموافقة الواقف او المحكمة المختصة. أما بخصوص الشق الثاني الهام في مسألة الرهن فهو استخدام الواقف في الوقف النقدي المؤقت لامواله رهنا لتحمل ديون او مطاليب لوقت حلول اوقافه المؤقتة، وقد رجحت الورقة مقارنة هذه الصورة بصورة رهن الدين من غير من هو عليه وخلصت الورقة الى تبني القول بالجواز وهو مذهب المالكية ووجه عند الشافعية. وهو مااخذ به قانون الامارات والاردن واجازه معيار هيئة المحاسبة والمراجعة للمؤسسات المالية الاسلامية (ايوفي) في المعيار رقم 39.

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APPLICATION OF LAW TO INCREASE FOREIGN INVESTMENT

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The principle used as the basis for the preparation of economic development cannot be separated from the principles contained in the Constitution of the Republic of Indonesia 1945 ("Constitution of 1945"), namely the principles of togetherness, equitable efficiency, sustainability, environmental insight, independence, and by maintaining the balance, progress and unity of the national economy. In law development, an approach to the national legal system has been outlined, which contains the principles of the constitution in an effort to run good governance. Law development has a very important role in supporting economic development.

To maintain the right direction of Indonesia's economic development, it must be planned in order to increase foreign investment through improving the procedures of investment licensing, improving infrastructure, and law enforcement as well. The logical consequences of a developing country, considering the importance of foreign capital and technology to accelerate economic growth in Indonesia, at the same time foreign domination of the Indonesian economy must be avoided. Therefore, development in the economic field must be in harmony with development in other fields, especially development in the legal field, because both have a very close relationship.

Keywords**: **Economic Development, Foreign Investment, Law Enforcement

A. Introduction

The principles used as the basis for the preparation of economic development cannot be separated from the principles contained in the Constitution of 1945, namely the principles of togetherness, equitable efficiency, sustainability, environmental insight, independence, and by maintaining the balance, progress and unity of the national economy. In development of law, it has been outlined the approach to the national legal system, which contains the principles of the constitution, because legal development has a very important role in supporting economic development.

Indonesia economic development plan is strived to increase foreign investment[45] through improvement of investment licensing procedures, infrastructure, and enforcement of law.[46]

As a developing country, there is a logical consequence for Indonesia that it should be considered the importance of foreign capital and technology in order to accelerate economic growth, but at the same time foreign domination of the Indonesian economy must be avoided. Therefore, development in the economic field must be in harmony with development in other fields, especially development in the legal field, because both have a very close relationship.

[45]Ida Bagus Rahmal, **Kerangka Hukum Kebijakan Investasi Langsung di Indonesia**, Ghalia Indonesia, Jakarta, 2005, p.1. Where are explained the terms investment and investment are known terms, both in business activities and in the language of the law. The term investment is more popular in the business world while the term investment is more widely used in the language of legislation. In the wider community the word investment has a broader understanding because it can include both direct investment and indirect investment (portfolio investment), whereas investment has more connotation to direct investment.

[46]Presidential Regulation Number 7 Year 2005 Regarding the National Medium Term Development Plan (RPJMN) 2004-4009, CHAPTER XVII Regarding Increasing Investment and Export of Non-Oil and Gas.

The capital is an important factor needed in economic development. As one of the steps to overcome the need for capital, the government of Indonesia has taken approaches in economic policy, including inviting foreign investment. In order to encourage and to foster foreign investment in Indonesia, on February 16, 1966 the government of Indonesia has signed an international convention, that is the Convention on the Settlement of Investment Disputes Between States and National of Other State, that ratified by the Law Number 1 of 1967 Regarding Investment (UUPM), Law Number 6 of 1967 Regarding Domestic Investment (UUPMDN), and Law Number 11 of 1970 Regarding Amendment and Addendum of Law Number 1 of 1967 Regarding Investment and Law Number 12 of 1970 Regarding Amendment and Addendum of Law Number 1 of 1967 Regarding Investment, until be enacted as the law.

It must be recognized that the investment, both foreign and domestic, is a factor that determines the success of economic development in Indonesia. For this reason, the government's effort to invite foreign investors to invest in Indonesia is based on evidence that the role of foreign investors in the economy is very significant in accelerating the (economic) development wheel in Indonesia, at least as evidenced when foreign investors leave Indonesia due to uncertainty politics, law, security and economy in Indonesia.

Initially, the investment, especially foreign investment, was open to all business sectors except certain fields which involved the interests of the state and the livelihoods of many people, such as ports, electricity, telecommunications, shipping, drinking water, railways, atomic power plants and mass media. Those fields cannot be fully controlled by foreign capital with the exception that foreign investment can only be done in collaboration with the Indonesian government or with state owned companies. An important provision to prevent the domination of foreign capital is the obligation of foreign capital to provide an opportunity for effective participation of national capital after a certain period according to the balance set by the government.

Seeing the reality in the society in this era of globalization, foreign capital should be given the opportunity to compete with national capital in providing services to the community, because with the competition it certainly brings a positive impact on the community with various benefits in addition to the availability of more choices. The urgency is that seeing the reality of the existence of national capital by both the government and the private sector is not of great benefit to the livelihoods of the people of Indonesia because in general it is only concerned with company profits. Instead the services provided by foreign capital through Foreign Investment (PMA) are felt to be less effective. The investment in the era of free market where the world seems to be infinite, has placed all the world's population in one global community, where the world has no border. The development of the world in the era of the second millennium was marked by the increasingly rapid leap of progress in the fields of science and technology. This development increasingly multi-dimensional when faced with such diverse human demands and needs. This complexity is increasingly when connected with the pattern of business relationships that exist in modern society. This implication has changed the nature of the world trade and economy into a form of global business community.

In developing the legal system in Indonesia, it must also be noted that the current national legal system in Indonesia is a combination of three systems that once existed in Indonesia, namely the western legal system, the customary legal system and the Islamic legal system. From these three systems the National legal system was formed.[47]

B. The Capital Investment in Relation with National Development

[47]Nuru Hakim,Pengaruh Pemikiran Hukum Snock Rgronje terhadap Penerapan Hukum Islam DI Indonesia, Jurnal Doktrin, Vol 1 Nomor 1, Tahun 2010. p 3.

The urgency of foreign investment is related to the capital needs of the development of the country. The entry of foreign investors was ultimately directed to support the acceleration of national development. The foreign investment is utilized to fill the lack of capital and national capacity, so that its role is as a complement to the available national capital.

Indonesia, although there are still many criticisms from outside, have tried to provide the lure to foreign investors, for example by issuing a deregulation package which among others has reduced the list of negative investments, reduced investment limits to lower tariffs and so on. In addition to the various alternatives above, Law Number 25 of 2007 regarding Investment (hereinafter referred to as UUPM) has been enacted, the UUPM has provided various new facilities beside existing facilities. The UUPM also stipulates that companies operating in the context of investment in Indonesia must be in the form of Limited Liability Companies under Indonesian law and domiciled within the territory of the Republic of Indonesia. The investment in the form of a Limited Liability Company can be done by: First, taking shares[48] at the establishment of a Limited Liability Company; Second, buying the company shares; Third, doing other ways in accordance with the provisions of the law and legislation.[49]

Another method that is permitted to invest[50] in Indonesia in the form of a Limited Liability Company is done with: First, a Joint venture is a collaboration between foreign and national capital be it private or central government or local government by setting up a new Limited Liability Company, for a business line that is open to foreign capital. Second, the production sharing contract where this term was first found in Article 12 paragraph (2) of Law Number 8 of 19971 Regarding PERTAMINA, then in Article 1 number 19 of Act Number 22 of 2001 Regarding Oil and Natural Gas, the term used is a form of cooperation contract. This cooperation contract can be done in the form of production sharing contracts or other forms of cooperation. This article does not specifically explain the meaning of product sharing contracts but is focused on theoretical cooperation in the natural gas and oil fields. Third, the management contract or contract of work, this is a form of cooperation in investment and participate in the management of the company. However, since formal juridical allowed the franchise to invest both in franchise and trade secrets, so this management contract is rarely done by special business investment.

The purpose of inviting investment, especially foreign capital, is essentially for technology transfer. Transfer of technology can be occurred through education and training, technical assistance, and hiring foreign experts. According to Sunaryati Hartono, the transfer of technology is a process that consists of several stages, namely imitation, adaptation and assimilation, then give birth to new innovations.[51]

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[48]A stock is a movable object and gives ownership rights to its holders. Ownership of shares as movable property gives material rights to the holders, which rights can be defended against everyone. Meanwhile, according to Anisitus Amanat, a stock is a piece or piece of paper that is intentionally made, formed and printed beautifully which gives two kinds of evidence to the owner or holder. First, prove that the owner / holder participates in the capital of a company and proves that the owner / holder is the owner of the company that issued the shares. Anisitus Amanat, Pembahasan Undang-Undang Perseroan Terbatas 1995 Dan Penerapannya Dalam Akta Notaris, Raja Grafindo Persada, Jakarta, 1997, p.41.

[49]Article 5 Law Number 25 Year 2007 Regarding Investment

[50]This matter has been enacted in Law Number 1 of 1967 concerning Foreign Investment, where this origin provides the following explanation: To expedite the implementation of economic development, the Government determines the forms of cooperation between foreign capital and national capital that are most beneficial for each business sector. Maybe this form of cooperation is in the form of a contract of work, a joint venture or other forms.

[51]Sunarjati Hartono, **Masalah-masalah dalam joint Venture Modal Asing dan Modal Indonesia**, Alumni, Bandung, 1974, p, 27.

As for the forms of transfer of technology that can be obtained from the country that provides the capital, namely: First, employing foreign workers individually. Second, organizing the supply of machinery or other equipment. Third, license agreement. Fourth, contract. Fifth, technical assistance.

The transfer of technology obtained from foreign investment essentially builds the country's industrialization. Because of the development of industrialization everywhere, not least in underdeveloped areas, actually will always give birth to a number of dilemmas. On the one hand, industrialization is expected to be a way out and a breakthrough door to accelerate efforts to reduce poverty and underdevelopment.

In the effort to uphold order in the economic field it must be based on the Pancasila and the Constitution of 1945. In Article 33 paragraph (1) of the Constitution of 1945 stipulated that "The economy is structured as a joint effort based on the principle of kinship." Furthermore, in paragraph (2) stated that "Branches of production which are important for the state and which control the livelihoods of the people are controlled by the state." Then emphasized paragraph (3) states that the earth and water and natural resources within the state are controlled for the prosperity of the people, while paragraph (4) describes the national economic system based on economic democracy with the principles of togetherness, fair efficiency, sustainable, environmentally friendly, independent and maintain a balance of progress and national economic unity.

In the subsequent developments emerged the concept of a modern legal state that has a broader authority. According to this concept the state remains a state of law, which means that state and community life is controlled by law and justifies the active state interference in the social, economic and cultural life of the people.[52] Furthermore, in the context of protecting human rights, the state as an institution formed based on community agreements (social contract) has a duty to help protect the rights of the people.[53]

This form of the modern legal state was later called the people's welfare state. Since the inclusion of the term of the welfare state, the state has interfered in the economy of its people through various policies that take the form of laws and regulations, including in social and environmental responsibility of companies in industrial estates. In accordance with the function of the state's presence, the government as an executive institution is responsible for advancing the welfare of its people which is realized through national development.[54]

Broadly speaking, there are some basic principles of a welfare state that reflect the role of the broader state in the welfare of its people namely:[55] First, that every human being has the right to obtain proper material and spiritual welfare. Second. that a decent living and a good standard of living by utilizing natural resources available through scientific knowledge. Third, that the state has the right and obligation to act when individual or private initiatives fail.

In Indonesia, state interference in the economic field can be seen from the 4th paragraph of the Preamble of the Constitution of 1945, which explains that in order to form an Indonesian Government which aims to protect the entire Indonesian blood spill.

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[52]Arifin Siregar, Ruslan Lubis, Issanuddin, ***Welfare State*** **(Negara Kesejahteraan**), Jurusan Hukum Tata Negara Fakultas Hukum Universitas Sumatera Utara, Medan, 1976, pp. 11-12.

[53]John O Manique,***Human Rights and Development, Human Rights Quartrly*****,** Vol. 14 The Johns Hopkins Univrsity Press, 1992, p.82.

[54]Ahmad Miru dan Sutarman Yudo, **Hukum Perlindungan Konsumen,** PT RajaGrafindo, Jakarta, 2004, p.30.

[55]*Ibid,* p.3. See also Romli Atmasasmita, **Teori dan Kapita Selekta Kriminologi,** Refika Aditama, Bandung, 2005, p.41. As stated by Locke, the function of the state is to protect the people based on the rule of law, which is the law in force in the country. In carrying out its duties to protect the community, one legal function is as a means to carry out social control in the community.

Based on the order mandated by the opening of the Constitution of 1945, the state has an obligation to protect all citizens from all kinds of threats that threaten, both physical and psychological, fear, and the dangers that threaten their property. Both from abroad or within the country.

State intervention in the field of economic development specifically for investment is carried out using fundamentals or principles.[56] These principles appear in forms of thought or ideas that are not explained in detail in the law but are assumed to have been accepted in or by the law in question. In all of these principles form the sphere of thought in which legal rules are enforced. As something that can be used as a basis, basic foundation or foundation of thought and ideals that become the basis, the principle is used to restore a thought.[57] The legal principle according to Satjipto Raharjo is the heart of the most extensive legal regulations and grounds and the reasons for the implementation of legal provisions.[58]

If seen from the three coveted legal ideals namely: First, justice, Second, expediency, Third, legal certainty, then the function of the legal ideal towards justice gets a view of the function of the legal principle which also leads to justice. Without the ideals of the law all legal norms lose their meaning as law and hence the legal ideal is also a regulative measure in assessing fair or not a positive law.[59] Whereas in Hans Kelsen's view justice is a social order that provides protection of the search for truth.[60]

From the view of the philosophy of Pancasila, justice can be formulated as an attitude of human behavior based on morals. This is based on the main ideas namely: First, the attitude of human behavior; and Second, moral values. The attitude of behavior possessed by every human being produces virtues arising from human consciousness and conscience, which is manifested in the act of thinking of the interests of others other than his self. In addition, humans as creatures of God Almighty, gift mind with compassion, while moral values refer to acts of kindness and happiness.[61]

In consideration of Law No. 25/2004 concerning the National Development Planning System it can be seen that the national development that is being implemented is not

[56]Investments are carried out based on the principle. First, legal certainty. Second, openness. Third, accountability. Fourth, the same treatment and does not distinguish the country of origin. Fifth, togetherness. Sixth, fair efficiency. Seventh, sustainable, eighth, environmentally sound, ninth, sterility, Tenth, balance and national economic unity. Which is contained in Law Number 25 of 2007 concerning Investment.

[57]Mahadi, **Falsafah Hukum Suatu Pengantar,** Alumni,Bandung, 2003, p.16.

[58]Satjipto Raharjo,**Ilmu Hukum,** Citra Aditya Bakti, Jakarta, 2000, p.45. Compare to Herlien Budiono, **Asas Keseimbangan bagi Hukum Perjanjian Indonesia,** Citra Aditya Bhakti, Bandung, 2006, which states that these legal principles have two foundations, which are rooted in the reality of society and in the values chosen by the community concerned as a way of life. The validity or validity of the legal principle is based on acceptance by the community.

[59]Wilk K, **The Legal Philosophies of Lask, Radbucrh and Dabin**, Harvard University Press, Cambridge, MA, 1950, p.72-78.

[60]Kelsen Hans, **What is Justice? Justice law and Politics in the Mirror of Science**, University of California Press, Berkeley and Los Angeles, 1957, pp.1-2. Declaring justice leads to democratic systems that apply in modern countries. The more democratic a political and legal system in the country, the more equitable the legal justice in the country is. And see also John Rawls, Political Liberalism, Columbia University Press, New York, 1993, where John Rawls explains two justice principles namely, First, every person has the same rights or the same basic rights system that is entirely adequate, which can be adjusted to same system for all. Second, social and economic inequalities must meet two conditions, 1). It must be related to different positions and positions for all under conditions of equal opportunity (the principle of freedom). 2) Must be more profitable for the most disadvantaged members of society (principle of difference).

[61]Thoga H Hutagalung, **Hukum Dan Keadilan Dalam Pemahaman Filsafat Pancasila dan Undang-Undang Dasar 1945**, Disertas di Universitas Padjadjaran, Bandung, 1996, p.348.

intended to pursue a high rate of economic recovery but emphasizes the importance of creating the welfare of the people at large. In the other word, the national development is the complete development of Indonesian people.[62] In addition, development must be adjusted to the objectives of the welfare state as mandated in the Constitution of 1945 especially Article 33. This national development must also be carried out based on the principle of democracy with the principles of togetherness, justice, sustainability and independence by maintaining a balance of progress and national unity. The position of the legal principle is a basic principle to strengthen the building of legal rules.[63]

Sunaryati Hartono[64] mentioned that the nature of a national development viz

"... The development is not only pursuing outward progress ... or inner satisfaction ... but harmony and balance between the two development is evenly distributed throughout the country ... "

All potentials must be empowered for the success of national development. Djuhaendah Hasan said that the development carried out in Indonesia is a comprehensive development in all sectors, where the economic sector is expected to be a support for development in other sectors.[65]

Development[66] in the broadest sense includes all aspects of community life and not just aspects of economic life - therefore the term economic development is actually not quite right, because we cannot develop the economy of a society without enjoining the development of other aspects of life. The role of law in development is to ensure that the changes that occur with legislation and decisions of the judiciary are better than irregular changes by using mere violence. Change and order are twin goals of a developing society.

In relation to economic development, Sunaryati Hartono said that economic development really needs legal facilities and infrastructure so that it can actually achieve the objectives that are planned. Sunaryati Hartono further stated that law has a very important role to maintain balance and harmony among various interests in society.[67]

The role of law in national development is to ensure that development is carried out in an orderly and orderly manner. Law as a means of community renewal (a tool of social engineering) taught by Roscue Pound. Then Mochtar Kusumaatmaja made adjustments to the real conditions in Indonesia. Where Mochtar Kusumaatmaja explained the role of law in the front in the development of a prosperous Indonesian society. Because the law becomes a tool that cannot be ignored in the process of community renewal needed in the development process. Furthermore, the law as a tool for renewal and community

[62]Darji Darmodiharjo & Sidharta, **Pokok-Pokok Filsafat Hukum, Apa dan Bagaimana Filsafat Hukum Indonesia**, Penerbit gramedia pustaka utama, Jakarta, 1999, p.240-241.

[63]Muhammad Arifin, Peyalahgunaan Keadaan sebagai faktor pembatas Kebebasan Berkontrak, Vol 1 Nomor 1 , Jurnal Doktrin, tahun 2010. Issn.20857869.

[64]Sunaryati Hartono, **Politik Hukum Munuju Satu Sistem Hukum Nasional**, Penerbit Alumni, Bandung , 1991, p.3.

[65]Djuhaendah Hasan, **Lembaga Jaminan Kebendaan Bagi Tanah Dan Benda Lain Yang Melekat Pada Tanah Dalam Konsepsi Penerapan Asas Pemisahan Horisontal (Suatu Konsep Dalam Menyongsong Lahirnya Lembaga Hak Tanggungan),** Penerbit Citra Aditya Bakti, Bandung, 1999, p.1.

[66]Development is a word used to describe processes and efforts to improve economic, political, cultural, legal and community infrastructure. Development is also aligned with the word social change. Mansour Fakih, **Sesat Pikir Teori Pembangunan dan Globalisasi**", Pustaka Pelajar, Yogyakart, 2001, p.10.

[67]Sunaryati Hartono, **Politik Hukum Menuju Satu Sistem Hukum Nasional**,Alumni, Bandung,1991, p.30.

development, which serves to maintain order in a developing society.[68] The same thing must be considered in development, according to Lili Rasjidi, quoting the opinion of Roscoe Pound, classifying interests protected by law in three main categories: public interest, social interest, and personal (private) interest.[69]

The reasonable basic of the function of law in development[70] explained further by Mochtar in his theory, law as a means of social development. The legal assumptions from Mochtar's theory are based on two things. First, that there is order or order in the development or renewal effort is desirable or even deemed necessary. Second, that the law in the sense of rules or legal regulations can indeed function as a regulator or means of development in the sense of channeling the direction of human activity in the direction desired by development or renewal.[71]

C. Procedures of Investment in Indonesia

Theoretically, it can be distinguished between direct and indirect investment, and from the benefits that can be taken by the recipient country, the presence of direct investment is more beneficial for the country. in addition, the presence of foreign investors can not only increase value added for the government but also have a direct impact on society.

The difference between foreign direct investment and indirect foreign investment, as shown below:

Table 2: The Difference between Direct and Indirect Investment

No	*Foreign Direct Investment (FDI)*	*Foreign Indirect Investment (FII)*
1	Transferring assets from a country to another	Transfer of money to buy shares
2	Establish a company	Not establish a company
3	All or part of the company controlled by the company's owner	Separation between owner and management
4	Investment cannot be withdrawing any time	Investment can be withdrawing at any time
5	Need physical presence	Not need physical presence
6	Based on Law No. 25/2007	Based on Law No. 8/1995

[68]Mochtar Kusumaatmadja, **"Konsep-konsep Hukum Dalam Pembangunan"**, Alumni, Bandung, 2002, p. 13,19,21 and 74. In this connection the legal role as a means of development was further confirmed by the Head of State on January 19, 1974, as follows: although development requires a series of urgent changes, it is absolutely essential to maintain order itself not to be given a static meaning, which only maintain the status quo. Law as an important means of maintaining order must be developed and fostered in such a way as to provide space for this change. Not the other way around, hindering renewal efforts because they simply want to retain old values. In fact the law must be able to come forward, show direction and provide a path for reform.

[69] Lili Rasjidi, **Filsafat Hukum**, **Apakah Hukum Itu?** CV Remaja Karya, Bandung 1988, p. 228.

[70]Sunarjati Hartono, commented that the legal function has four functions: law as maintaining security order; law as a means of development; law as a means of enforcing justice; and law as a means of public education. Sunarjati Hartono, **Hukum Ekonomi Pembangunan Indonesia**, Bina Cipta, Jakarta, p. 10.

[71]Mochtar Kusumaatmadja, **Hukum, Masyarakat dan Pembinaan Hukum Nasional**, Lembaga Penelitian Hukum dan Krimonologi, Fakultas Hukum-Universitas Padjadjaran, Bina Cipta, Bandung, 1986, p.13. See also: Mochtar Kusumaatmadja, **"Konsep-konsep Hukum Dalam Pembangunan,** *Op.Cit,* p. 190. Explain that state power is the mandate of the people as the owner of all the wealth.

7	Supervised by BKPM (Province Government)	Supervised by BAPEPAM-LK (Ministry of Finance Republic of Indonesia)

Source: Derivate from M. Sarnarajah, "*The International Law on Foreign. Investment*" Cambrigde University Press, 1994.[72]

From the table above it can be seen that in direct investment there is an asset transfer from one country to another, whereas for indirect investments the transfer of funds is to buy shares, so investors in indirect investments do not need to be physically present.

In direct investment, investors establish companies in destination countries, while indirect investments do not need to establish companies. Then also in direct investment the company is controlled in whole or in part by the shareholders, while the indirect investment occurs between the owner and management. In direct investment, an investor cannot withdraw the investment at any time, whereas in an indirect investment this can be done or can be moved at any time.

The general basis for foreign direct investment is Law Number 25 Year 2007 concerning Investment, while the general basis for indirect foreign investment is Law Number 8 Year 1995 concerning Capital Market. So that the management institutions of the two investment properties are also different, where foreign investment is directly managed by the Investment Coordinating Board (BKPM), while foreign investment is not directly managed by the Capital Market Supervisory Supervisor (BAPEPAM).

It is expected that by the enactment of Law Number 25 of 2007 can provide motivation / encouragement for both investors to increase their investment, as well as prospective investors to invest in Indonesia, because government policies to increase investment flows from a juridical perspective can already be said to be positive, as evidenced by the enactment of Law Number 25 Year 2007, which is a guarantee of legal certainty for investors / potential investors.

There are several guarantees of legal certainty given by the government to investors / potential investors, among others:[73]

1. The government gives equal treatment to all investors / non-discrimination, unless there are special rights based on an agreement with Indonesia;
2. The government will not take over the ownership rights of investors / nationalization, if done, the government will provide compensation, the amount of which is determined based on market prices;
3. The government does not prohibit investors to transfer their assets to the desired parties in accordance with statutory provisions;
4. The government gives investors the right to make transfers and repatriation in foreign currencies.

Law Number 25 Year 2007, Article 26 has explicitly regulated one-stop integrated services with the aim of establishing investors / investors in obtaining service facilities, fiscal facilities, and information regarding investments made by authorized institutions or agencies in investment sector that has been delegated or delegated authority from an institution or agency that has licensing and non-licensing authority at the central level or an institution or agency authorized to issue licenses and non-licenses in the province or district / city.

Laws that are regulated in various forms such as legislation, do not run in a vacuum. Law is a quantitative variable.[74] Every use and application of the law will increase the legal

[72]M. Sarnarajah, "*The International Saw on Foreign. Investment*" Cambrigde University Press 1994, p. 84

[73]*Ibid*

[74]Iman Jauhari, Sosiologi Hukum, Pustaka Bangsa Press, Medan, 2009, p. 5

quantity.[75] For example, applying the Copyright Act and defending it against piracy will add weight (quantity) to the law in the community, if the community uses it and implements it means that the community has been lawful.[76]

Satjipto Rahardjo in his various studies often mentioned the law as human behavior, in practice the law was seen from the symptoms caused by judges, courts, police, other state officials or the people themselves in obeying, obeying or violating established laws. Throughout history, humans will always leave a trail to be bound by the bonds they make themselves, but at the same time humans try to break away from the bonds that they make themselves when they feel they don't fit (again). This is what Satjipto called that human beings throughout their history, will build and obey the law (making the law) and breaking the law.[77]

D. Conclusion

The implementation of investment can only be achieved, if the supporting factors that hamper the investment climate can be overcome, among others through coordination between central and local government agencies, creation of efficient bureaucracy, legal certainty in the field of investment, high economic costs, and competitive climate conducive business. In addition to that the government must do generally increase investment through: First, provide legal certainty of transparency and not discriminate and provide equal treatment to domestic and foreign investors; Second, give incentives including fiscal facilities, immigration and import licenses; Third, Simplify the investment process and creating integrated services both obtaining fiscal facilities and information regarding capital management; The fourth is to prioritize domestic workers and allow certain positions and expertise for foreigners based on the legislation in force.

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[75]*Ibid*

[76]T. Riza Zarzani , Jurnal Doktrin ,Perlindungan Hak Cipta Musik Ditinjau dari Sosiologi Hukum. Vol 2, Nomor 2.

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PUBLIC TRANSPARENCY OF COURT IN INDONESIA AS A CONTEMPT OF COURT PREVENTION

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ABSTRACT

Public transparency in the courts, in particular, the case file information and decisions, often highlighted as it relates to the right to a fair trial. As an independent state agency, the court has a major role in the development of law, public policy, recognition and protection of rights, and state duty fittings retain national law. Public transparency also influences preventing Contempt of Court. Public transparency of an institution will be followed by increasing public confidence and low Contempt of Court. In Indonesia, there is no special legislation regarding the Contempt of Court. The term Contempt of Court simply stated in Penjelasan Undang-undang Nomor 14 Tahun 1985 Tentang Mahkamah Agung, butir 4 alinea ke-3. That its meaning is often misunderstood. While the Contempt of Court can be a result of the lack of public transparency. Indonesian constitution divides judicial authority in the field of justice are five general courts, religious courts, administrative courts, military courts, and the constitutional court. For that, it should be examined how an Indonesian court of public transparency effect on the prevention of Contempt of Court. Data is obtained from literature such as books, journals, previous research and check information updates on the official website.

***Keyword (s*)**: *Contempt of Court, Court, Public Transparency*

BACKGROUND

Historically, the absolute power of kings must be limited when they confront justice. There is a place where justice takes precedence and is applied to everyone, the court. In Indonesia it is called the Supreme Court of the Republic of Indonesia. Institutions in the constitutional system that hold judicial power together with the Constitutional Court and are free from the influence of other powers. below it is the general courts, religious courts, military courts and state administrative courts.

In the modern state administration system, the court is equal to the president and parliament. This emphasizes that every citizen is considered equal before the court. Because it is considered sacred, the court needs apparatus that upholds the sanctity. Then damaging his holiness deserves to be punished. According to the Black's Law Dictionary, contempt of court is any act which is calculated to embark, hinder, or obstruct the court in the administration of justice, or which is calculated to lessen its authority or its dignity. Including deliberately violating authority or thwarting judicial duties or carried out by parties in the case intentionally not obeying court orders.

Contempt of court existed before the XIII Century, but acts that demean the king's dignity, not the court or known as the Contempt of The King. At that time the king's power was very dominant and absolute and the concept of judicial independence was unknown. the rules are made by the king and the responsibility is only to God. But then many experts accelerated the courageous court and opposed the king if it contradicted existing norms.

The court is an official forum that has the legal authority to resolve disputes and seek justice. The court is a great, respected and authoritative institution so that many people in dispute become reluctant and afraid to get information related to their case. The result is people feel dissatisfied with the decision or the performance of the agency. Therefore the court is required to commit to implementing public transparency of information related to it.

Public transparency has started in for the last twenty years. A paradigm shift occurs, from all closed information except those declared open to all open information except those declared closed. The openness of public information begins with Undang-undang No 25 Tahun 1999 Tentang Program Pembangunan Nasional which encourages freedom and transparency of information. Then Law No. 14 of 2008 on Public Information and its derivative rules. Within the Supreme Court, there is a Chief Justice Decree No. 1-144 / KMA / SK / I / 2011 explaining information in court services. This information consists of three categories, firstly information that must be announced periodically, secondly information that must be available at all times and accessible to the public and thirdly information that is excluded.

It is important to discuss how public transparency in courts in Indonesia can reduce the contempt of court. The research method is normative juridical with legislative approach, case approach and

conceptual approach. The source is secondary data. Consists of primary legal materials, namely legislation and secondary legal materials, namely literature and research. The analytical method to obtain qualitative conclusions is juridical analysis.

DISCUSSION

Building public trust in law and its enforcement is an important aspect in Indonesia as a rule of law. Law enforcement has lost its identity because of the abuse of authority. Testing by higher judicial institutions, appeals from the High Court and the Supreme Court of cassation, has been infiltrated by corruption, then how to return the law to its habitat. One way is to open the widest possible access to the public to take part in the justice system. Provide information needed for a fair trial.

The principle of justice that is open to the public gives the right to the public to see, hear and follow the course of justice. The purpose of this principle is good, namely to hold an objective judiciary. Public presence in the judicial process can provide psychological challenges for judges so that it is not arbitrary or biased. But the question is whether the presence of the community in court can create an objective decision. The facts show that many of the judges' decisions are controversial or disturb the sense of justice. Even though the trial was witnessed by the community. In the Baiq Nuril's case, convicted of violating the Undang-undang Informasi dan Transaksi Elektronik, the Supreme Court rejected the request for Reconsideration by that. The honorary teacher from SMA 7 Mataram had to undergo six months of imprisonment and a fine of five hundred million rupiahs in three months' confinement. This shows that the principle of open justice is not a guarantee to make an objective and fair decision.

Judges' deliberations in making and compiling decisions are not open. So that the public cannot follow and witness it. Even though many decisions are subjective in this process and other factors, including bribery. Regulated in the Guidelines for Information Services in the Court as excluded information.

Public Transparency through Information Openness

There are several regulations supporting transparency and information services in court, first: Law No. 14 of 2008 on Public Information. This regulation is an optimization of public oversight of the administration of the state to realize good governance. The law which consists of 64 articles gives every Public Agency an obligation to open access for every public information applicant to obtain information, except information that is excluded.

Second, Law No. 25 of 2009 on Public Service set the principles of good governance which is the effectiveness of government functions. Effective public services carried out by governments can strengthen democracy and uphold human rights, increase economic prosperity, social cohesion, reduce poverty, protect the environment, be wise in the use of natural resources, deepen trust in government and public administration.

Third, Chief Justice Decree No. 1-144 / KMA / SK / I / 2011 on Guidelines for Information Services in the Court. Is a revision of the Chief Justice Decree No. 144 / KMA / SK / VIII / 2007 on Information Openness in Courts by adding more information disclosure to the Courts.

Fourth, Chief Justice Decree No. 026 / KMA / SK / II / 2012 on Judicial Service Standards. It is based on building public trust and improving the quality of services provided by the Supreme Court and the judicial bodies under it. Also to fulfill the mandate of Law No. 25 of 2009 on Public Service, as well as the basis for the team in all judicial bodies in providing public services.

Law Enforcement Contempt Of Court

Contempt of court first appeared in countries that adopted a Common Law System. England, regulate it in the Contempt of Court Act 1981. Everyone who violates criminal law must meet the following elements: the accused commits an alleged act, known as Actus-reus, and charged with violating the law by accompanied by evil intentions, Mens-rea.

Britain that adopts a strict liability system applies to 3 kinds of offenses, namely: public nuisance (disturbance of public order, blocking the road, emitting bad odors that disturb the environment); criminal libel; and contempt of court (violation of court rules). In 1742, the British imposed Contempt of Court by

the doctrine of Pure Streams of Justice, which is considered as the basis of its validity. In 1981 an update was made with the adoption of the 1981 Contempt of Court Act. The United States first enacted Contempt Court in 1789. Regulate enforcement and ensure the judicial process runs without pressure from various parties, as well as court officials.

The characteristics of the Contempt of Court, first, the rules about the types in Indonesia are implicitly set out in the Criminal Code and Criminal Code Procedures. A description of the related chapters is as follows: a. Contempt. Crucial characteristics. According to R. Soesilo, article 207 of the Criminal Code guarantees that the instruments of state power remain respected. Insulting orally or writing is attacking honor and damaging a reputation. This humiliation was contained in the Draft of Criminal Code. b. Intentionally. Criminal offense Contempt of Court committed on purpose. There are several intentions in the theory of legal science. First, according to Mr. M.H. Tirtaamidjaja has three forms: 1) Intentionally as an intent (oogmerk). 2) Intentionally certainty (opzet bij zekerheids-bewustzijn). Believing that his actions have inevitable consequences and will occur other consequences. 3) Intentionally aware of the possibility (voorwaardelijk opzet, dolus eventualis). He does not believe that the effect will occur but has estimated the possibility of the effect.

Second, the current context of the Contempt of Court is absurd and unclear. It is often obscured and confronted with the principles of transparency, judicial control, and freedom of expression in the name of democracy and reform. The Contempt of Court Rule has initially been a concept to prevent the influence and intervention of the judiciary, increasingly shifting to control over judicial authority.

In judicial power, there is the principle of independence of the judiciary. It means that the course of the judicial process must be guaranteed to avoid the influence, pressure, threats from any party that has the potential to reduce the nobleness of the principle. This principle is universal and recognizes in various countries.

Type contempt of court often refers to the categorization according to Oemar Seno Adjie, namely: One, disobeying court orders. Waiver of subpoenas is often done by parties who feel inappropriate to be present in court. For example, those who have positions in government structures or high social strata of society. Whereas in Article 27 paragraph (1) of the 1945 Constitution, it is explained that:

> “Segala warga negara bersamaan kedudukannya dalam hukum dan pemerintahan dan wajib menjunjung hukum dan pemerintahan dan wajib menjujung hukum dan pemerintahan itu dengan tidak ada kecualinya.”

Ignoring a subpoena as a witness or disputing party, is a disregard for the law and government, is also a denial of the provisions of the 1945 Constitution. The State Administration official who was summoned to the court also ignored it because feeling inappropriate or other reasons that did not make sense. This action opposes the judicial authority, which is an institution of dispute resolution with justice by the concept of the rule of law.

Two, the sub judice rule. The United States interprets it as an unusual act before the court so that it can obstruct the judicial process. Contempt of court now, the meaning and understanding are not clear. The concept of humiliation is obscure and confronted with the principles of transparency, judicial control, and freedom of expression beyond moral boundaries in the name of democracy and reform. Contempt of court regulation which was initially a concept to prevent and not insult court institutions. Nevertheless, increasingly shifted by the idea of control over judicial power involving technical judicial, both formally institutionalized, and by the general public. Directly carried out by giving an opinion that should not be commented on because it is related to the technical trial until the final stage, namely the reading of the judge's decision.

Three, the sub judice rule. It has been argued that in addition to executive, legislative, and judicial branches of government in Trias Politica theory, there are also other forces beyond the powers that be a balancing of all this power, the independent press. Press transparency is a positive signal in the life of democracy, nation and state. However, it becomes a problem when the press starts to enter and become a counterweight to the news, which dramatically influences the judicial process.

Fourth, scandalizing the court. Judges are ordinary people. Get the mandate to decide and enforce the law with justice. Mistakes and errors in the verdict must be there. As happened in the case of murder with defendants Sengkon and Karta, who have served sentences, years in prison, later admitted the real perpetrators. But that does not mean because of these mistakes, everyone has the right to make corrections and evaluations without legal procedures. There are existing rules in the mechanism for dissatisfaction with decisions that have been deliberately taken by the Judges.

Generally, the law applied must meet three elements, is; legal principles, legal norms, and legal rules. Legal principles give birth to legal norms. For example, it is prohibited to interfere with property

rights and subsequently will become legal rules, the principle of law, the principle of recognition of individual property rights. Then give birth to the rule of law for example article 362 of the Criminal Code:

> "Setiap orang yang mengambil barang sebagian atau seluruhnya milik orang lain, dengan maksud untuk seolah-olah dimiliki, dengan jalan melawan hukum, dipidana karena pencurian".

In Indonesia, there are no laws and regulations that specifically address the contempt of court. The discussion is only contained in the explanation of Law No. 14 of 1985 on the Supreme Court Item 4 of the 4th paragraph:

> "Selanjutnya untuk dapat lebih menjamin terciptanya suasana yang sebaik-baiknya bagi penyelenggaraan peradilan guna menegakkan hukum dan keadilan yang mengatur penindakan teradap perbuatan, tingkah laku, sikap dan/atau ucapan yang dapat merendahkan dan merongrong kewibawaan, martabat, dan kehormatan badan peradilan dikenal sebagai *contempt of court*."

Contempt of court in Indonesia has been regulated in Articles 207, 212, 214, 217, 218, 221, 223, 224 of the Criminal Code. Nevertheless, the actions regulated in these articles cannot be said to be officially understood. While cases of humiliation that occur in court are increasingly frequent, Indonesia has not yet made strict arrangements regarding this issue. Then we need a law that regulates it.

Contempt of court is not free from bad habits. It does not only occur inside the court but also during the trial. Examples, insulting judges, damaging objects inside or outside the court, chatting during the trial, using sharp objects and firearms, dressing improperly, bribery of judges, to not carrying out court decisions. Which cases often occur in the State Administrative Court. These things could be controlled by the presiding judge who presided over the proceedings at the time. If there is a dispute or commotion in the courtroom, the presiding judge can act decisively and reprimand even remove the rioters. The role of judges is enormous, considering that there are no specific regulations regarding the enforcement of contempt of court in Indonesia.

Identified into several groups of court insults in Indonesia that can cause changes to 3, is: relating to violating the law, related to violating the trial code of conduct, and related to changing the code of ethics of law enforcement. Cases of contempt of court in Indonesia often occur. It is performed by law enforcement or anarchist acts by justice seekers. One of them occurred at the Bantul District Court; an anarchist act carried out by the Pemuda Pancasila group who destroyed the court facilities. This incident is only a few examples of cases, many more cases that occur in Indonesia.

Public transparency and contempt of court

The lack of public trust in the judiciary is the main problem of harassment of the judiciary. The crisis of public trust is very influential on the integrity and authority of the judiciary as the last bastion of justice. To erode the spirit of the rule of law as mandated in article 1, paragraph 3 of the 1945 Constitution. As a follow-up to law enforcement is an attempt to realize the ideas of justice, legal certainty, and social benefits become a reality.

Law enforcement is the process of manifesting creativity. As an effort to the functioning of legal norms and guidelines in legal relations in social and state life. It is also an effort to realize the ideas and legal concepts that people expect to become a reality. Several factors affect law enforcement, according to Soerjono Soekanto:

First, legal factors. In the practice of law enforcement, there can be a conflict between legal certainty and justice. The cause is the concept of justice, which is abstract, while legal certainty is a procedure that has been determined normatively through legislation. A policy or action that is not entirely based on law can be justified as long as the policy or action is not contrary to law. The implementation of law does include not only law enforcement but also peace maintenance because the implementation of the law is a process of harmony between the values of the method and the pattern of real behavior aimed at achieving peace.

Second, law enforcement factors. The function of law, mentality, or personality plays an essential role in law enforcement officials if the rules are ethical, but the inferior quality officer then issues. Third, supporting facilities. Almost every court is equipped with an integrated service center. The public and justice seekers can ask questions or take care of their cases centrally. Nevertheless, some courts, the clerk that there was only one person while the long queues. It is not supported by sufficient staff. Fourth, community factors. Law enforcers from the community aim to achieve peace in the community. Some members of the community have legal awareness, but the quality varies. There are good and less functional. This factor is an indicator of the functioning of each law. Fifth, cultural factors. Cultural

functions to regulate human beings can understand how they should act and determine their attitude when dealing with others. Thus, culture is mainline of behavior that sets rules about what must be done and what is prohibited.

These factors, when related to the contempt of court, legal factors cannot be blamed because there are no specific regulations regarding contempt of court. Community factors are very important. This community is the people who interact directly with the courts and the public in general and can be divided into two general categories: factors of the knowledge society and people's satisfaction factor.

The element of ignorance and mistrust of society also cannot be forgotten. From the element of ignorance, it can be assumed that people who do not understand the law so feel cheated, do not believe and do contempt of court. Some contempt of court cases was carried out by lawyers. One of the cases was the beating of a judge in the Central Jakarta District Court by lawyer Tomy Winata, businessman Desrizal, when reading the court's ruling.

By knowing information related to a case, that is when the community is satisfied. Updates in Sistem Informasi Penelusuran Perkara (SIPP), for example. From research in the Palembang Religious Court, published SIPP is faster than in the Palembang District Court appeal. This allows abusive acts towards the court to occur more in the Palembang District Court than the Palembang Religious Court. When the community is satisfied, trust now arises. Trust is an indicator of reduced contempt of court in Indonesia. Public transparency is a preventive effort by the judiciary.

CONCLUSION

Contempt of court is nothing new in Indonesian justice. It exists and develops as the court system advances. The non-fulfillment of people's right to a judicial process, contempt of court is likely to occur. While the Contempt of Court Act is still a National Legislation Program, contempt of court is paid back to the articles in the Criminal Code just as repressive.

On the other hand, there is a Public Information Openness Act, which requires Public Agencies to open access for every applicant for public information except for specific information. It can be a preventive measure for the court to reduce the contempt of court. People who get information about a particular case quickly and entirely will tend to be more positive and accepting. The acceptance is a form of satisfaction in obtaining information that results in public trust in the institution. When people trust the court, the contempt of court decreases.

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