
# The Legal Challenges of Modern World

We live in and by the law. The law shapes who we are as citizens, employees, and property owners. We are subjects of the law's empire, obedient to its techniques and principles, tied in spirit as we argue what to do. What sense does this make? When the legal books are silent, vague, or ambiguous, how can the law command them?

This book provides a comprehensive response. Why is that so? It is because this book is meant to introduce various legal issues. Therefore, this book aims to introduce numerous legal challenges and solutions ranging from criminal law to business law, civil law to business law, and constitutional law. This book contains brilliant thoughts that attempt to address actual legal issues. If we want to avoid the mistakes of the past, we must reverse course and begin utilizing the scientific knowledge base. This opportunity did not exist a decade ago. Hence, now is the perfect time to do it.

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M. Imam Nasef (Ed.)

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Andi Widiatno, Ayu Nrangwesti, Ramadhana Anindyajati Bachry,
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# Preface

We live in and by the law. The law shapes who we are as citizens, employees, and property owners. We are subjects of the law's empire, obedient to its techniques and principles, tied in spirit as we argue what to do. What sense does this make? When the legal books are silent, vague, or ambiguous, how can the law command them? This book provides a comprehensive response. Why is that so? It is because this book is meant to introduce various legal issues. Therefore, this book aims to introduce numerous legal challenges and solutions ranging from criminal law to business law, civil law to business law, and constitutional law.

This book was written by lecturers who began with a weekly discussion session at the Faculty of Law, Universitas Trisakti. Thus, this book contains brilliant thoughts that attempt to address actual legal issues. As dean, I am proud that this book has been published so that it can be read by the larger community.

I hope that this work is widely read. If we want to avoid the mistakes of the past, we must reverse course and begin utilizing the scientific knowledge base. This opportunity did not exist a

decade ago. Hence, now is the perfect time to do it. We would like to express our heartfelt gratitude to everyone who contributed to making this book a reality in its current form.

Dean of Law Faculty, Universitas Trisakti

Dr. Dra. Siti Nurbaiti, S.H., M.Hum.

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# DIGITAL ASSETS AS GUARANTEE

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**Abstract**

The development of technology and information brings many benefits to businesses, especially those related to commerce and digital assets. However, it is believed that digital assets as security in commercial transactions do not yet have legal certainty in the commercial transactions subject to security. This is because positive law does not have regulations regarding guarantees related to digital assets as security. The Collateral Act, which is the right of access of this Agreement, may not be used as a subject. Digital assets cannot be used as collateral for the following reasons: in other words, digital assets are in the form of commodities that cannot be widely used to generate economic value. When, in that case, there is no digital asset guarantee agency that can guarantee implementation in Indonesia.

**Keywords:** digital assets, security guarantee.

## A. Introduction

The development of technology and information brings many benefits to businesses, especially in relation to commerce and digital assets. However, considering this point, digital assets as collateral in business activities do not yet have legal certainty in the secured business activities. As the subject matter of guarantees in positive law relates to digital assets as collateral, there are no rules governing this. Digital assets as security in positive law. Lien, which is the beneficiary of the main contract, digital assets cannot be used as a lien for the following reasons: There are several reasons, to generally achieve economic value. When in that case, there is no digital asset guarantee agency that can guarantee implementation in Indonesia.

These digital assets are typically categorized into images and multimedia, known as media assets and descriptive content. As technology advances, these digital assets are data that persists regardless of the device on which they were stored or created. As technology advances, so does digital asset management. Types of digital assets:

1. Cryptocurrency investment

   Cryptocurrency digital asset type is still a controversial form of digital asset investment in Indonesia. This digital currency was launched in 2009 under the name Bitcoin. Led by an anonymous group of developers, Satoshi Nakamoto. To date, over 3,800 digital currencies (https://coinranking.com) are traded on 205 exchanges, using almost the same platform as Bitcoin. These digital currencies include Ethereum, Ripple,

Bitcoin Cash, EOS, Stellar, Litecoin, Tether, Cardano, and more.

2. Mutual fund and stock investment

   In much the same way that digital assets are invested in cryptocurrencies in digital assets, mutual funds and digital assets in the form of equities are one of the digital asset investments we hear most about. It's one. Investing in mutual funds and stocks is now included in investing in digital assets and can be traded online through brokers and other marketplaces.

3. Social media

   This type of digital asset is familiar to us and not to our ears. We also follow many influencers and celebrities on our social media accounts. These celebrities and influencers' social media accounts are a type of digital asset. These influencers have built a digital footprint or image that allows them to influence their followers. Their social media accounts with large numbers of followers have become one of the most popular forms of digital assets we know.

Digital assets can be traded online, but cannot be physically seen or touched. Although we cannot touch digital assets directly, digital assets are physical assets that we can claim ownership of and control their value. You can sell, buy, store and trade digital assets online.

One example of a digital asset that is currently happening is NFT (Non-Fungible Token). Ghozali Everyday's account on OpenSea went viral because of sales of NFT selfie photos that

reached billions of rupiah. The owner of the Ghozali Everyday account has succeeded in reaping the coffers of money from consistently selling selfie photos taken within the last 5 (five) years. Ghozali Everyday's real name is Sultan Gustaf Al Ghozali, a 7th semester student at the Faculty of Computer Science, D-4 Animation Study Program, Dian Nuswantoro University (Udinus) Semarang. The second son of three brothers of the couple of Erna Setyawati and Heru Kamdani, was surprised because his photos had even gone viral and reaped financial benefits. Unlike other physical assets such as land, homes, cars, motorcycles, and expensive paintings, NFTs are digital and have a unique identity and ownership, which makes them worth selling. Artwork such as music, photos, recordings, and videos are uploaded in digital form in NFT format. NFT ownership is recorded on the blockchain and cannot be duplicated.

Source : https://news.detik.com/berita-jawa-tengah/d-5900096/miliarder-dadakan-begini-cerita-ghozali-everyday-cuan-miliaran-dari-nft

The advantages of trading digital assets include:

1. Forming self-image

   One of the most owned digital assets is social media. Digital assets in the form of social media influencers such as Facebook, LinkedIn, Instagram, and Twitter can shape a self-image for mass recognition. Consciously or unconsciously, social media plays an important role in people's lives. It is undeniable that social media as a digital asset has a great influence in determining the image and character of individuals in society.

2. Alternative passive income

   Given the existence of digital assets in the form of social media followers, many brands may wish to promote their products and recommendations on the social media pages of influencers. An influencer's social media accounts may not always be in the form of money, but they may receive engagement and products without spending or paying, as well as passive income.

3. Easy to trade

   One of the advantages of digital assets is that they can be traded very easily anytime and anywhere with an internet network. Unlike stocks, which follow business days and hours, digital assets can be traded 24/7.

4. More transparent

   Digital assets use the blockchain system, which makes digital assets more transparent than other investment vehicles. Blockchain is a computer technology for creating blocks that are linked together so that all information, both transaction and asset tracking, is known.

In addition to the advantages of trading digital assets, it is also necessary to know the weaknesses and drawbacks of these investment vehicles before investing in digital assets. The disadvantages of buying and selling digital assets include:

1. Many countries are not ready
   There are still many digital assets that are not regulated or supervised by the relevant authorities. Many countries are unprepared to face the rapid growth of digital assets. This makes it difficult for authorities to exercise maximum oversight.
2. There is no consumer protection
   Without clear regulation, consumers/investors of digital assets cannot be fully protected. Digital assets already have regulated instruments, but all risks rest entirely with the consumer.
3. It is considered not a pure investment
   There are still many people who consider digital assets to be trading tools rather than just investments. Because of the volatility of the price, you can make large profits in a short period of time, but you can also suffer a large loss in a short period of time.

Digital assets are relatively new and unique assets. It is therefore important to enact laws and regulations that can protect parties associated with these digital assets, especially when these digital assets are used as security objects. This paper raises two problems, namely: 1). What is the form of security for digital assets? 2). How is the execution of digital assets security?

## B. Discussion

Book II of the Burgerlijk Wetboek (BW) on Objects specifies the safety of enclosed properties. The conclusion of Book 2 of the BW means that the conception of the subject in question is limited only to those found in this BW or the Civil Code. Businesses, on the other hand, must follow the technology and information development of both transactions and objects as business objects that evolve according to the needs of the community.

1. Security

   Guarantees is broadly divided into two types: general guarantees and special guarantees. General guarantees are set out in Article 1131 BW to protect the person making the promise. However, since general guarantees still have many weaknesses, legislators are also preparing alternative guarantees that are more stable: special guarantees or securities covering goods/things. Collateral has the property of granting priority to certain goods/items and the inherent property of following the goods/items in question. A personal guarantee does not give preference to any particular goods/things and is only guaranteed through the property of the person who guarantees the performance of the relevant order. Right to give position:

   a. The creditor is prioritized and assisted in repaying the loan from the proceeds from the sale of a particular commodity or group of particular commodities from the debtor, and/or
   b. There are certain debtor assets subject to the right of the debtor, which are valuable to the debtor and may

put psychological pressure on the debtor to adequately perform its obligations to the creditor. Since the asset acting as collateral is usually valuable to the debtor, there is a kind of psychological pressure on the debtor to repay the debt. It is human nature to seek to protect what is valuable, considered to be one's property, and recognized as one's property, and this is the basis of guarantee law.

According to Civil Law which are generally the kinds of goods known in Burgerlijk Wetboek are as follows:

a. Tangible goods and intangible goods (lichamelijke zaken-onlichamelijke zaken, Article 503);
b. Movable and immovable goods (roerende zaken-onroerendezaken, Article 504);
c. Consumables and non-consumables (verbruikbare zaken-onverbruikbare zaken, Article 505);
d. Goods in trade and goods outside trade (zaken in de handelzaken buiten de handel, Article 1332);
e. Things that already exist and things that will still exist (toekomstige zakentegenwoordige zaken, Article 1334);
f. Divisible and indivisible goods (deeibare zaken-ondeelbarezaken, Article 1163);
g. Items that can be replaced and items that cannot be replaced (ven/angbare zakenonven/angbare zaken, Article 1694).

2. Digital assets

A digital asset is a commodity or object of value that exists in an electronic system and can be owned and controlled by both individuals and entities. Digital assets are an evolution of the asset concept that originally existed only in the physical world but has evolved into the digital world. Furthermore, a digital asset is an object whose ownership is digitally recorded and which can be directly controlled by the owner.

Encryption technology is a technological innovation designed to protect communications between two parties so that a third party cannot compromise the confidentiality and integrity of the data being transmitted. Cryptography is sophisticated with blockchain technology that connects servers in a decentralized, peer-to-peer fashion, creating a transaction book using cryptography as a verification method. Once a transaction is recorded, the ledger cannot be changed without the consent of the majority of servers on the network. Blockchains consist of public and private blockchains, as well as the internet and intranets.

According to Goldman Sachs, Bitcoin is sometimes called a currency, a financial asset, or a commodity. On the other hand, Srokosz and his Kopyscianski argue that the legal treatment of Bitcoin in each country is determined by the legal system adopted (common law or civil law). In the United States, Bitcoin is classified as legal tender as it is considered the official currency within the group. After that, in Europe, which adopted a civil law legal system, Bitcoin

was classified as private property like securities, so it was not recognized as legal tender.

3. Object of Security
   Items that may be subject to security agreements are commodities within the meaning of BW Section 1332, but goods that are not subject to security agreements are not subject to security agreements. Items that can be used as collateral/collateral are subject to transferability and economic value. These terms are cumulative, not alternative.

In the digital age, people's needs generally use digital to make economic transactions easier and more efficient. The emergence of crypto or bitcoin as a digital product as a digital trading tool is not officially regulated in Indonesia. It's just that crypto assets are recognized as commodities. Commodity means goods, services, other rights and interests, and derivatives of commodities that are tradable and are subject to futures contracts, shariah derivative contracts, and/or other derivative contracts. The legality of crypto-assets is regulated by Article 1(7) of Commodity Futures Trading Supervisory Authority Regulation No. 5 of 2019 on Technical Regulations for Physical Market Operators of Crypto-Assets (Crypto-Assets) on Futures Exchanges. increase. According to the regulations, crypto assets (crypto assets), hereinafter referred to as crypto assets, are not commodities. It uses tangible digital assets using cryptography, peer-to-peer networks, and distributed ledgers to manage the creation of new entities, validate transactions, and secure

transactions without interference from other parties. The concept of a digital asset as an item that has commercial value, is already legal, and is used by the general public does not preclude its use as an endorsement.

Elements of NFTs fill the scope of ownership in the form of digital assets. Article 499 of the Civil Code states that goods are all things and rights that can be the subject of property rights. Article 1131 of the Civil Code states that all movable and immovable property belonging to the debtor serves as security for the debtor's personal obligations, both now and in the future. Indonesian regulations do not provide a legal framework for her NFTs, so using NFTs as collateral for contracts has no legal basis. Her perception of NFTs as security objects with legal grounds still has a long way to go, as no clear legal protection exists for NFTs. However, as with Ghozali, all NFT transactions are taxable.

The Ministry of Communications and Information ("Kominfo") has issued a notice to the NFT transaction platform that the platform facilitates the dissemination of content that violates laws and regulations, whether in the form of violation of personal data protection regulations or infringement of intellectual property rights. I warned you not to. right. Kominfo monitors trading activity for non-fungible tokens (NFTs) in Indonesia and coordinates with the Commodity Futures Trading Regulatory Authority (CoFTRA) of the Ministry of Trade as the licensing authority for the governance of cryptocurrency trading.

Law Number 11 of 2008 on Information and Electronic Transactions (including its amendments and implementing regulations) obliges all PSEs to ensure that their platforms are

not used for acts contrary to laws and regulations. Violation of existing obligations may be subject to administrative penalties, such as blocking access to the platform for users from Indonesia.

NFT artist Clarissa Veronica explained that NFTs are digital assets that have a token or certificate number as their authenticity ID. NFTs are traded in cryptocurrencies and used as an investment vehicle. For artists and creators, NFTs have economic potential due to the perpetual royalties. Additionally, her NFT transactions involving cryptocurrencies are attractive to the general public. And before implementing NFT, the community also needs to make various preparations. NFT creators need to understand the norms of ethics, labor, capital, and energy. NFT creators are prohibited from mining (uploading someone else's work, uploading the same work elsewhere), plagiarism, creating works that violate human rights or race or ethnicity, or promoting works that are not in place it has been.

The existence of a final guarantee is attached to the principal contract, i.e. the loan or loan agreement. Let the loan agreement be the main contract/main contract and the collateral be the addendum/subcontract. Accordingly, whether there is a warranty or not depends on the Principal Contract and the warranty shall not be greater or less than agreed in the Principal Contract. Basically, a guarantee arises from Article 1131 and 1132 BW, which guarantee legal certainty for a creditor to obtain a right against a debtor. In addition, the contract divides guarantees into two types: general guarantees and special guarantees. A general guarantee is a guarantee given to all creditors for all assets of the debtor. Even if the guarantee is not expressly stated in the

contract clauses, the creditor acquires a legal right, i.e. BW §1131. However, no creditor has priority for payment. A special guarantee is a guarantee created as a result of a special agreement between a debtor and a creditor, but which designates certain items as collateral for the principal contract. For example, pledges, escrow collateral, mortgages, etc. Special warranties distinguish between warranties and personal warranties. Security follows the nature and characteristics of the objects acting as security.

A security item is a commodity/item that has characteristics within the meaning of Article 528 BW. In this article, it describes the property as having two characteristics. Firstly, the absoluteness of property rights that can be enforced by all, and secondly, the droit de suite that property rights are attached to the person who owns the goods/things. Goods/items subject to security in the legal sense are personal property and immovable property. There are two types of collateral for personal property: there are two types of security, namely pledge and fiduciary, while for immovable goods, types of security are mortgage (hak tanggungan) and hypothec. The four types of collateral already have their own forms/systems of collateral. As background, based on the development of technology and information, debt transactions can now be carried out online under the supervision of the Financial Services Agency. Some digital assets are investments in the digital age.

From its own perspective, digital assets are mobile but intangible, and by their very nature and nature they can easily follow the will of their owners or simply be transmitted digitally and over the internet. Digital assets can be stored on electronic devices and servers, and can be transferred from one wallet to

another via electronic networks or the Internet. You can even transfer bitcoins from cold storage to your mobile wallet if you want. Based on this declaration, digital assets can meet the requirements of commodities. Therefore, it can be concluded that a digital asset is a tangible commodity that can be moved or transferred from one owner to another and is an intangible commodity as it is in digital form through electronic devices via the internet. . However, there are no legal regulations governing this under the Guarantee Act. According to the authors, due to the similar nature of collateral objects, digital assets can be secured using trust authorities. However, this cannot be enforced as there are no regulations governing this.

## C. Conclusion

For digital assets depends on what type of digital asset is a pawn or fiduciary either pledge or fiduciary. Digital assets are collateral intangibles that are not specifically regulated by law or regulation. Basically, the legitimacy of the civil legal system adopted in Indonesia is urgently needed to ensure legal certainty. Digital assets cannot be used as collateral for the following reasons: There is no guarantee agency for digital assets that can guarantee implementation in Indonesia. The role of the legislator is therefore to pursue the legality of digital assets, especially as collateral, in order to achieve legal certainty, taking into account the needs of the community for technology and digitality. For digital assets is also difficult because digital assets are traded online, but cannot be seen and touched physically.

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# LEGAL CONSEQUENCES OF MILK KINSHIP MARRIAGE ON THE POSITION OF CHILDREN AND INHERITANCE RIGHTS IN THE PERSPECTIVE OF THE MARRIAGE LAW AND THE CIVIL CODE

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## Abstract

Every mother who gives birth must give exclusive breast milk to her baby. As for a biological mother who cannot provide breast milk for her baby due to medical indications, the mother is absent, or the mother is separated from the baby, breast milk can be given by a breast milk donor. The provision of breast milk by breast milk donors must be carried out based on religious norms and consider socio-cultural aspects, quality, and safety of breast milk. The government has not accommodated the registration of recipients and donors of breast milk. This is a problem in the future if the recipient of breast milk does not know the family of the donor of breast milk, there is a possibility of marriage between the recipient (baby) of mother's milk marrying the child of the donor of breast milk. This marriage is called incestuous marriage. Breastfeeding marriages that are prohibited are not only marriages carried out by couples born from the same mother's womb and receiving milk from the same mother, but also couples born from different mothers' wombs

and receiving milk from the same mother. Breastfeeding brings legal consequences to the legal position or not of a child and the right to inherit the child from his parents or also the child's guardianship rights. The formulation of this counseling problem is related to breastfeeding in the perspective of the Marriage Law and the Civil Code. The study focused on (1) What is the position of children from milk kinship marriages based on the Marriage Law? (2) What are the inheritance rights of children from milk kinship marriages based on the Civil Code? The type of research used is normative literature research by conducting a search on library materials in the form of literature and legislation relating to the position of children and inheritance rights due to the marriage of the parents who are breastfeeding. The type of data used is secondary data which is arranged in the form of literature consisting of books, journals, legislation, and writings relating to the position of children and inheritance rights due to the marriage of the parents who are breastfeeding. The method used in this study is a normative legal research method. In this case, it focuses on law as a statutory system that is enforced as positive law in Indonesia. Conclusions are drawn by starting with general things and then applying them to specific things. Conclusions in the form of (1) children born from milk kinship marriages are children whose civil and legal consequences are considered equal in position as legal children; (2) The position of a child born from milk kinship marriage still has an official legal position as a legal child who has a legal relationship with his mother and father, so that the child has the right to be the heir of both parents.

**Keyword:** breast milk, marriage, children.

## A. INTRODUCTION

Newborns are very susceptible to infections caused by exposure to bacteria and viruses. "Prevention of this can be done by one way of giving breast milk in the first 30 (thirty) minutes after birth. Breastfeeding can maintain prolactin hormone levels and prevent prelacteal.[1] The government is responsible for setting policies in order to guarantee the right of babies to get breast milk, so the state also mandates this as stated in Article 128 of Law Number 36 of 2009 concerning Health which states that babies have the right to get breast milk, and during breastfeeding, the family, government, local government and community must fully support mothers and babies by providing special time and facilities. The rules for implementing this article are regulated in Government Regulation Number 33 of 2012 concerning Exclusive Breastfeeding. Article 6 of Government Regulation Number 33 of 2012 states that every mother who gives birth must provide exclusive breast milk to her baby. As for a biological mother who cannot provide breast milk for her baby due to medical indications, the mother is absent, or the mother is separated from the baby,[2] breast milk can be given by a breast milk donor.[3]

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1 Linda Amalia dan Yovsyah Yovsyah, "Pemberian ASI Segera Pada Bayi Baru Lahir," *Jurnal Kesehatan Masyarakat Nasional*, Vol. 3 No. 4 Februari 2009, at https://journal.fkm.ui.ac.id/kesmas/article/view/220, accessed 17 September 2022.

2 Article 7 Peraturan Pemerintah Number 33 Year 2012 tentang Pemberian Air Susu Ibu Eksklusif.

3 Article 11 Peraturan Pemerintah Number 33 Year 2012 tentang Pemberian Air Susu Ibu Eksklusif.

The provision of breast milk by breast milk donors must be carried out based on religious norms and consider socio-cultural aspects, quality, and safety of breast milk.[4] The government has not accommodated the registration of recipients and donors of breast milk. This is a problem in the future if the recipient of breast milk does not know the family of the donor of breast milk, there is a possibility of marriage between the recipient (baby) of mother's milk marrying the child of the donor of breast milk. This marriage is called milk kinship marriage. Milk kinship marriages that are prohibited are not only marriages carried out by couples born from the same mother's womb and receiving milk from the same mother, but also couples born from different mothers' wombs and receiving milk from the same mother.

The state guarantees the rights of citizens to form families and continue offspring through legal marriages, guarantees the rights of children to survive, grow and develop and are entitled to protection from violence and discrimination as mandated in Article 28B of the 1945 Constitution of the Republic of Indonesia. Marriage in Indonesia is regulated in Law Number 1 of 1974 in conjunction with Law Number 16 of 2019 and this law is universal. When the law takes effect, there is a legal unification of marriage in Indonesia as a guide in the implementation of marriage.

Milk kinship marriages are marriages that are prohibited and regulated in Article 8 letter d of Law Number 1 of 1974 in conjunction with Law Number 16 of 2019. Marriages that are prohibited but still take place can have legal consequences on the

4 Article 11 (3) Peraturan Pemerintah Number 33 Year 2012 tentang Pemberian Air Susu Ibu Eksklusif.

position of the child and property of the marriage. This research examines milk kinship marriage in the perspective of the Marriage Law and the Civil Code. The study focused on (1) What is the position of children from milk kinship marriages based on the Marriage Law? (2) What is the inheritance rights of children from milk kinship marriages based on the Civil Code?

## Conceptual framework

The type of research used is normative literature research by conducting a search on library materials in the form of literature and legislation relating to the position of children and inheritance rights due to the marriage of the parents who are breastfeeding. The type of data used is secondary data which is arranged in the form of literature consisting of books, journals, legislation, and writings relating to the position of children and inheritance rights due to the marriage of the parents who are breastfeeding. The method used in this study is a normative legal research method. In this case, it focuses on law as a statutory system that is enforced as positive law in Indonesia. Conclusions are drawn by starting with general things and then applying them to specific things.

Historically, various marriage laws apply to various groups of citizens and various regions, such as the following:[5] 1. For native Indonesians who are Muslims, religious laws that have been inspired in Customary Law apply; 2. For other Indonesians, customary law applies; 3. For native Indonesians who are

5 Penjelasan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.

Christians, Huweliksordonantie Christen Indonesia (S. 1933 No. 74) applies. 4. For Chinese Foreign Easters and Indonesian Citizens of Chinese descent, the provisions of the Civil Code with minor changes apply; 5. For other Foreign Easterners and Indonesian Citizens of other Foreign Eastern descent, their customary law applies; 6. For Europeans and Indonesian Citizens of European descent and who are equated with them, the Civil Code applies.

The definition of marriage based on Article 1 of Law Number 1 of 1974 as amended by Law Number 16 of 2019 concerning Marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on Belief in the one and only God. From this understanding, marriage does not only have physical/physical elements, but also mental/spiritual elements which have an important role as well.

Marriage is prohibited between two people who are:[6] 1. related by blood in a straight line of descent or descent; 2. related by blood in a sideways lineage, namely between siblings, between a person and a parent's brother and between a person and his or her grandmother's brother; 3. having sexual relations, namely in-laws, step-daughter-in-law and mother/stepfather; 4. related to breastfeeding, namely nursing parents, nursing children, nursing siblings and nursing aunts/uncles; 5. having a relationship with the wife or as an aunt or niece of the wife, in the event that a husband has more than one wife; 6. have a relationship which by their religion or other applicable regulations, marriage is prohibited.

6 Article 8 Undang-Undang Number 1 Year 1974 tentang Perkawinan.

Furthermore, the conditions for marriage as regulated in Articles 6 to 11 of Law Number 1 of 1974 are as follows:[7] 1. There is agreement between the two prospective brides; 2. There is permission from parents/guardians for the prospective bride and groom who are not yet 21 (twenty one) years old; 3. The age of the prospective groom has reached 19 (nineteen) years and the bride has reached 16 (sixteen) years; 4. Between the two prospective bride and groom there is no blood/family relationship that is prohibited from marrying; 5. Not bound by marital relations with other people; 6. Not divorced for the second time with the same husband or wife, who wants to be married; 7. For a woman (widow) cannot remarry before the waiting time has passed.

The legal consequences of marriage are as follows: 1. The rights and obligations of husband and wife,[8] that the position of husband and wife is balanced, with the husband as the head of the family and the wife as a housewife with predetermined obligations, and each party has the right to perform legal action. In this case, if the husband and wife neglect their obligations, then each of them can file a lawsuit to the court; 2. Property in marriage,[9] that there will be what is called joint property as long as both parties, both husband and wife, do not separate property specifically. What is meant by joint property is property acquired during the marriage. While the assets carried by each party are

7 Fitria Agustin. "Kedudukan Anak dari Perkawinan Berbeda Agama Menurut Hukum Perkawinan Indonesia." *AJUDIKASI: Jurnal Ilmu Hukum*, Vol. 2 No. 1, Juni 2018, h. 46-47, https://core.ac.uk/download/pdf/327233414.pdf.

8 Article 30 Undang-Undang Number 1 Year 1974 tentang Perkawinan.

9 Article 35 Undang-Undang Number 1 Year 1974 tentang Perkawinan.

called innate assets, and in this case each party has the full right to carry out legal actions regarding their assets; 3. The position of a child born in or as a result of a legal marriage,[10] that this legitimate child has inheritance rights over the assets of both parents.

## B. DISCUSSION

### 1. Child Position Due to Parental Milk Kinship Marriage According to Marriage Law

Marriage to be valid must be recognized by law, and this happens if the marriage is carried out according to the provisions of the law. The marriage must meet 2 (two) kinds of conditions, namely material requirements and formal requirements.[11] Material requirements are requirements regarding the personal requirements of the prospective husband and wife who will carry out the marriage, while the formal requirements are requirements regarding the formalities that must be met or carried out at the time of the marriage. Material requirements are divided into two kinds of conditions, namely: 1. General material requirements or absolute conditions of a marriage. This condition is a condition that applies to all marriages, if these conditions are not met then the person concerned cannot carry on at all, because it is said that material conditions that are not fulfilled give rise to absolute authority to enter into marriage and it is said to be an absolute

10 Article 42 Undang-Undang Number 1 Year 1974 tentang Perkawinan.

11 Wahyono Darmabrata, *Hukum Perkawinan Perdata (Syarat Sahnya Perkawinan, Hak dan Kewajiban Suami Istri, Harta Benda Perkawinan,* (Jakarta: Rizkita, 2019).

obstacle to marriage. ; 2. The special material conditions or the relative conditions of a marriage are conditions that only apply to certain marriages and the non-fulfillment of these conditions creates special authority, because it is said that it is a special marriage obstacle.

There are 2 (two) kinds of special material requirements, namely: a. The existence of prohibitions to carry out marriages in the form of prohibitions that do not allow the granting of dispensation on the basis of a close blood relationship or a close marriage relationship and prohibition of marriage on the basis of certain circumstances; b. There is an obligation to ask permission to carry out marriages from people appointed by law. There are 2 (two) formal requirements, namely the formal requirements that precede the marriage and the formal requirements that must be met at the time of the marriage. The formal requirements that precede the marriage are:

1. Notification of the intention to marry, in which the prospective husband and wife must inform the Civil Registry Officer of their domicile in writing or verbally, namely in person. The notification is made a deed by the Civil Registry Officer; 2. Announcement of the marriage will be announced by the Civil Registry Office by attaching the announcement letter to the big door of the agency building where the civil registry deeds are stored and lasts for 10 (ten) days. New marriages can take place after 10 (ten) days have passed since the announcement is made. If within 1 (one) year the marriage has not taken place, the announcement must be repeated. Marriage is legal if it is carried out according to

the law of each religion and belief.[12] With the formulation in Article 2 paragraph (1), there is no marriage outside the law of each religion and belief, in accordance with the 1945 Constitution. What is meant by the law of each religion and belief includes the provisions of the legislation that applies to their religious group and belief as long as it does not contradict or is not otherwise stipulated in this law. The conditions for marriage that must be fulfilled as regulated in Articles 6 to 11 of Law Number 1 of 1974 are as follows:[13] 1. There is the approval of the two prospective brides; 2. There is permission from parents/guardians for the prospective bride and groom who are not yet 21 (twenty one) years old; 3. The age of the prospective groom has reached 19 (nineteen) years and the bride has reached 16 (sixteen) years; 4. Between the two prospective bride and groom there is no blood/family relationship that is prohibited from marrying; 5. Not bound by marital relations with other people; 6. Not divorced for the second time with the same husband or wife, who wants to be married; 7. For a woman (widow) cannot remarry before the waiting time has passed. Therefore, marriage ratification is carried out according to each religious law first and then recorded at the registry office.

12 Article 2 (1) Undang-Undang Number 1 Year 1974 tentang Perkawinan.

13 Fitria Agustin, *Op. Cit.*

The marriages that are prohibited between two people are:[14] 1. related by blood in a straight line of descent or descent; 2. related by blood in a sideways lineage, namely between siblings, between a person and a parent's brother and between a person and his or her grandmother's brother; 3. having sexual relations, namely in-laws, step-daughter-in-law and mother/ stepfather; 4. related to breastfeeding, namely nursing parents, nursing children, nursing siblings and nursing aunts/uncles; 5. having a relationship with the wife or as an aunt or niece of the wife, in the event that a husband has more than one wife; 6. have a relationship which by their religion or other applicable regulations, marriage is prohibited. Marriages that are prohibited and registered can be annulled. The reason for the annulment of the marriage is because it does not meet the requirements to carry out the marriage.[15] Applications for annulment of marriage can be submitted by:[16] 1. The families in the straight line of descent from the husband or wife; 2. Husband or wife; 3. The authorized official only as long as the marriage has not been decided; 4. The appointed official in paragraph (2) Article 16 of this Law and any person who has a direct legal interest in the marriage, but only after the marriage is dissolved.

The occurrence of marriage annulment will lead to new problems as a result of the cancellation of marriage, one of which is the position of the child. Children born from an annulled marriage are children who are considered legal children. A legitimate child

14 Article 8 Undang-Undang Number 1 Year 1974 tentang Perkawinan.

15 Article 22 Undang-Undang Number 1 Year 1974 tentang Perkawinan.

16 Article 23 Undang-Undang Number 1 Year 1974 tentang Perkawinan.

is a child who is born or raised during a marriage, obtaining a husband as the father.[17] This is also stated in the Marriage Law which states that court decisions regarding requests for annulment of marriages do not apply retroactively to children born from such marriages.[18] A marriage, even though it has been declared void, has all its civil consequences, both to husband and wife, and to their children, if the marriage is carried out in good faith by both husband and wife.[19] In this article, it is stated that children born from annulled marriages are children who are civil and the legal consequences are considered equal in position as legal children.

## 2. Children's Inheritance Rights from Parents Milk Kinship Marriages According to the Civil Code

The birth of a child as a legal event that occurs because of a husband-and-wife relationship carries the consequences of several rights and obligations reciprocally.[20] Children have the right to maintenance in a decent life, health insurance, clothing, food, shelter, adequate education from their parents, whether valid during the marriage period or after the marriage is terminated or canceled by law.

17 Article 250 Civil Code

18 Article 28 (2) Undang-Undang Number 1 Year 1974 tentang Perkawinan.

19 Article 95 Civil Code

20 Enny Suprapti, et.al., "Kedudukan Hukum Anak Dari Perkawinan Orang Tuanya Yang Memiliki Hubungan Darah, Artikel Ilmiah, Fakultas Hukum Universitas Jember, https://repository.unej.ac.id/bitstream/handle/123456789/58943/Enny%20Suprapti.pdf?sequence=1&isAllowed=y.

The legal consequences of ownership rights or property in this case are separated between innate property and joint property. Congenital assets are assets owned by each husband and wife not through a collaborative process, such as inheritance, grants and others, so this innate property is owned back individually by husband and wife. While joint property is property obtained during marriage with a cooperative effort, the joint property is shared jointly and each party obtains ownership rights to the joint property. From the moment the marriage takes place, according to the law there is a total joint property between husband and wife, as long as there are no other provisions in the marriage agreement. The joint property, as long as the marriage is running, may not be abolished or changed with an agreement between husband and wife.[21] The Civil Code regulates the dissolution of joint assets due to death, marriage with the permission of the judge after the husband or wife is absent, divorce, separation of table and bed, separation of assets.[22] It is different with the dissolution of joint assets because the annulment of the marriage is not regulated in the Civil Code and the Marriage Law. The legal consequence of annulment of marriage is that marriage is considered to have never existed from the start, so it is difficult for one party to claim the property of gono-gini.

Children do not bear the guilt of their parents as a result of an annulled marriage due to milk kinship marriages. The position of the child who is born still has an official legal position as a

21 Article 119 Civil Code.

22 Article 126 Civil Code.

legitimate child who has a legal relationship with his mother and father, so that these children are also entitled to become heirs of both parents. In connection with the obligations of parents to their children, even though the marriage between their parents has broken up, the obligations of parents to their children must still be carried out until the children are adults. When the marriage of both parents is annulled, then the position of the child is both in the right to inherit until the right to maintenance is still related and becomes the obligation of the father and mother. The annulment of the marriage is not the cause of the change in the status of the child's inheritance rights. This is because when a child is born, both parties do not know if their marriage has violated the conditions and must be annulled.[23]

## C. CONCLUSION

Children born from milk kinship marriages are children who are both civil and legal as a result of which they are considered to have the same position as legitimate children. The position of children born from milk kinship marriages still has official legal status as legal children who have legal relations with their mothers and fathers, so that the child has the right to become heirs of both parents.

23 Putri Maharani. "Status Kedudukan Anak dari Pembatalan Perkawinan Sedarah (Incest) Ditinjau dari UU No. 1 Tahun 1974 Tentang Perkawinan." *Jurnal Kertha Patrika*, Program Studi Fakultas Hukum Universitas Udayana, Vol. 40, No. 2 Agustus 2018, h. 128, https://ojs.unud.ac.id/index.php/kerthapatrika/article/view/40636/2.

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# ILLEGAL FISHING IN INDONESIA'S TERRITORIAL MARINE FRONTIER REGION

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**Abstract**

Indonesia as an archipelagic country has boundaries consisting of territorial sea borders, the limit of Exclusive Economic Zone (ZEE) and the Continental Shelf Boundary. Indonesia is directly bordered by many other countries. It is bordered by land with Malaysia, Papua New Guinea (PNG), and Timor Leste. Meanwhile, it is also bordered by the sea with 10 other countries namely India, Malaysia, Singapore, Thailand, Vietnam, Philippines, Republic of Palau, Australia, Timor Leste and Papua New Guinea (PNG). Indonesia's waters are directly bordered by the neighboring countries which are often used them as the access for trans-national crime such as illegal fishing. Although there have been some laws that regulate the activities of illegal fishing but illegal fishing activities conducted by these neighboring countries still occur frequently. The vastness of Indonesia's territorial waters makes the government supervision in the border areas of the waters has not been optimal. The lack of good border security

technology facilities and the lack of involvement of traditional fishermen's role become the factors that cause illegal fishing. Illegal fishing activities are not only an issue for Indonesia but also a cross-border issue because the actors and their activities happening cross-country. Therefore, the handling of this issue must be done cross-country, either by establishing strategic measures or through bilateral cooperation.

**Keywords:** Illegal Fishing, Indonesian Waters, Strategic Steps and Bilateral Cooperation.

## A. INTRODUCTION

Borders become an important aspect because the sovereignty of a country will be tangent to the sovereignty of another country. Currently, almost no country in the world is not directly adjacent to the authority of other countries. Similarly, Indonesia. As an archipelagic country, Indonesia borders with many countries, both land and sea borders. Indonesia has a direct land border with Malaysia, Papua New Guinea (PNG) and Timor Leste; while the sea border is with Australia, Papua New Guinea, Malaysia, Singapore, Philippines, Thailand, Vietnam, Timor Timor, India, and the Republic of Palau.

As the world's largest marine and archipelagic country, Indonesia has approximately 5.8 million KM2 of marine waters (75% of the total Indonesian territory) comprising of 0.3 million KM2 of territorial sea waters; 2.8 million KM2 of marine waters of the archipelago; and 2.7 million KM2 of sea of Exclusive

Economic Zone of Indonesia (ZEEI). These vast territorial waters of Indonesia contain great fishery resources.[1]

The abundance of fishery resources in Indonesia's marine waters has attracted the attention of foreigners to be able to enjoy it both legally and illegally. Illegally through illegal fishing activities carried out mostly by foreign fishermen from neighboring countries in areas enter Indonesian waters illegally. This illegal fishing costed the country financially,[2] as it has reduced the productivity and fish-catching volume significantly, in addition to threatening Indonesia's marine fisheries resources. The foreign fishermen who often entered the territorial waters of Indonesia, among others came from Thailand, Vietnam, Philippines, and Malaysia. Natuna waters, North Sulawesi waters and waters around Maluku and the Arafura Sea are the most vulnerable areas to illegal fishing activities. Illegal fishing activities that occur in Indonesian waters can be interpreted as a trans-national crime, which becomes a serious problem for Indonesia.

1 Indonesia's marine fish production potential (MSY) is estimated to reach 6.4 million tons per year. Rokhmin Dahuri, *Blueprint of Marine and Fisheries Development Towards a Prominent, Just-Prosperous, and Sovereign Indonesia*, Bogor: PKSPL-IPB, 2010, p. 15, in Simela Victor Muhamad. "Illegal Fishing In Indonesian Waters: Problems And Their Bilateral Efforts In Region." *Jurmal Politica*, Vol. 3, No. 1, May 2012, p. 60.

2 Economic losses due to illegal fishing are not only a loss of state revenues reaching Rp 30 trillion per year but also the loss of 1 million tons of fish every year that must be caught (harvested) by Indonesian fishermen, even stolen by foreign fishermen. See, Akhmad Solihin, *Political Law of Marine and Fisheries*, Bandung: Publishers Nuance Aulia, 2010, p. 8.

Indonesia's efforts to overcome illegal fishing activities is not easy and cannot be done by the Indonesian government alone. Therefore, strategic steps are needed to overcome illegal fishing that occurs, including applying bilateral cooperation between Indonesia and neighboring countries in the region. based on this argument, the issues that will be discussed in this paper are: 1). What is the provision of illegal fishing according to Indonesian law; 2). What is the cause of illegal fishing in Indonesia, and 3). How to overcome it.

## B. DISCUSSION

### 1. The Definition of Illegal Fishing

Viewed from the terminology, illegal fishing comes from the English language that is "illegal" and "fishing". Illegal means non-legal, prohibited or contrary to law, and "fishing" means fish-catching that is used as a livelihood or fishing grounds.[3] In Law Number 45 Year 2009 regarding the Amendment to Law Number 31 Year 2004 about Fisheries, Fishing is defined as an activity to obtain uncultivated fish from by any means or tools, including activities that use ships to load, transport, store, cool, handle, process, and/or preserve it. Thus, illegal fishing means any kind of fishing activity that violates the provisions of Law Number 45 Year 2009 and other legislation that is still in effect.

3 John M. Echols dan Hassan Shadily, *Kamus Inggris Indonesia,* (Jakarta: Gramedia Pustaka Utama, 2002), p. 311.

## 2. Some Legal Rules Related to Illegal Fishing in Indonesia

### a. Law of the Republic of Indonesia Number 45 Year 2009 regarding the amendment to Law Number 31 Year 2004 about Fisheries

Law Number 45 Year 2009 contains several amendments of Law Number 31 Year 2004 about Fisheries. The law also regulates that foreign persons/legal entities that are allowed to conduct fishery business in the territory of Indonesia as long as there is government approval or there is an agreement between countries. In supervising fishery activities in the territorial waters of Indonesia, the government establishes fishery supervisory bodies which one of its authorities is to perform special actions in the form of burning and/or sinking foreign-flagged ships if proven to conduct a fishery crime in the territorial waters of Indonesia.

### b. Law No. 5 Year 1983 on Exclusive Economic Zone of Indonesia

The definition of an Exclusive Economic Zone (ZEE) is an outer and bordering route to the Indonesian sea with the outer limit of 200 (two hundred) nautical miles, measured from the basin of the Indonesian territory (Article 2). Article 5 paragraph (3) expressly states that the exploration and exploitation of living natural resources in a certain area in the Indonesian Exclusive Economic Zone by individuals or legal entities or the Government of a Foreign State can be permitted, if the amount of catch does not exceed what is permitted.

Any party acting in contravention to the provisions of the laws of the Republic of Indonesia and international law in the Indonesian Exclusive Economic Zone and causing a loss, shall be liable and pay compensation to the Republic of Indonesia.

**c. Law No. 6 Year 1996 on Indonesian Waters**

Article 3 states that what is meant by the territorial waters of Indonesia include Indonesia's territorial sea, archipelagic waters, and inland waters as wide as 12 miles. All foreign-flagged ships have the right to enjoy the right of peaceful passage through the territorial sea and waters of the Indonesian archipelago. However, if it is deemed harmful to the peace, order or security of Indonesia, or if the ship engages in activities prohibited by convention and/or other international law, one of which is illegal fishing activities, then this ship may be charged under this Law.

**d. Minister of Marine Affairs and Fisheries Regulation No. 57 Year 2014 on Prohibition of Transhipment**

This ministerial regulation was established with the aim of preventing fraudulent foreign fishing ships from direct shipping of fish abroad, preventing fishing offenders who are unwilling to pay retribution and other costs to the Republic of Indonesia as well as to increase seafood export targets, and to realize the production base of marine products and fisheries sustainably. In the provisions of Article 37 paragraph (6) of this Ministerial Regulation, it is required

that any fishing ship lands its catch fish at the port of base as stated in SIPI (Fishing Permit) or SIKPI (Fish Freighter Permit). If this is not done, it will be subject to the sanction of revocation of SIPI or SIKPI (Article 37 paragraph (9).

## 3. The causes of illegal fishing in Indonesia

Illegal fishing can be categorized as a form of transnational crime, a form of transnational crime that the perpetrator is a foreigner or an Indonesian but involving a foreign party behind him/her. Illegal fishing activities usually operate in border areas and international waters. For East Indonesia's Waters, illegal fishing is often done in the territorial waters of Papua, Maluku Sea, Tual Waters, Sulawesi Sea, Pacific Ocean, Indonesian-Australian Waters, East Kalimantan Waters. For the Western Waters of Indonesia, it covers the North Borneo waters, the waters of Nanggroe Aceh Darussalam (NAD), the Malacca Strait, North Sumatra, Karimata Strait, Tambelan Island Waters, Natuna Sea and the Waters of Gosong Island Niger.[4]

The rise of illegal fishing activities in Indonesian waters is partly due to:

1. The high demand of raw fish resources in illegal fishing countries, so they expand into Indonesia;
2. Limited facilities and supervisory infrastructure and operational fund oversight;

4 Muhammad, Simela Victor. "Illegal Fishing Di Perairan Indonesia: Permasalahan Dan Upaya Penanganannya Secara Bilateral Di Kawasan" *Jurnal Política*, Vol. 3, No. 1, Mei 2012, p. 71.

3. Lack of participation of the community/traditional fishermen in maintaining the safety of Indonesian waters from illegal fishing;
4. Foreign fishing ships know the marine patrol's surveillance ability because of their sophisticated communication tools, resulting in less-than-optimal operating results;
5. Fishery court only located in District Court of North Jakarta, Medan, Pontianak, Bitung and Tual. Due to the problem of distance between the illegal fishing location and the fishery court location, sometimes the case is not resolved on time and the country losses cannot be saved. With so many unresolved cases, the perpetrators then consider it as trivial thing;
6. Lack of inter-agency coordination between: TNI AL (Indonesian Navy), POLRI (Indonesian National Police), PPK KKP (Ministry of Marine Affairs and Fisheries), PPNS (Government Investigators) of Ministry of Transportation, PPNS of Customs and Excise, PPNS of Immigration, PPNS of Environment. Because every institution feels that they have the authority to finally take their own action, and often there are unscrupulous officers who can be invited to "cooperate" with the perpetrators of illegal fishing.

## 4. Illegal Fishing Eradication Strategy and Inter-Country Bilateral Cooperation

Government commitments related to this have been listed in "Nawacita", namely "Eradication of Illegal, Unregulated and

Unreported Fishing (IIU)". To achieve this, a number of strategic policy directions are issued in the form of internal strategy, external strategy and bilateral cooperation between countries.

a. Internal strategy include:

   1) Protecting the territorial waters of the Exclusive Economic Zone (ZEE).

      This should be done by the Indonesian Navy, which is responsible for safeguarding Indonesia's sovereignty and protecting marine natural resources from the actions of fish theft in ZEE.

   2) Increasing the participation of traditional fishermen

      With the empowerment of traditional fishermen, it can help preventing the theft of fish by foreign ships. Traditional fishermen therefore need to be facilitated by ships that use large GT (Gross Tonnage) with modern technology so that fishing ships can reach the high seas. If these traditional fishermen operate on the high seas, naturally foreign ships will be afraid to enter the waters of Indonesia.

      a) Developing and strengthening the ability of supervision (law enforcement) at sea. Such as implementing MCS (Monitoring, Control and Survey) system using VMS (Ship Monitoring Systems) as recommended by FAO. This system consists of a geographic information system (GIS)-based data system, so that foreign fishing vessels can be immediately identified for follow-up.

b) Empowering and improving community-based-monitoring capacity of institutions and organizations. As an active role of local fishermen, it is hoped that they can monitor fishing areas from illegal fishing efforts. This community-based surveillance system has been implemented in developed countries.

c) Improving coordination and cooperation with related inter-sectoral agencies in the field of supervision.

3) Maintaining strict legal action for illegal fishing perpetrators conducted by foreign ships in Indonesian waters under the applicable law, as has been done by the government in recent years, by applying specific measures of burning and/or sinking of fishing ships with foreign flags.

b. External strategy related to the importance of bilateral and regional cooperation especially related to neighboring countries. Some of these external strategies are:

1) Tightening fishing permit in NKRI area. Permits for fishing ships must be above 30 Gross Tonnage. The fishing business permit (SIUP), fishing permit (SIPI) and fish freighter permit (SIKPI) must be in accordance with the fishery management area (WPP).

2) Applying special conditions for granting licenses to foreign ships that will operate in the territorial waters

of Indonesia, to land the fish in the territorial waters of Indonesia. The owner of the foreign ships must be willing to contribute to the development of fishery facilities at fish landing centers in Indonesia.

3) Implementing cooperation agreement that has been made by Indonesia with bordering countries such as with Malaysia, Filipina, Vietnam and Thailand expressly. Cooperation to share marine and fishery data from each country as a form of data transparency in Marine and Fisheries sector.
4) Prohibiting the Transhipment or unloading in the middle of the sea. The prohibition of Transhipment became the main capital of strong guard of moratorium and illegal fishing. Because this could support the creation of revitalization of the fishery industry.
5) Maintaining special sanctions in the form of burning or sinking of foreign ships, as a deterrent effect for countries which violate the agreements that have been signed together, both in bilateral and regional agreements.
6) Requesting neighboring countries with maritime borders with Indonesia to take responsibility for violations committed by foreign ships with the flags of their country.

c. Bilateral Cooperation

1) Indonesia – Thailand

Indonesia and Thailand, have sought to build a commitment to cooperate in overcoming illegal fishing

[5] by signing Memorandum of Understanding (MoU) related to fisheries issues.[6] One form of cooperation that will be developed is to invite Thai investors to get involved in the process of fish processing. Through this partnership, Thai fishing ships operating in Indonesia can process their catch into finished products while still in Indonesia.

2) Indonesia – Vietnam

Indonesia and Vietnam have signed Memorandum of Understanding on Marine and Fisheries Cooperation in Hanoi, Vietnam, on October 27, 2010. But despite the MoU, illegal fishing activities conducted by Vietnamese fishermen in Indonesian waters still occur. This means concrete steps need to be taken by both parties to implement the MoU, such as immediately implementing joint patrol activities involving the apparatus of the two countries in the border waters as well as socializing international law relating to the territorial boundaries of the state and the provisions of Indonesian fisheries especially to the traditional Vietnamese fishermen.

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5 Thai fisherman is one of the foreign fishermen who often enter the territorial waters of Indonesia and illegally catch fish. In Pangkal Pinang, for example, the Navy forces secures 33 Thai fishing-boat crew suspected of illegally fishing in Natuna waters. See "ZEE in Malacca Strait Theft," Kompas, June 5, 2011.

6 "Indonesia-Thailand Pererat Sektor Perikanan," *VIVAnews*, 15 Februari 2010, *http://dunia.vivanews. com/news/read/129622-indonesia_thailand_pererat_sektor_perikanan* - diakses 12 September 2011. Lihat Simela Victor Muhammad. *Loc.Ci.,*

3) Indonesia – Philippines

Until now there is no specific agreement between Indonesia and the Philippines related to efforts to eradicate illegal fishing. Moreover, the two countries also have no agreement on the maritime boundary, especially in the waters in north and south of Miangas Island where the waters are often used by traditional fishermen from both countries to find fish. However, this should not be a barrier for both countries to address the problem of illegal fishing. Indonesia and the Philippines can temporarily optimize Joint Border Committee (JBC) and Joint Commission for Bilateral Cooperation (JCBC) forums regularly to bridge border issues bilaterally, and the problem of illegal fishing can be one of the discussed agenda.

4) Indonesia – Malaysia

Illegal Fishing is not only happening in Indonesian waters, but it can also occur in Malaysian waters. The unfinished borders of the border between the two countries in places, such as around the waters of the Strait of Malacca, have caused frequent illegal logging from both countries. However, both countries should take cooperative measures, for example, to agree that in the vicinity of border waters where there is no acceptable border, there should be no fishing activities by fishermen from both countries. The Indonesia-Malaysia bilateral cooperation needs to be established and developed, in addition to avoiding

misunderstandings among field staff, specifically aimed at preventing and resolving trans-national crime activities.

## C. CONCLUSION

As an activity included in trans-national crime, illegal fishing has been financially detrimental to the country because it has contributed significantly in reducing the productivity and fish-catch, in addition to threatening Indonesia's marine fisheries resources. Various laws and regulations have regulated the activities of illegal fishing, namely in Law No. 5 Year 1983 on Exclusive Economic Zone of Indonesia; Law Number 6 Year 1996 regarding Indonesian Waters; Law of Republic of Indonesian 31 Year 2004 which has been updated with Law of Republic of Indonesia Number 45 Year 2009 on Fisheries and Minister of Maritime Affairs and Fisheries Regulation Number 57 Year 2014 on Prohibition of Transhipment.

The rise of illegal fishing activities that occur in the waters in Indonesia is caused by many factors, partly because of the high demand for raw fish resources in the country of illegal fishing actors; limited facilities and monitoring infrastructure including operational costs; lack of participation of the community/ traditional fishermen; the vastness of the territorial waters of Indonesia. 3. In order to solve the problem of illegal fishing, strategic steps are needed, both internally and externally, as well as conducting bilateral cooperation in the form of MoU and implementing the MoU strictly.

## D. RECOMMENDATIONS

The Republic of Indonesia should increase the number, strengthen the capacity and equip the technology facilities of the waterbird patrol ship fleet and increase the number of fishing ships having capacity above 30 Gross Tonnage, along with the latest technological equipments, in order to better reach the management area of Indonesian ZEE. Bilaterally, Indonesia needs to request strong commitment from neighboring countries to overcome the illegal fishing together and seriously, among others by making agreement to jointly patrol in border waters in a coordinated and periodic manner. Bilateral cooperation between Indonesia and neighboring countries in the region should be developed to strengthen regional commitments and therefore need to be strengthened through the development of bilateral cooperation.

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# THE URGENCY OF THE PERSONAL DATA PROTECTION COMMISSION IN INDONESIA

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**Abstract**

The Indonesian constitution, namely the 1945 Constitution, has mandated that the state must provide personal and community protection, as well as provide a sense of security and freedom from the threat of fear. One of the things that should be protected is personal data. Personal data protection is based on the Personal Data Protection Act which was just passed in 2022. Personal data protection certainly requires an organ that focuses on the area of personal data protection. This study uses a type of juridical normative research. By emphasizing the approach to the legal approach. The results of this study found that in the Personal Data Protection Law there is an organ devoted to the protection of personal data, not in the form of a commission. In addition, in the existing PDP Law, this institution does not yet have clarity on its institutional nature. The law does not state that this institution is an independent institution or not. The law only states that this institution is responsible to the president. The conclusion in this

study shows that the institution that will be formed based on this government regulation will have low authority and is easily intervened by other branches of power in its implementation because it is only formed based on government regulations.

**Keywords:** Commission, Independent, Protection, Personal Data.

## A. INTRODUCTION

The 1945 Constitution, in Article 28G, states that every person has the right to protect himself, his family, honor, dignity, and property under his control, and has the right to a sense of security and protection from the threat of fear to do or not do something wrong. is a human right. The provision does not explicitly mention the right to privacy. Still, the norms in the article explain the position of the state which constitutionally must maintain the privacy of every citizen through the protection of personal data. Of course, this constitutional mandate will be closely related to technological developments in society.

Correlating with the context of the industrial revolution 4.0 era, developing innovation and technology can store and analyze data as an effort to facilitate human activities. These changes have an impact on all human activities that cannot be separated from technology, both in the aspect of implementing e-commerce for the trade sector, mobile banking for the banking sector, online education for education, e-government for all forms of online-based government services, social media (Facebook, Twitter, Instagram, Tik-Tok) for interaction, search engines (google),

google maps for information retrieval, as well as all forms of automatic data storage connecting from mobile phones via the cloud method.[1]

All of the above activities require identity verification carried out by the controller or processor. This is an effort to ensure that people who carry out electronic activities are not bots (robots), but people who can be legally accounted for. This condition then becomes the reason for the controller to ensure that every user who wants to take advantage of its services enters their personal data such as name, address, place of birth, identification number, family card, and a number of other identities which are essentially private information.

However, the problem is when the personal identity that should be protected by the controller suddenly leaks and the possible causes of actions and violations. This condition is one of the sociological foundations for legislators to issue regulations related to the protection of personal data. The protection of personal data is related to the concept of privacy. The concept of privacy itself is to maintain personal integrity and dignity. The right is closely related to the right to keep information confidential to others. This was confirmed by Anita Allen who divides privacy rights into three types, Informational privacy, bodily privacy, and decisional privacy are the three types of privacy protected by privacy rights. Informational privacy refers to the desire for secrecy, anonymity, and confidentiality,

1 Siti Yuniarti. "Perlindungan Hukum Data Pribadi Di Indonesia" *Business Economic, Communication, and Social Sciences (BECOSS) Journal*, Vol. 1, No. 1, 2019, hlm. 147–154.

and is most commonly understood as the right to keep personal information private from others.[2] This opinion was also agreed by Westin who stated that A person's right to privacy is defined as the ability to "control, amend, manage, and remove information about him or her, as well as determine when, how, and to what degree this information can be accessible by others.[3] Therefore, the right to privacy can be interpreted as a person's power to share information with whomever they want and what the information is used for. On the other hand, information leakage is a violation of privacy rights, because privacy rights include the right to control certain kinds of information about oneself or not.

Meanwhile, regulations related to privacy rights related to personal data in the Indonesian legal system have not been optimally codified or are still scattered in several regulations, for example Law no. 36 of 2009 concerning Health which contains norms related to the confidentiality of the patient's personal condition, and Law no. 10 of 1998 concerning Banking which regulates personal data regarding depositors and their deposits. This condition causes the protection of personal data is still partial and sectoral which has an impact on the potential for human rights violations when information leaks occur. Based on a number of things mentioned above, the discussion of the draft

2 Michele L. Tyler. "Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers." *Georgetown Law Journal*, Vol. 86, No. 3, 1998, hlm. 783.

3 Tadas Limba and Aurimas Šidlauskas "Secure Personal Data Administration in the Social Networks: The Case of Voluntary Sharing of Personal Data on the Facebook." *Entrepreneurship and Sustainability Issues,* Vol. 5, No. 3, 2018, hlm. 528.

law that specifically deals with the protection of personal data is an urgent matter.

The presence of a personal data protection commission is a vital thing in the Indonesian constitutional system. The existence of an independent institution will ensure that the process of the ombudsman, auditors, and law enforcement related to the protection of personal data will be carried out independently. This is important, because the object of the personal data protection law is not only a person, but a public legal entity, including executive, legislative and judicial powers. The granting of personal data protection authority to an independent institution will ensure the impartiality of law enforcement regarding the protection of personal data.

Based on this background, the author will discuss issues related to the urgency of the presence of a personal data protection commission in Indonesia. The author will raise the formulation of the problem as follows: What is the urgency of the presence of a personal data protection commission in Indonesia?

## B. DISCUSSION

Personal data protection will certainly be inefficient when there is no institution that focuses on protecting it. Of course, before seeing that Indonesia needs an independent institution in the field of personal data, it is necessary to investigate first about an independent institution. Independent state institution is the term most commonly used by experts and scholars of constitutional law, although in fact there are those who argue

that the term "supporting state institution" or "independent state institution". M. Laica Marzuki again avoids confusion with other institutions located under constitutional state institutions with the term state auxiliary institutions rather than "independent state institutions" to avoid confusion with other institutions located under constitutional state institutions.[4]

The position of these institutions is not within the realm of the executive, legislative, or judicial branches of power. However, a number of these institutions cannot be treated as private organizations or non-governmental organizations (non-governmental organizations) or NGOs (non-government organizations) even though they have similarities with NGOs because the funding source comes from the public and aims for the public interest, making it impossible to call it an NGO in the truest sense.[5]

Some scholars consistently classify such independent institutions in the realm of executive power, although there are some who place them separately as the fourth branch of government power, as stated by Yves Mene and Andrew Knapp below. Regulatory and oversight bodies are a new sort of autonomous administration that has grown in popularity in the United States (where it is frequently described to as the government's "headless fourth branch"). It manifests itself

4 Zainal Arifin Mochtar. *Lembaga Negara Independen: Dinamika Perkembangan Dan Urgensi Penataannya Kembali Pasca Amandemen Konstitusi*. (Jakarta: PT RajaGrafindo Persada, 2016).

5 Rizki Ramadani. "Lembaga Negara Independen Di Indonesia Dalam Perspektif Konsep Independent Regulatory Agencies." *Jurnal Hukum Ius Quia Iustum*, Vol. 27, No. 1, 2020, hlm. 67.

in the form of Independent Regulatory Commissions (IRCs).[6] Theoretically, independent state institutions begin with the desire of the state to create new state institutions whose members are drawn from non-state elements, given authority, and financed by the state without having to become state employees. The discourse of independent state institutions essentially stems from the previously strong desire of the state when dealing with the public, willing to provide opportunities for the public to supervise. So, even though the state is still strong, it is monitored by the community that vertical accountability and horizontal accountability are created.

An independent institution that has functions in the executive and judicial branches of power, the 1945 Constitution of the Republic of Indonesia has provided space for the creation of other institutions whose functions are related to judicial power as long as they are regulated in regulations. This provision provides legality for new supporting state institutions to be able to have some authority from the judicial branch of power. Since the reform which was marked by the amendment of the 1945 Constitution of the Republic of Indonesia, the possibility for the creation of new state institutions that are independent and have a quasi-judicial function is very open. The establishment of these independent institutions is considered to be the answer to exercising control over government power, as well as momentum for reviewing the design of state institutions.

6 Yves Meny dan Andrew Knapp dalam Eki Furqon. "Kedudukan Lembaga Negara Independen Berfungsi Quasi Peradilan Dalam Sistem Ketatanegaraan Indonesia." *Nurani Hukum*, Vol. 3, No. 1 2020, hlm. 77.

The concept of independence in an institution has different variations. According to Metia Winadi, the independence of an institution can be divided into several categories: First, institutional independence is also understood as political or goal independence, because independence means that the status of the institution is not bound by executive or government power, is free from parliamentary influence, and is free from other institutions. politics or government. Second, functional independence can be interpreted as instrument independence, namely the institution is free to determine the method or implementation of media policies that are considered important to achieve its vision and mission. Third, organizational independence as an effort to prevent political intervention and integrity related to personnel.

The discussion about these independent institutions will certainly be relevant to the establishment of a personal data protection commission (independent authority) which is essentially a mandate from several international agreements related to the protection of personal data, including:

1. UN Guidelines for The Regulation of Computerized Personal Data Files 1990

   This regulation is the basis for countries that will establish rules relating to the protection of personal data. The contents of the regulation mentioned related to the minimum basic principles that must be met in connection with the formation of laws related to personal data in a country. One of the loads is:

   > "The law of every country shall **designate the authority** which, in accordance with its domestic legal

system, is to be responsible for supervising observance of the principles set forth above. **This authority shall offer guarantees of impartiality, independence** vis-avis persons or agencies responsible for processing and establishing data, and technical competence. In the event of violation of the provisions of the national law implementing the aforementioned principles, criminal or other penalties should be envisaged together with the appropriate individual remedies."

Based on these provisions, it can be seen that there is a fundamental principle in the formation of rules regarding personal data in the UN Guidelines, namely the need to establish an authority that is impartial and independent.

2. European Modernized Convention for The Protection of Individual with Regard to The Processing of Personal Data 1981 (Convention 108)

   Convention 108 is an agreement with European Union countries regarding minimum regulatory standards for personal data protection. Based on Convention 108, it is stated that the objectives of the agreed rules are:

   a. Each Party shall select one or more authorities, whose names and addresses it shall disclose to the Council of Europe's Secretary General.
   b. Each Party that has designated more than one authority must specify the competence of each authority in the communication referred to in the preceding subparagraph."

It can be seen from one of the articles in Convention 108 above, that basically, the regulation of personal data protection is the establishment of one or more authorities that specifically deal with data protection issues.

3. APEC Privacy Framework 2015

The 2015 APEC Privacy Framework is essentially an agreement with APEC member countries regarding the protection of personal data related to the economic activities of a country. Based on the APEC Privacy Framework it is stated that:

> "Cooperation to promote both effective information and electronic commerce and innovation is a major aspect of APEC economies' efforts to boost consumer confidence and assure the expansion of electronic commerce and innovation. privacy protection and the free flow of information in the Asia Pacific region, while respecting domestic laws and regulations, worldwide frameworks for data privacy protection and information security in the Asia Pacific area."

In addition, in another article, it is stated that:

> "A Privacy Enforcement Authority is a public body that is responsible for enforcing an APEC economy's Privacy Law. It will have powers to conduct investigations and/or pursue enforcement proceedings. An economy may have more than one Privacy Enforcement Authority."

It can be seen that based on the explanation above, the 2015 APEC Privacy Framework has agreed on the establishment

of a personal data protection authority, but the design of the establishment of the authority is based on the constitutional system of each APEC member country.

4. European Union General Data Protection Regulation (GDPR)
GDPR is a regulation related to the protection of personal data agreed upon by European Union countries and is a reference for other countries in forming regulations governing the protection of personal data. Based on Article 117 of the European Union GDPR it is stated that:

> "The formation of supervisory authorities in Member States, enabled to execute their jobs and exercise their powers completely independently, is a critical component of protecting natural persons when their personal data is processed. To reflect their constitutional, organizational, and administrative structures, Member States should be permitted to establish multiple supervisory authorities."

It can be seen that based on the provisions contained in the GDPR above, the establishment of an independent authority is one of the important components of the personal data protection law. In fact, the GDPR recommends the establishment of an independent authority for more than one institution. In addition to the mandate of several international provisions, a personal data protection commission will certainly be formed as an independent authority. Of course, the independent nature of this personal data protection commission will determine the continuation of the implementation of this institution in the future. There

are at least some views regarding the independent nature of an independent institution.

Three views prioritize independent interests in the protection of personal data. Huttl divides it into three kinds of views:[7]

a. The European Commission's view

In the view of the European Commission, an independent authority should be free from any influence. The concept of the European Commission is known as complete independence. The supervisory authority should **be free of all forms of influence**, whether it comes from within or outside the administration. As a result, the member state's regulation should make it impossible for supervisory authorities' decisions and execution to be influenced from the outside. The word 'total independence' not only implies that there is no dependency of any kind (on anyone), but also that there is no dependence in any kind.

b. The German View

In contrast to The European Commission View, according to The German View, the independence of the personal data protection authority is not separate from other powers. Independence is limited to solely independent functions. The independence of authorities includes a functional independence, which indicates

7 Tivadar Hüttl. "The content of 'complete independence'contained in the Data Protection Directive." *International Data Privacy Law*, Volume 2, Issue 3, August 2012, hlm. 137–148.

that the authorities must be isolated completely and exclusively from the organizations that they supervise, and Community law mandates that any influence in this direction be avoided.

c. The Advocate General Opinion

In contrast to the European Commission's view and The German View, according to the Advocate General's Opinion, the independence of an institution can be measured through a fair litigation process, independence cannot be measured by the relationship between the independent authority and other powers. The existence of supervisory authorities is one of the directive's tools for striking a fair balance between the free movement of personal data and the protection of the right to a private life; however, the supervisory authorities' independence has nothing to do with the authorities' scrutiny, or the lack thereof. Referring to the draft law on the protection of personal data, there is no provision of a single provision in the article that regulates the authority of personal data by the provisions of applicable international law. Therefore, the author is of the view that it is very important to establish an independent personal data protection commission. The author also believes that in the future the commission for the protection of personal data will be independent of any intervention, the author wants this institution to be both institutional and functional in carrying out its duties and duties.

## C. CONCLUSION

The establishment of an urgent personal data protection authority is to be implemented in Indonesia. Referring to the 2015 APEC Policy Framework, it is stated that the determination of an independent authority must adapt to the constitutional system of each country. In addition, there are international provisions, such as the GDPR, which is the basis for the need for Indonesia to have a Personal Data Protection Commission. Bearing in mind also that the Personal Data Protection Bill which is currently in the process does not at all stipulate the existence of an independent institution in law enforcement regarding personal data.

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# ERGA OMNES OBLIGATION IN THE SAFETY AVIATION

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**Abstract**

Erga omnes obligation is a very important concept in international law. This concept is actually rooted in the concept of general obligation in legal study. This concept is then applied at the states level. This concept was confirmed in the decision of the International Court of Justice in the Barcelona Traction case. In the other hand, aviation safety is the most important aspect in the 1944 Chicago Convention. Its priority is based on the concept of the state's obligation to comply with aviation regulations issued by the International Civil Aviation Organization. This is what emerges the problem of how is the connection between the concept of erga omnes and aviation safety is related. The result of the discussion is that the obligation of erga omnes is an obligation that burdens the international community as a whole which is applied in the enforcement of national and international civil aviation safety rules. Humanitarian considerations are a

common thread that links the obligations of erga omnes with aviation safety.

**Keyword:** erga omnes, legal obligation.

## A. INTRODUCTION

The obligation erga omnes is a concept of obligation stipulated in international law. This obligation is actually based in the concept of basic obligation in legal terms. The obligation of erga omnes imposes the international community to have considerations and to take some actions against such conducts that are considered to violate international law. Aviation safety is defined as a condition of meeting safety requirements in the use of airspace, aircraft, airports, air transportation, flight navigation and supporting facilities and other public facilities.[1] Aviation safety is one of the important core arrangements between countries in international civil aviation which is included in the preamble of the 1944 Chicago Convention.[2]

This paper will discuss the relationship between erga omnes obligations in international law and aviation safety. The first description in this paper will explain the concept of obligation

1 See Article 1 of the Law of the Republic of Indonesia Number 1 of 2009 concerning Aviation.

2 See The Preamble of The Convention on International Civil Aviation 1944 (Chicago Convention 1944):"…the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner…".

erga omnes from the notion of obligation in legal study, which will then be drawn to the international level. The next description will discuss the meaning and legal basis of aviation safety. The next description will analyze the relationship between these two concepts, which will then be formulated in the formulation of a conclusion.

## B. DISCUSSION

### 1. The Essence of Legal Obligation

The concept of legal obligation is essentially explained by H.L.A Hart who says that there is a difference between 'a person who is obliged to do something' and 'a person who has an obligation to do something'.[3] The basic essence of this obligation is illustrated by Hart in a situation known as the Gunman Situation.[4]

Hart explains further, that obligations have the following basic characteristics:

1. The obligation have the characteristics that contain the need for honesty and truth and fulfillment of promises;
2. Obligations are considered to be of a character that involves sacrifice or abandonment, and the possibility of a conflict between obligations and interests.[5]

3 H.L.A. Hart, *The Concept of Law*, (London: Oxford University Press, 1961), p. 81.

4 *Ibid*., p. 80.

5 *Ibid*., p. 85.

The legal obligation is related to other concepts, namely the concept of rights. These two concepts have a close relationship, where one reflects the existence of the other. The illustration of these relationship between rights and obligations can be described as Person A who has an obligation to do something to a certain person, namely Person B. If Person A has done something, it can be said that Person A has carried out his obligations. On the other hand, because A's obligation to B has been carried out, this will give rise to a title of right for A over B. That right is in the form of power that can be applied to B.[6] There are several obligations, namely: absolute and relative obligations, public and civil obligations, positive and negative obligations, universal, general and special obligations as well as primary and sanctioning obligations.[7]

## 2. State Obligation in International Law

Understanding the concept of obligations in international law must link into 2 (two) legal systems, namely national law and international law. Both legal systems are basically related to the state. National law cannot be separated from the state, as well as the state has an intrinsic relationship with international law, which means that all elements of the state are determined by international law.

6 Satjipto Rahardjo, *Ilmu Hukum*, (Bandung: PT.Citra Aditya Bakti, 1991), p. 54.

7 *Ibid*., p. 60.

The same relationship is now approached from the point of view of international law. International law presupposes orders of national law just as presupposes orders of international law. International law regulates the reciprocal behavior of states, but this does not mean that international law is coercive. International law requires the consent of states in its implementation.

Basically, the rights and obligations are only on the state, not on the individual. However, the subject of international law is not only the state, but individuals can also be the subject of international law. This is based on the reason that all laws regulate human behavior (all laws are regulations of human behavior). State is an abstract concept. The only social reality that legal norms can refer to is the relationship between people. Therefore, legal obligations and legal rights cannot contain anything except individual or human behavior.[8]

The state as a subject of international law is basically a legal individual (juridical person). The reason is because the state as a person who acts, is a manifestation of human actions which are considered as organs. Individuals act as organs of their state signify that their actions are linked to their national legal order.[9] So that when international law obliges and authorizes states, this does not mean that it does not oblige and authorize individual human beings. This means that international law obliges and authorizes individual human beings who are organs of the state.[10]

8 Hans Kelsen, *The General Theory of Law and State*, (New York: Russel and Russel, 1961), p. 341.

9 *Ibid*., p. 342.

10 *Ibid*., p. 343.

Obligations in international law are meant for state obligations. This is because the main subject of international law is the state. In addition, the terminology of this country is also closely related to international relations. In international relations, states are the first and foremost actors in their interactions. The discussion on state obligations is based on the principles of the rights and duties of the state.

Hans Kelsen provides a rationale opinion for state obligations by saying that the obligations and authorities of states by international law have the same character as the obligations and authorities of a legal entity by the national law.[11] Kelsen's thinking is referred on his own opinion that the state is also a legal entity, namely a community formed by a normative order that institutionalizes organs that are directly or indirectly required to carry out their functions, based on the principle of division of labor.[12]

## 3. Obligation in International Community as a Whole

A state obligation can lead to an international community obligation as a whole.[13] This obligation is called the obligation of erga omnes (towards all). The obligation of erga omnes has

11 Hans Kelsen, *Teori Hukum Murni (Pure Theory of Law)*, translated by Raisul Muttaqien, (Bandung: Nusa Media, 2012), p. 359.

12 *Ibid*., 320 *et seq*.

13 The point is that this obligation is not only the obligation for 1 (one) country but is the obligation of all countries in the world. The word comprehensive also indicates obligation that impose on other members of the international community besides the state.

characteristics that are universal and non-reciprocal. Erga omnes is an obligation that leads to the obligations of the international community as a whole. This obligation has the characteristics of the obligation which is to be concerned of all states.[14]

The term international community as a whole can be found in the case of Barcelona Traction 1970.[15] This case is a dispute between Belgium and Spain. Belgium requested compensation from Spain for the actions of Spanish state organs which were deemed to have caused harm to Belgian citizens who are shareholders of the Canadian Barcelona Traction Company.[16] In the case of Barcelona Traction, the ICJ provides a definition of the erga omnes obligation as follows:

> "By their very nature the former obligations of a State towards the international community as a whole are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes."[17]

In fact, the exact characteristics of this erga omnes obligation are still being debated. For it is not entirely clear whether states are empowered only to enforce erga omnes norms (according to the ICJ statement in the Barcelona Traction case that all states can be deemed to have a legal interest in the protection

14 Jiefang Huang, *Aviation Safety through the Rule of Law*, (Netherlands: Kluwer Law International, 2009), p. 159.

15 *Ibid*.

16 Ray August, *Public International Law Text, Cases and Readings*, (New York: Prentice Hall, 1995), p. 206.

17 *Ibid.*

of victims) or whether they are also required to do so. There is also no consensus on what specific norms constitute erga omnes obligations. As an example of the obligation erga omnes, the ICJ describes obligations that stem from the prohibition of acts of aggression, and genocide, as well as from principles and rules concerning basic human rights, including protection from slavery and racial discrimination.

The definition of erga omnes can also be seen in Article 53 of the 1969 Vienna Convention which states in the sentence that the erga omnes obligation is: "… a norm accepted and recognized by the international community of States as a whole …".[18] In addition, the obligation of erga omnes is also contained in Article 48 Paragraph 1 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts 2001 which states that:

> "…any State other than an injured State is entitled to invoke the responsibility of another State, if the obligation breached is owed to the group of States including that State, and is established for the protection of the collective interest of the group or the obligation breached is owed to the international community as a whole…"[19]

The obligations to the international community as described above are a category of obligations that involve third parties (third

18 Mochtar Kusumaatmadja, Etty. R.Agoes, *Pengantar Hukum Internasional*, (Bandung: Penerbit PT. Alumni), p. 312.

19 This article from the International Law Commission has been included in UN General Assembly Resolution 56/83 December 12, 2001. Therefore, it can be said that this article has become a Declaration of the UN General Assembly and is legally binding on countries.

parties' obligation). This obligation that is also imposed on third parties is expected to support the enforcement of international law. This reflects the principle that basically all states have an interest in international law. In order to fulfill the interests shared by all these countries, countries justify each other to contribute to the security of the international community and the rule of law.[20]

This third-party obligation is referred to as state bystander obligation. This obligation model is different from the non-party third state obligation model. Non-party third-state obligations is a general term that refers to the obligations of all states that are not technically parties to the dispute. So that this last obligation is more concerned with the disputing party or the non-disputing party.[21] The use of this state bystander obligation is applied in the event of a state failure to protect its citizens when human rights violations occur. This obligation is placed on the shoulders of all countries as bystanders.

## 4. Erga Omnes Obligation in the Safety Aviation

Aviation safety as described above is a condition for the fulfillment of aviation safety elements which include aircraft, airports, air transportation, air navigation and other aviation facilities. Aviation safety is an important aspect that has been taken into consideration when drafting the 1944 Chicago Convention.[22]

20 Lea Brilmayer, et.al., "Third State Obligations and The Enforcement of International Law", *New York University Journal of International Law and Politics*, (Volume 44 Fall 2011), p. 5.

21 *Ibid.*

22 See the Preamble of the Chicago Convention 1944.

Almost all of the 19 Annexes of the 1944 Chicago Convention, have the substance of aviation safety. For example, Annex 8 on Airworthiness of Aircraft, Annex 17 on Security Safeguarding International Civil Aviation against Acts of Unlawful Interference and Annex 18 on Safe Transport of Dangerous Goods by Air, all of which contain aviation safety.

Aviation safety can be viewed from various perspectives, including law and culture. Aviation practitioners and regulators are usually highly developed aspects of aviation safety culture. These aspects are pathological, reactive, calculative, proactive dan generative. [23] When viewed from a legal perspective, the main legal basis of civil aviation, namely the 1944 Chicago Convention has stated that aviation safety is the goal and basis for the formation of the International Civil Aviation Organization (ICAO). Article 44 of the 1944 Chicago Convention affirms that civil aviation around the world must grow and develop in a safe and orderly manner.[24] This affirmation made ICAO as the world's civil aviation organization develop a civil aviation system that prioritizes aviation safety.

The 1944 Chicago Convention in the context of aviation safety has provided a legal basis for aviation safety standards and recommendations as contained in Chapter VI.[25] This means that countries must adapt, and comply with and comply with

23 Yaddy Supriyadi, *Keselamatan Penerbangan Teori dan Problematika*, (Tangerang: PT. Telaga Ilmu Indonesia, 2012), p. 62.

24 Article 44 Chicago Convention 1944:"… *Ensure the safe and orderly growth of international civil aviation throughout the world*…".

25 Usually called as the terminology of *Standard and Recommended Practices* (*SARPs*).

aviation safety standards and recommendations as determined by the 1944 Chicago Convention. The compliance of countries is transformed into national aviation safety regulations.[26]

The aviation safety standards are designed to protect the common interests of countries in ensuring the safety of national and international civil aviation. The concept of aviation safety includes aviation security. ICAO makes a distinction between safety and aviation security. Aviation safety is related to the safety of aircraft, including personnel licensing and eligibility (personnel licensing and airworthiness). Meanwhile, aviation security is more about protecting civil aviation from unlawful acts that can threaten the safety of civil aviation.[27]

In the previous description, it has been explained that the obligation of erga omnes has universal and non-reciprocal characteristics. Universal characteristics mean that erga omnes is an obligation imposed on the international community as a whole.[28] Meanwhile, non-reciprocity means that this obligation is the concern of all states.[29]

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26 In Indonesia, detailed aviation safety regulations are made in the form of Ministerial Regulations called Civil Aviation Safety Regulations (CASRs) which are direct adoption of aviation safety rules recommended by ICAO.

27 Jiefang Huang, *Op. Cit*., p.7.

28 The international community as a whole means including all who are included as members of the international community (not only states). For example, such as international organizations, individuals, multinational companies and others.

29 Jiefang Huang, *Op. Cit*., h. 159. This means that erga omnes obligation might emerge without bilateral or multilateral agreement in order to enforce it.

Previously, the International Court of Justice (ICJ) in its decision on the Barcelona Traction case, distinguished between the obligations of the international community and the obligations of erga omnes. The first obligation of which burdened the international community (in this case states) to be responsible. While the second obligation, is imposed on the international community as a whole (not only countries). This ICJ considerate the dichotomy of both obligations referred on Article 53 of the 1969 Vienna Convention (The Vienna Convention on the Law of Treaty 1969) on the concept of jus cogens.[30]

In the description above, it has been explained that aviation safety is the main goal of establishing ICAO. ICAO has established aviation safety standards and recommendations that all countries (especially ICAO member countries) must comply with. This means that this aviation safety obligation is universal, and this characteristic is one of the characteristics of the erga omnes obligation.

The obligation of erga omnes in addition to being universal, is also non-reciprocal based on human values (sense of humanity). Humanitarian considerations are at the core of the imposition of the erga omnes obligation on the international community as a whole. When it comes to flight safety, flight safety also has to do with humanity, in this case basic human rights, namely the right to life. Threats to aviation safety are threats to the right to life.[31]

30 Andre de Hoogh, *Obligations Erga Omnes and International Crimes, A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*, (Netherlands: Kluwer Law International, 1996), p. 93.

31 Jiefang Huang, *Op, Cit*., p. 162.

Therefore, the obligation for flight safety is an obligation that does not require the consent of the states and is non-reciprocal. The international community as a whole (not just countries) is obligated to enforce aviation safety.

## C. CONCLUSION

The obligation of erga omnes is an obligation that burdens the international community as a whole which is applied in the enforcement of national and international civil aviation safety rules. Through the erga omnes obligation, the international community is obliged to fight against all forms of violations of aviation safety rules.

Humanitarian considerations are a common thread that links the obligations of erga omnes with aviation safety. The compliance of countries with the standards and recommendations of aviation safety regulations from ICAO is an obligation that concerns all countries without the need for consent and reciprocity between countries.

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# THE SUMMARY OF EVIDENCE IN THE PROCEDURAL LAW OF THE COMMERCIAL COURT: BANKRUPTCY, CASE NUMBER: 12/Pdt.Sus-PKPU/2021/PN.Smg

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## Abstract

This research explores the particular practice of the summary of evidence (*pembuktian sederhana*) in the procedural law of the commercial court in Indonesia, focusing on a case of bankruptcy. The article elaborates the Case Number 12/Pdt.Sus-PKPU/2021/PN.Smg to reclaim the legal decree of Indonesian Procedural Law of the Commercial Court, as well as to give additional updates on the mechanism of the summary of evidence, in which it has become rather obsolete and ineffective, in regards to the rising cases of bankruptcy. In such cases, the requirements of proposing the summary of evidence add a certain burden to both the creditor and the debtor, including the submission of the Debt Payment Obligation Postponement (*Penundaan Kewajiban Pembayaran Utang*/PKPU), the amount of debt in dues, as well as the company's inability to carry out any operational activities. The submission of the postponement shall be impractical, even for the judge to grant, and therefore a more sophisticated method

is needed to extend the legal decree of the law. The method used in this article is the method of normative legal research, which allows this article to compare the summary of evidence in the Law No. 37 of 2004 with various practices and tangible facts presented in the court, as well as to observe the significant role of the summary of evidence in the case of bankruptcy in Indonesia. This research particularly focuses on a span-new solution to evolve the mechanism of the summary of evidence through a reflectional and contemporary study toward the Case No. 12/Pdt. Sus-PKPU/2021/PN.Smg, to eventually provide *ius contituendum* (established law) in Indonesia's procedural law.

**Keywords**: The Summary of Evidence, Procedural Law, Bankruptcy, Dispute Settlement, Indonesian Commercial Court, Indonesian Supreme Court.

## A. INTRODUCTION

In the case of bankruptcy, we shall encounter a sub-case of debt payment postponement that is proposed by the debtor to the bank as the creditor. One of many cases of debt payment postponement is the Case Number 12/Pdt.Sus-PKPU/2021/PN.Smg, concerning the dispute between Citigroup Inc. or Citibank N.A., Indonesia as Applicant No. 1, Bank QNB Indonesia (Public Company) as Applicant No. 2, both as the creditor, and Sri Rejeki Isman (Public Company), Sinar Pantja Djaja (Public Company), Britatex Industries (Public Company), and Primayudha Mandirijaya (Public Company), as the debtor, as well

as Prima Karya (Limited Partnership) as the co-respondent of the debtor. The case had received the verdict from the Supreme Court in May 19th, 2022 based on the ruling of the Head Judge of the Supreme Court and the Assembly Chairman.

The case evolved around the debts arrears from the debtors, consisting of at least four Limited Companies (*Perseroan Terbatas*/PT) and one Limited Partnership (*Perseroan Komanditer*/CV), of Rp 12,175,355,112,748.00 (twelve trillion, one hundred and seventy five billion, three hundred and fifty five million, one hundred and twelve thousand, and seven hundred and forty eight Rupiahs). The debtors proposed a mediation as a peaceful resolution to the adversity they were having at that moment, in the form of the Deed of Peaceful Agreement (Homologation) Number 2/Pdt.Sus-Perdamaian/K/2022 PN.Smg. In accordance with the agreement, it was also stated that the debtors should pay off the outstanding debts as intended and approbated in the agreement, as it was ruled in by the Commercial Court in Semarang, Central Java, due to the fact that the case had complied with the Article No. 281 Subsection No. 1 of the Law No. 37 of 2004 concerning the Bankruptcy and Debt Payment Obligation Postponement, decided by the applicable and accountable judicial mechanism.

However, the Applicant No. 1 perceived that there was a need for further review process toward the agreement, which was then became the Deed of Statement and Application for Cassation of Peace, by generating an argument based on the Article No. 285 Subsection No. 4 of the Law No. 37 of 2004, which stated that it was permissible to take legal effort as an appeal to against the ratification of the peace agreement, in which they had wished for

it to be cancelled. Nevertheless, according to the General Power to Attorney No. 084/AFS/-Citibank/IV/2022, Applicant No. 1 had decided to withdraw the lawsuit, as represented by their attorney team. Hence, according to the Article No. 49 Subsection No. 1 of the Law No. 3 of 2009, identical to the decision made by the Supreme Court, the withdrawal was granted on the grounds that the legality of such withdrawal or revocation was permitted in the Indonesian Law.

Both parties, the debtors and the creditors, were required to pay the court fees, which was in a rather sumptuous number for the debtors, as they were proposing that they had actually run into bankruptcy and had been unable to pay the debt, let alone pay the court fees. However, the creditors had to undergo a huge loss for the unpaid outstanding debt. This research shall explore the significant role of the summary of evidence in the legal case between corporate banking and private companies as elaborated in the Article No. 8 Subsection No. 4 of the Law No. 37 of 2004 concerning Bankruptcy. A premise was conformed and complied with: more than two creditors have the long-due outstanding debts and the debtors could not make any repayment and therefore dismissing the claims and reminders from the creditors.[1]

The mechanism used in this case was rather an obsolete method, which is no longer effective to today's development in pursuing justice in the cases of bankruptcy.[2] The mechanism

1 Kapoyos, N., "Konsep Pembuktian Sederhana Dalam Perkara Kepailitan." *Jurnal Yudisial*, *10*(3), (2017), hlm. 340. https://doi.org/10.29123/jy.v10i3.264.

2 Andani, D., & Pratiwi, W. B., "Prinsip Pembuktian Sederhana dalam Per-

required too many documents, only to proof that a certain company had failed to continue their regular operational due to the company's incapability to manage the debts that eventually caused an accumulation of outstanding or unpaid debts, though it was mainly caused by the global setback after the Covid-19 pandemic started in the early 2020. This article shall uses this notion as the background of further discovery to establish a more accountable and reliable summary of evidence in the legal scope of Indonesian procedural law, as elaborated in the discussion part of this article.

## B. DISCUSSION

### 1. The Summary of Evidence within the Context of the Procedural Law of Indonesian Commercial Court

The summary of evidence in the Indonesian Commercial Court should meet at least two necessary elements or conditions, consisting of the following (Pramudita, 2021:1926; Isnaeni, 2017:10):

a. The involvement of two or more creditors[3]

   At least two creditors have to be involved in the lawsuit, so that the creditors shall not position themselves as

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mohonan Penundaan Kewajiban Pembayaran Utang." *Jurnal Hukum Ius Quia Iustum*, *28* (3), (2021), hlm. 1-2. https://doi.org/10.20885/iustum.vol28.iss3.art9.

3 Pramudita, P., "Pembuktian Sederhana Pengajuan Permohonan Pailit oleh Pekerja Atas Dasar Upah yang Tidak Dibayar." *Jurist-Diction*, *4* (5), (2021), hlm. 1926. https://doi.org/10.20473/jd.v4i5.29826.

individuals, but as a group of creditors. There are two types of a creditor, which are the preferred creditor and the separatist creditor. The preferred creditor has a prerogative to precede with the lawsuit, in the means of receiving repayments with particular or certain calculations. In correlation with the case discussed in this article, the lawsuit filed by Citibank Indonesia dan Bank QNB Indonesia had met the first necessary element or condition. Therefore, as creditors, both banking companies were proven to file a legitimate lawsuit. This was the unassuming process of creating the summary of evidence, because the only thing to prove was the eligibility and capacity of each party involved in the case.

b. The long outstanding or unpaid debt[4]

A debt is a loan borrowed by the debtor from the creditor in the shape of physical currency or cash money, with a solid agreement or contract as the foundation. In general, within the concept of the Collateral Law (Isnaeni, 2017), the debtor shall propose a loan package to the bank as the creditor as the business asset of the debtor's company. Both movable and immovable materials shall be put into the list of collateral that binds the debtor to the creditor, such as certificates of property rights (lands, buildings, or other valuable objects). It shall become another problem to the debtor, if the list of collateral that the debtor added was the

4 Moch. Isnaeni. *Pengantar Hukum Jaminan Kebendaan*. (Surabaya: Laks-Bang PRESSindo, 2017), hlm. 10.

certificate of inherited lands, buildings, or other properties. The collateral listed could not be put to appraisal, and therefore became less or not valuable, or it shall provoke a dispute amongst the inheritors of the property.

In the practical application of the procedural law in Indonesia, it is necessary to have definite knowledge and ability to start litigations or legal circumstances, especially in pledging over inherited property as the collateral of the debt proposed. Without the approval of the inheritors of the inherited property, it is quite vague for the bank to process the loan proposal as it might be harmful for the bank when the debtor failed to make repayments. The bank shall encounter another legal case, let alone a civil lawsuit from the inheritors, if the debtor could not guarantee the viability of the collateral, in relation to the auction process that the bank should carry out if they were about to foreclose or impound the property. Hence, the debtor should present an agreement amongst the inheritors as the summary of evidence, after they declare for bankruptcy. The summary shall be the proof of the debtor's inability to pay his debt off, though various efforts has been made, such as submitting a unilateral statement to other heirs or filling a lawsuit to gain inheritance. But the debt remains an obligation for the debtor to resolve, and to further prove that various means and conducts had been carried out to settle the outstanding payments. A letter of monition from the bank, or the illustrated example above, could be a part of the summary.

In accordance with the case discussed in this article, the

approximate twelve-trillion Rupiahs debt was more than a huge amount of money, so that it is almost impossible for the debtor to pay all outstanding debt off. Then, the question is: what kind of collateral that the debtor shall list for the creditor? The problem arises when the collateral given to the Applicant No. 1 and 2 could not cover the maturing or expiring debt. The summary of evidence of a debt that has reached its due is much easier to prove by showing the documents containing the letter of debt maturity and the letter of agreement on cooperation between the parties concerned. At last, if the debtor does not respond to any reminders given by the creditor, the summary of evidence in deferring outstanding debt repayment should be renewed to be a more flexible and accommodative solution for both parties, considering that the bank is usually more of the separatist creditor who bears different principles with the preferred creditor.[5]

c. Collection without response

The debt collection toward the debtor shall be carried out through several letters of warning. The first letter received by the debtor reminds them of the obligation to pay the debt off before it becomes an outstanding debt with further consequences. The creditor sent this letter to minimize the breach of contract. The breach of contract shall be defined

5 Lie, G., Saly, J. N., Gunadi, A. & Tiray, A. M., "Problematik UU No. 37 Tahun 2004 tentang Kepailitan dan PKPU Terhadap Bank Sebagai Kreditor Separatis." *Jurnal Bakti Masyarakat Indonesia*, *2* (2), (2020), hlm.1-2. https://doi.org/10.24912/jbmi.v2i2.7242.

as a state where one of the parties involved in an agreement failed to fulfil his/her obligation as it was agreed on the contract that binds all parties involved, according to *Pacta Sunt Servanda* principle (a binding agreement with a certain legal decree).[6] The breach of contract was often found after the Covid-19 pandemic situation hit the country real hard in the first quarter of 2020. Most business went collapsed, strict though partial lockdowns took place in a number of big cities, as well as the lingering issue of national and regional economic recession in 2022. Entrepreneurs everywhere are struggling with their business, leading them to a hardship as debtors who often proposed loans in the means of acquiring assets.

This article finds that, in regards to the summary of evidence of in the procedural law of the Commercial Court, the debtor shall be experiencing difficulties on making repayment of their outstanding due. In an in-depth study on the case, it is obvious how the creditors have the right to collect the outstanding payment of the debtors as stated in the contract or agreement. Besides, it is also obvious how the debtors shall encounter multiple pressure to respond the collection process, while the damage of their bankruptcy could be very detrimental. The debtors should be aware that they will be required to pay the debts, declare bankruptcy, as well as

6 Kurniawan, N. S., "Konsep Wanprestasi Dalam Hukum Perjanjian Dan Konsep Utang Dalam Hukum Kepailitan (Studi Komparatif Dalam Perspektif Hukum Perjanjian Dan Kepailitan)." *Jurnal Magister Hukum Udayana (Udayana Master Law Journal), 3* (1), (2014), hlm. 10-11. https://doi.org/10.24843/jmhu.2014.v03.i01.p09.

pay the court fees if the creditors decided to file a lawsuit toward them. What if there is a condition where the debtors run away from the obligation or try to tamper with the evidences in the court? Eventually, the summary of evidence shall become useless and way too rigid to be placed as a solution.

There is a clear urgency for a renewal of the mechanism of the summary of evidence, in which the summary should be extended to maximum two letters of warning that becomes a sign of failed reconciliation process. Therefore, the requirements in the summary of evidence shall be met and would cut the legal process for both parties. The new mechanism should be more than just flexible, but also to apply strict sanctions to the debtors who are unable to pay the debts off but keep on accumulating debt as their business grows, as seen on the case study in this article. Updates on the requirements of the summary of evidence must be in accordance with the imposition of sanctions that imitate the fundamental principle of the procedural law, which manifested in three keystones of prompt, unassuming, and affordable legal practice. In short, the enforcement of agential coercion shall be carried out for the creditors and directly held auctions that is based on the court decision within a certain periode of time, namely within seven consecutive days. Without further confirmation or exception from the debtors, the requirements of the summary of evidence are met by presenting an argument that the debtors had failed to show good faith in the legal process.

## 2. Legal Significancy of the Summary of Evidence in the Civil Case of Bankruptcy, Case No. 12/Pdt.Sus-PKPU/2021/PN.Smg

In regards with exploring the legal significancy of the summary of evidence, reflecting on the Case No. 12/Pdt.Sus-PKPU/2021/PN.Smg, the renewal of the summary shall start with a mediation process, while considering the time limit or period of carrying a lawsuit out. Each party should show a sense of conformity and cooperativeness by attending court sessions, or at least being represented by the legal representative, assigned through valid power of attorneys.[7] The legal significancy of the summary of evidence will also be much simpler if the assigned period of the judicial process or proceedings in the Commercial Court is brief but definite to avoid corruption, collusion, and nepotism, which are strictly disgraceful to the professional code of conducts for both party. The summary of the evidence will also become a process that could be held without taking much time for both parties, considering that one of the pieces of evidence shown could be a checking form from Bank Indonesia, in the shape of *BI Checking* or mere transaction history, other arrears proposed by the debtors, or the banking activities of the debtors. The summary of evidence shall need no lengthy procedural legal process that involves mediation, reconciliation by the means of a deed, or other unreasonable processes. The creditors shall

7 Gladwin Lukman, Khu, F., Indra Kho & Edric Victori. "Batas Tanggung Jawab Hukum Dan Etis Atas Perilaku Tercela Advokat Dalam Persidangan." *Jurnal Hukum Samudra Keadilan*, *15* (1), (2020), hlm. 96-97. https://doi.org/10.33059/jhsk.v15i1.2111.

receive their rights, such as the debt repayment and bankruptcy declaration from the debtor, while the debtors could restart their business in the shape of Micro, Small, and Medium Enterprises (MSMEs), which could be developed into a trustful company to run an accountable business once again .[8]

Furthermore, the role of the curator in helping to resolve bankruptcy cases has become increasingly significant, the explanation of the curator profession has not been socialized so that many people do not understand the mechanism and the process, giving rise to various assumptions. That the role of simple evidence can not only be completed by legal counsel, but also with the assistance of a curator who helps complete the debt repayment process by auctioning the debtor's movable and immovable property. The mediation process as an alternative to the management and settlement of bankruptcy assets also contributes to facilitating the process in court after simple evidence is carried out and granted by the judge handling the case (Kartoningrat & Andayani, 2018). In connection with case number 12/Pdt.Sus-PKPU/2021/PN.Smg, the role of the curator in simple proof can be by accompanying the mediation process first, then the peace agreement deed can be used as additional evidence in simple evidence. In contrast to non-simple proofs, this method cannot be applied in cases because it is too complex. We argue that this simple method of proof should not be uncomplicated because the mechanism is too difficult. We appreciate the way the Supreme Court judges decided case 12/

8 Laila M. Rasyid & Herinawati. *Modul Pengantar Hukum Acara Perdata*. (Acaeh: Unimal Press, 2015), hlm. 18.

Pdt.Sus-PKPU/2021/PN.Smg wisely by considering the principle of justice, because justice is the essence of law as stated by Gustav Radbruch. The ideal of law is none other than justice. Justice is the legal moral foundation and at the same time the benchmark for a positive legal system.[9]

Studying the case above, what was done by the creditor was very appropriate to realize a simple proof. However, there were polemics that occurred starting from the making of a peace agreement deed to pay off debts to the cancellation of the agreement. In fact, it is an effort to buy time and harm the creditor himself in getting his receivables repaid.

### 3. The solution to regenerate the legal decree of the summary of evidence in the procedural law of the commercial court, in regards to the decision of Indonesian Supreme Court on Case No. 12/Pdt.Sus-PKPU/2021/PN.Smg

In connection with the solution that the author offers to increase the credibility and efficiency of simple evidence in the Procedural Law, especially in the Commercial Court in bankruptcy cases, it is to do it as simply as possible according to its name. This simple process includes evidence based on facts that are used to make it easier for the parties, consisting of BI checking or transaction history, evidence of the first

9 Purwadi, A., "Prinsip Moral Pada Pengaturan Perikatan Alam." *Mimbar Keadilan*, *13* (2), (2020), hlm. 145. https://doi.org/10.30996/mk.v13i2.3296.

warning letter, second warning letter, to a letter of calling for debt repayment which is carried out flexibly, transparently, and does not make it up. Furthermore, if the effort of simple proof has been carried out in its entirety, but the debtor concerned has not heeded it, a reconciliation can be made first with the agreement of all parties, before the lawsuit is finally submitted to the court. The court is the last step taken for the parties by applying the principle of ultimum remedium or the last option in dispute resolution is a court of law. Finally, the renewal that can be offered by the writing team as a solution for simple proof in addition to the mechanism being changed in the shortest possible time, can also be carried out by forcing the agency (gijzeeling) if the debtor neglects to immediately pay off the debt, because such strict sanctions can have negative effects. deterrent for debtors who are negligent by facing the reality in the detention room, including seeing the solution to the settlement of bad loans can be an example of simple proof in court.

## C. CONCLUSION AND RECOMMENDATIONS

### 1. Conclusion

That from the method of dispute resolution in the Commercial Court Procedural Law, the writing team was able to find many complex discussions that could be developed into useful writing for reforms in the field of Procedural Law, especially in the simple proof mechanism that the author offers, namely by carrying out the formality of submitting warning letters and summons, mediation efforts, to the courts as the

last resort, to the imposition of burdensome sanctions, such as forcing agencies or reforming rules regarding social work that are far more educating the debtor and contributing to the State in addition to the debtor reorganizing the economy and the company declared bankrupt. The importance of renewing Law No. 37 of 2009 for the sake of the advancement of the procedural law itself, especially in the all-digital era, where even though the proof is simple, the possibility of digitally falsifying documents will widen attract discussion to the criminal realm. Therefore, a flexible, futuristic, and contemporary mechanism will produce something extraordinary for the expected legal development (ius constituendum).

## 2. Recommendation

We recommend resolving disputes either through the Commercial Court or arbitration institutions such as the Indonesian National Arbitration Board (BANI) or known as the BANI Arbitration Centre, both in the conventional realm and in the sharia realm, by applying principles that are easy, practical, and as simple as possible. We as a team of writers also feel that it is necessary to review the ability of the parties to pay court fees and settle cases.

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## Statutory Regulation

Law No. 3 of 2009 concerning the Supreme Court.
Law No. 37 of 2004 concerning Bankruptcy.
Law No. 21 of 2011 concerning the Financial Service Authority.
The Jurisprudence matter, which is the Supreme Court decision of the Case No. 12/Pdt.Sus-PKPU/2021/PN.Smg.

# CONSTITUTIONAL COMPLIANCE ON THE DECISION OF THE CONSTITUTIONAL COURT IN THE CASE OF JUDICIAL REVIEW BY THE DECISION'S ADDRESSEE

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## Abstract

Theoretically and conceptually the final decision means that the Constitutional Court's (MK) decision is the first resort as well as the last resort for justice seekers. If it is related to the context of upholding the supremacy of the constitution, it certainly does not only stop at the cancellation of a norm of law that is contrary to the constitution, but rather how the decision on annulment is then obeyed and implemented by the addressee of the decision. That is because the nature of the final MK decision. However, in the recent constitutional issues, compliance by state institutions in implementing the Constitutional Court's decision becomes a problem because there are indications of non-compliance to follow up on the final and binding Constitutional Court's decision. Based on this, the formulation of the problem to be answered in this study is how the level of compliance with the implementation of the judicial review decision in the Constitutional Court for the period 2013 - 2018. The research is a juridical-normative

research, with the main data source, namely secondary data, data analysis using analysis qualitative and approach methods use the statute approach and conceptual approach. The results of this study indicate that there are three categories of levels of compliance with the implementation of the 2013-2018 PUU MK ruling, namely: full compliance; partial compliance and non-compliance. The results of the study show that the majority of MK PUU decisions were complied, as many as 59 decisions or equal to 54.12%. However, there are also some decisions that are partially complied, as many as 6 decisions or equal to 5.50%. Whereas the decisions that were not complied with amounted to 24 decisions or 22.01%. The remaining 20 decisions, or 18.34%, have yet to be identified in terms of compliance because of two things, namely: 1) the constitutionality period given by the Constitutional Court in its decision has not been exceeded, meaning that the legislators still have time / opportunity to follow up; 2) there has been no follow-up at all from the addressee of the decision both normatively and empirically.

**Keywords:** Compliance, Decision, Constitutional Court, Judicial Review, Addressee

## A. INTRODUCTION

The presence of the Constitutional Court (MK) as the sole interpreter of the constitution and the guardian of the constitution, has made a major contribution to the process of democratization and upholding the supremacy of the constitution in Indonesia

(Asshiddiqie, 2012: 132). One of the powers of the Constitutional Court which have been proven to have contributed to this is the authority to review laws against the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). From its establishment until now specifically from 2003-2019, the Constitutional Court has issued 1228 special decisions relating to judicial review. From this number, as many as 259 cases, the Constitutional Court has granted the applicant's request. It means that at least the Constitutional Court has saved the nation and state 259 times from the enactment of an unconstitutional legal norm.

However, if it is related to the context of upholding the supremacy of the constitution, of course, it does not only stop at the cancellation of a legal norm that is contrary to the constitution, but also how the decision is then obeyed and implemented by the addressee become much more important. This is because the nature of the Constitutional Court's decision as stated in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia is a final decision. In Article 10 paragraph (1) of the Constitutional Court Law, the nature of the final Constitutional Court decision is emphasized again.

Theoretically the final decision implies that the Constitutional Court's decision is the first resort and the last resort for justice seekers (Sutiyoso, 2006: 160). As stated by Former Constitutional Law Justice Maruarar Siahaan (2005: 4) who said that the measure to determine whether a judicial decision is final or not, can be seen from the presence or absence of a body or institution that is legally authorized to conduct a review of the court's decision, as well as the presence or absence of procedures

or mechanism in procedural law about who and how the review is carried out. According to Sri Soemantri, decisions that are final must also be binding and cannot be annulled by any institution. In English, the final and binding juridical meanings are always united, namely final and binding (Huda, 2018: 141).

In that sense, it is the obligation of all elements of the nation and state to implement Constitutional Court's decision consistently. However, the executing power of the Constitutional Court's decision can be classified into two types, namely the self-implementing/executing category and the non-self-implementing/executing category. Research conducted by Syukri Asy'ari et al shows that in general, the decisions of the Constitutional Court that are self-implementing/self-executing can be found in the decision model which legally cancels and declares null and void. Meanwhile, the decisions of the Constitutional Court that are non-self-implementing/non-self-executing can be found in the conditionally constitutional decision model, the conditionally unconstitutional decision model, the limited constitutional decision model, the limited constitutional decision model and decisions that formulate new legal norms (Asy'ari, 2013: 694-698).

However, in recent constitutional developments, the compliance of state institutions in implementing the Constitutional Court's decisions has become a problem. Various forms of non-compliance with the Constitutional Court's decision can be categorized as a constitutional disobedience that can threaten the supremacy of the constitution. Based on this situation, it is very important to study it further in the form of research so

that it can find a constitutional solution in accordance with the principles of constitutionalism. Based on the background above, this paper elaborates the level of compliance on the decision of the Constitutional Court in the case of judicial review by the verdict's addressee as well as the forms of non-compliance for the period of 2013-2018.

## B. DISCUSSION

The constitutional review system includes 2 (two) main tasks, namely: first, to ensure the functioning of the democratic system in the balance of roles or interplay between the branches of legislative, executive, and judicial powers. In other words, constitutional review is intended to prevent the utilization of power by limiting the power of the majority and overseeing the political process so that it runs within the corridors of the constitution. In a situation like this, it is clear that constitutional review means crowning the rule of law. Although the crowning effort was often injured by the majority layer. As Tocqueville often expressed his concern, "*how can courts, and judges whom serve on them, constraint governing majorities in practice?*" (Tocqueville, 1956:75). The question, of course, made the majority layer nervous. The essence of this question is that the judiciary does not only function as a court decision maker, but also plays a passive role in limiting the political power of the largest group. Second, protect every individual citizen from abuse of power by state institutions that harm their fundamental rights guaranteed in the constitution (Lijphart, 1999:225).

Since its establishment in 2003, the Constitutional Court has received and heard many cases of requests for judicial review of the constitutionality of laws. The total number of PUU cases that have been decided from 2003-2018 is approximately 1199 cases. Most of these cases were rejected and not accepted because they did not meet the requirements. Some of them were granted, which began to be decided in their 2004 decision. The rest were declared invalid and not authorized. The full recapitulation of PUU cases from 2003 to 2018 can be seen in the following table:

**Table 1**.
Recapitulation of PUU Cases from 2003 to 2018
at the Constitutional Court

| NO | Tahun | Jumlah Putusan | Amar Putusan | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | | Kabul | Tolak | Tidak Terima | Tarik Kembali | Gugur | Tidak Berwenang |
| 1 | 2003 | 4 | 0 | 0 | 3 | 1 | 0 | 0 |
| 2 | 2004 | 35 | 11 | 8 | 12 | 4 | 0 | 0 |
| 3 | 2005 | 28 | 10 | 14 | 4 | 0 | 0 | 0 |
| 4 | 2006 | 29 | 8 | 8 | 11 | 2 | 0 | 0 |
| 5 | 2007 | 27 | 4 | 11 | 7 | 5 | 0 | 0 |
| 6 | 2008 | 34 | 10 | 12 | 7 | 5 | 0 | 0 |
| 7 | 2009 | 51 | 15 | 18 | 11 | 7 | 0 | 0 |
| 8 | 2010 | 61 | 18 | 22 | 16 | 5 | 0 | 0 |
| 9 | 2011 | 94 | 21 | 29 | 35 | 9 | 0 | 0 |
| 10 | 2012 | 97 | 30 | 31 | 28 | 5 | 2 | 1 |
| 11 | 2013 | 110 | 22 | 52 | 22 | 12 | 1 | 1 |
| 12 | 2014 | 131 | 29 | 41 | 37 | 17 | 6 | 1 |
| 13 | 2015 | 157 | 25 | 50 | 61 | 15 | 4 | 2 |
| 14 | 2016 | 96 | 19 | 34 | 30 | 9 | 3 | 1 |
| 15 | 2017 | 131 | 22 | 48 | 44 | 12 | 4 | 1 |
| 16 | 2018 | 114 | 15 | 42 | 47 | 7 | 1 | 2 |
| **TOTAL** | | **1199** | **259** | **420** | **375** | **115** | **21** | **9** |

*Data diolah dari website MK: Rekapitulasi Perkara Pengujian Undang-Undang*

Specifically, for decisions that grant the request, a total of 259 cases or 20% of the total cases that have been decided. However, in fact the total number of decisions whose decisions

were granted was only 239 decisions. This is because there was the same case, which was then decided by the Court in one decision. There are at least 14 decisions that grant, which unites several similar cases in one decision. For example, the decision of the case Number 001-021-022/PUU-I/2003 related to the review of Law Number 20 of 2002 concerning Electricity, decision number 071/PUU-II/2005; 001-002/PUU-II/2005 related to the review of Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations; Decision Number 112/PUU-XII/2014-36/PUU-XII/2015 related to the review of Law Number 18 of 2003 concerning Advocates, and so on.

Based one Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia *juncto* Article 10 Paragraph (1) of Law Number 24 of 2003 concerning the Constitutional Court as amended by Law Number 8 of 2011, it is stated that the nature of the decision on judicial review by MK is final. The final and binding decision has a very broad effect, applies to anyone, not *interpartes* or not only to the disputing parties (erga omnes). Therefore, every decision must be based on philosophical values and have a binding legal certainty value, which is based on the values of justice (Faqih, 2010: 114). According to Bagir Manan, erga omnes is a decision whose consequences apply to all cases containing similarities that may occur in the future, so when the legislation is declared invalid because it conflicts with the Constitution or other laws and regulations higher then it becomes null and void for everyone (Azis, 2020: 132-133). The decision of erga omnes can be considered as entering the function of legislation (legislative function), Judges are no longer merely

stipulating laws for future events (abstract) and this contains elements of law formation. The formation of law for events that are abstract is a function of legislation, not a judicial function.

As a decision that has a statutory function (negative legislator), the final nature of the Constitutional Court's decision is binding on all parties, both citizens and state institutions. Therefore, all state organs are bound to no longer apply the law that has been annulled. The decision must be used as a reference or reference in treating their rights and authorities. In line with that, Hans Kelsen also stated that "unconstitutional" laws cannot be applied by any other organ (Isra, 2014: 8-9).

However, in practice the implementation of the Constitutional Court's decisions, especially those related to PUU cases, does not always run consistently. This will certainly have an impact on the level of compliance of the state institutions that are the adjudication of the Constitutional Court's decision. In the perspective of constitutional review, non-compliance with the Constitutional Court's decision can be considered as a violation of the constitution (constitutional disobedience).

In the procedural law discourse, the term execution of court decisions is always identified or even equated with the term "execution". Theoretically, the meaning of execution is the same as the notion of carrying out a decision (*tenuitvoer leggings van vonnissen*). The term carrying out a decision has the meaning of carrying out the contents of a court decision. Nowadays the term "implementation of decisions" seems to have become a general term, and almost everyone in the legal world uses the term "implementation of decisions" (Samosir, 2011: 328).

Etymologically, execution comes from the Dutch language "*executive*" which means the implementation of a court decision, so execution is etymologically the same as carrying out a decision. According to the terminology of procedural law, execution is a forced act with general force carried out by the Court to the losing party to implement a decision that has permanent legal force. It is not enough for the court/judge to just settle the case by making a decision, but also the decision must be enforceable or enforceable (Samosir, 2011: 328).

Basically court decisions that have permanent legal force (*inkracht van gewijsde*) can be implemented, but in practice not all decisions can be implemented (executed). Including the decision of the Constitutional Court which is often a debate related to its executive power. Referring to the provisions of Article 47 of the Constitutional Court Law, it is emphasized that "*The decision of the Constitutional Court has permanent legal force since it has been pronounced in a plenary session which is open to the public*". This shows that since the decision being pronounced or read out, from that moment the decision must be carried out.

Since the end of 2008 until now, there are two types of decisions of the Constitutional Court, namely: *first*, decisions that can be directly implemented since the decision has permanent legal force (self-executing). The purpose of this self-executing decision can be interpreted that the decision will be effective immediately without the need for further follow-up. The character of such decisions is generally decisions that only nullify a law without requiring changes or revisions to new laws, because their existence is not related to concrete cases. *Second*,

decisions that require certain follow-up (non-self-executing). This non-self-executing form of decision is a form of decision that must wait for changes to the law that has been annulled.

With regard to this issue, the author believes that actually the Constitutional Court's Decision is valid and binding from the moment it is pronounced and immediately has executive power. However, the implementation of a Constitutional Court Decision includes at least two dimensions, namely the practical dimension and the normative dimension. From the practical dimension, all decisions of the Constitutional Court are self-executing, meaning that they must be carried out by everyone (*erga omnes*) including state organs, state official or individual.

There are at least two arguments that support this statement, namely; First, the main measure of a court decision that can be executed is that it must be a decision that has permanent legal force (*in kracht van gewijsde*). The indicator that a court decision has permanent legal force is when the decision is no longer open to using available ordinary legal remedies. The Constitutional Court's decision certainly fulfils these criteria because it has been confirmed in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia, that the Constitutional Court's decision is final. It means the Constitutional Court's decision is the first resort and the last resort for justice seekers.

Second, the measure of whether or not a court decision can be executed is when the order contains a "*condemnatoir*" order. According to Lilik Mulyadi, the qualifications for a condemnatory decision are those that contain punishment, such as punishment containing the surrender of an item, vacating a plot of land,

paying a certain amount of money or doing a certain act, and so on. In fact, the Constitutional Court's decision, especially in the PUU case, apart from being declaratory and/or constitutive, also contains a condemnatory nature, as can be seen in each of the Constitutional Court's decision on PUU case containing one order which reads "*ordering the inclusion of this decision in the State Gazette of the Republic of Indonesia as appropriate*".

From the perspective of normative dimension, the Constitutional Court's decision does require a follow-up from the institution that become the addressee of the decision. In such a context, it is natural for someone to mention that there are types of decisions of the Constitutional Court that fall into the non-self-executing category. From a constitutional perspective, this is due to the link between the implementation of the Constitutional Court's authority in PUU with the legislative function which Hans Kelsen calls negative legislators (Kelsen, 1973: 268). In other words, the Constitutional Court is a part that can influence the legislative process in the legislature. In this regard, Anna Rotman affirms Hans Kelsen's view because its decisions had the power "*to make a statute disappear from the legal order*". Still referring to the opinion of Hans Kelsen, H.M. Laica Marzuki emphasized that when the Constitutional Court is a negative legislator, the parliament that produces laws is called a positive legislator. In that sense, added Laica Marzuki, not only the parliament has a legislative function but also the Constitutional Court (Marzuki, 2007: 6).

Explaining the significance of judicial power in the legislative process, Vicky C. Jackson and Mark Tushnet in Comparative Constitutional Law said, when constitutional judges review the results of the legislative process, the decision-making process is closer to the legislative decision-making process (Isra, 2014: 8-9). In such a framework, because the Constitutional Court performs its legislative function negatively, the Constitutional Court's decision needs to be transformed into positive legislation. Therefore, to make positive the provisions of articles or paragraphs, especially those that are declared constitutional/ conditionally unconstitutional and/or contain new legal norms, a follow-up action is required by the law maker.

In addition, in the normative dimension, the Constitutional Court's decision also requires follow-up from the organs related to the substance of the decision. Because in the Indonesian context, the validity of the statutory norms is regulated in a hierarchical manner as stipulated in Article 7 of the Law number 12/2011. Because the Constitutional Court's decision is mentioned as one of the contents of the Law, all laws and regulations under the Law must also be harmonized and synchronized with the Constitutional Court's decision. Thus, the follow-up to the Constitutional Court's decision is not only at the level of law, but also Government Regulations (PP), Presidential Regulations (Perpres), Ministerial Regulations (Permen), Regional Regulations (Perda) and so on.

Within the conceptual framework as described above, compliance with the Constitutional Court's Decision includes these two dimensions, namely the practical dimension and the normative dimension. To find out how the implementation of

the Constitutional Court's decisions in the PUU case and the level of compliance of state institutions in implementing those decisions, the authors conducted a research by taking samples of the Constitutional Court's decisions in the PUU case for the 2013-2018 period. Thus, the authors take a sample of the Constitutional Court's decisions for five years, starting in 2014, 2015, in 2016, 2017 and 2018.

The decisions of the Constitutional Court in the PUU case for the 2013-2018 period, which are the subject of the author's reserach, are of course specific to the decisions that "*accept the applicant's application*". As previously mentioned, the total number of decisions of the Constitutional Court which said "*accepting the applicant's application*" was **1,199 decisions**. However, because the author limits it to the 2013-2018 period, the number of decisions that are the subject of the author's study amounted to 109 decisions with the following details:

a. The PUU MK Decisions in 2014 amounted to 28 Decisions
b. The PUU MK Decisions in 2015 amounted to 26 Decisions
c. The PUU MK Decisions in 2016 amounted to 19 Decisions
d. The PUU MK Decisions in 2017 amounted to 21 Decisions
e. The PUU MK Decisions in 2018 amounted to 15 Decisions

Based on this research, an overview of the implementation and compliance with the PUU MK decisions for the 2013-2018 period can be described as follows:

**Table. 2**
Level of Compliance Towards PUU Decisions of the Constitutional Court

| Compliance level | Amount | Percentage |
|---|---|---|
| Fully Complied | **59** | **54,12.. %** |
| Partially Complied | **6** | **5,50..%** |
| Not Complied | **41** | **37,61..%** |
| Unknown | **3** | **2,75..%** |
| **Total** | **109** | **100%** |

Based on the table above, the authors divide three categories of levels of compliance with the implementation of the PUU MK decision, namely: fully complied; partially complied and not complied. The results of the author's study showed that the majority of the decisions of the PUU MK were complied, namely 59 decisions or 54.12%. However, there were also several decisions that were not fully complied with or in other words only partially complied, namely 6 decisions or 5.50%. As for the decisions that were not complied, there were 41 decisions or 37.61%. The remaining 3 decisions or 2.75% have not yet identified because the constitutionality period given by the Constitutional Court in its decision has not been exceeded, meaning that the legislators still have time/opportunity to follow up. Thus it can be concluded that the level of compliance with the PUU MK decision for the period 2013 – 2018 is still higher than the level of non-compliance with a comparison of 54.12%

compared to 37.61%. But the number of non-compliance is very worrying related to the supremacy of the constitution.

In identifying the level of compliance with the PUU MK decision for the 2013 – 2018 period, the authors first categorize all the 109 decisions into two categories, namely; (1) decisions that do not require follow-up (in the terminology of other researchers the term self-implementing is used) and (2) decisions that require follow-up (in the terminology of other researchers the term non-self-implementing is used). For the first category, the identification of compliance is seen from a practical perspective, while for the second category the identification of compliance is seen from the practical or normative side, it means that if it is not found from the practical side, it is seen from the normative side.

## C. CONCLUSION

Based on the description above, it can be concluded that there are three categories of levels of compliance with the implementation of the PUU MK decisions for the 2013-2018 period, namely: full compliance; partial compliance and non-compliance. The results of the author's study showed that the majority of the decisions of the PUU MK were complied with, namely 59 decisions or 54.12%. However, there were also several decisions that were not fully complied with or in other words only partially complied with, namely 6 decisions or 5.50%. As for the decisions that were not complied with, there were 41 decisions or 37.61%. The remaining 3 decisions or 2.75% have not yet identified the level of compliance because the constitutionality period given by

the Constitutional Court in its decision has not been exceeded, meaning that the legislators still have time/opportunity to follow up. Thus, it can be concluded that the level of compliance with the PUU MK decision for the period 2013 – 2018 is still higher than the level of non-compliance with a comparison of 54.12% compared to 37.61%. But the number of non-compliance is very worrying related to the supremacy of the constitution.

The forms of non-compliance by the addressee for the period 2013 – 2018 can be seen in practical and normative dimension. Practically speaking, non-compliance with the PUU MK decision is manifested in the form of state administration, government policies, state institutions and/or agencies as well as judicial processes/decisions. Meanwhile, normatively non-compliance with the PUU MK decision is manifested in at least 8 forms as follows: (1) Laws and/or Law revisions; (2) Government Regulations and/or their revisions; (3) Presidential Regulation and/or its revision; (4) Ministerial Regulation and/or its revision; (5) Regional Regulations/Special Regional Regulations/Qanun and/or their revisions; (6) State Institution Regulations ex: KPU/ Bawaslu and/or their revisions; (7) Regulation of the Supreme Court and/or its revision; and (8) Circular Letter.

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# DISCRIMINATING RELIGIOUS BELIEFS THROUGH BLASPHEMY LAWS: THE CASE OF AHMADIYYA IN INDONESIA AND PAKISTAN

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**Abstract**

The existence of blasphemy laws or laws that criminalized any act that insults or defames religion has existed in many countries, usually these laws are formed to prevent conflicts between religious groups in society. The problem is, in reality, these laws are often used not to prevent conflicts between various groups in society, but to discriminate against certain religious groups. In this paper, I want to show how the use of blasphemy laws in Indonesia and Pakistan – two Muslim-majority countries – were used to discriminate against Ahmadiyya, a minority sect within Islam, and I would like to argue that the existence of these laws that discriminate against Ahmadiyya actually did not have a strong constitutional basis in both countries, in contrast, the existence of blasphemy laws is contrary to the constitutions of both countries because the constitutions of both countries place equality and freedom of religion as two of the most important rights in their constitutions.

**Keyword:** discrimination, blasphemy, Ahmadiyya.

## A. INTRODUCTION

Despite its controversial nature, the blasphemy laws or the law that criminalized any act that insults or defame religion has existed in many countries across the globe.[1] Usually, the state authorities claimed that this law was made to maintain public order or to prevent conflicts between many religious groups in society. In fact, some proponents of blasphemy laws also argued that the existence of these laws was needed to protect the religious rights of the offended groups.[2] However, in contrast to many of these claims, studies show that blasphemy laws generate more religious conflict in society, rather than prevent it.[3] Even in some countries, blasphemy laws are often be used by the religious

1 Joelle Fiss and Jocelyn Getgen Kestenbaum, *Respecting Rights? Measuring the World's Blasphemy Laws* (US Commission on International Religious Freedom 2017) 5.

2 Jo-Anne Prud'homme, *Policing Belief: The Impact of Blasphemy Laws on Human Rights* (Freedom House 2010) 1.

3 See Omar Khan, 'In the Name of God: Problems with Pakistan's Blasphemy Laws' (2016) 4 Cornell Int'l L.J. Online. <https://cornellilj.org/2016/01/19/in-the-name-of-god-problems-with-pakistans-blasphemy-laws/>; See also Siswo Mulyartono, Irsyad Rafsadie and Ali Nur Sahid, 'How did a complaint about a mosque loudspeaker end up in a blasphemy conviction?' (September 4, 2018) Indonesia at Melbourne. https://indonesiaatmelbourne.unimelb.edu.au/how-did-a-complaint-about-a-mosque-loudspeaker-end-up-in-a-blasphemy-conviction/.

majority groups to impose a certain interpretation of religion on members of the minority sect who are considered heretical.[4]

These problems caused a considerable number of countries, especially Western secular states to abolish blasphemy laws, or even if they still maintained them, these laws are only existing nominally and rarely be implemented.[5] The United Nations Human Rights Committee in General Comment No. 34 regarding Freedom of Expression and Opinion also emphasized that the blasphemy laws are not compatible with Article 19(3) of the International Covenant on Civil and Political Rights, which deals specifically with the right to freedom of expression.[6]

Regardless of these problems, there still a large number of states that have and enforce blasphemy laws, usually these countries are theocratic or Muslim-majority states that do not separate religion from politics.[7] As for the Muslim countries that still have this law, there is much evidence that shows that among these states' the implementation of blasphemy laws is used to discriminate against religious minorities.[8]

4 Prud'homme (n 2) 2.

5 Farhan Raouf, *Modernizing Pakistan's Blasphemy Law as Hate Speech* (LLM Theses, Schulich School of Law, Dalhousie University 2016) 8.

6 Human Rights Committee, 'General comment No. 34 on Freedom of Opinion and Expression (article 19)' (2011) International Covenant on Civil and Political Rights Para 48.

7 Haidar Adam, *Blasphemy Law in Muslim-Majority Countries: Religion-State Relation and Rights Based Approaches in Pakistan, Indonesia, and Turkey* (LLM Theses, Central European University 2015) 3.

8 Prud'homme (n 2) 6.

Indonesia and Pakistan are the prime examples where blasphemy laws are used to discriminate against religious minorities, wherein these two Muslim majority states, the identity of the people who have been accused of committing blasphemy is mostly non-Muslims,[9] and this is a surprising fact considering that both countries always claim that they have created the blasphemy laws in a general manner without specifically targeting certain religious groups.[10] But, contrary to these claims, there is one religious group that is specifically targeted by the blasphemy laws in both states, namely Ahmadiyya, a minority sect within Islam. This happens because the Ahmadiyya community views its founder, Mirza Ghulam Ahmad, as the last prophet after Prophet Muhammad (who generally has been considered as the last prophet of Islam), and they also have several different teachings from the orthodox teachings of Islam.[11] This difference then makes their teachings considered heretical by many Muslims in both societies.

In Pakistan, the blasphemy laws contained in Chapter XV of the Pakistan Penal Code regarding "Offences Relating to Religion"

9 See Muhammad Ali Ilahi, Blasphemy Laws, 'Radicalization and Discrimination in Pakistan' (March 6, 2019) Cornell Policy Review. <http://www.cornellpolicyreview.com/blasphemy-laws-pakistan/>; See also Amnesty International, *Prosecuting Beliefs: Indonesia's Blasphemy Law* (Amnesty International 2014) <https://www.amnestyusa.org/files/_index-_asa_210182014.pdf>

10 Melissa Crouch, 'Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law' (2012) 7 Asian Journal of Comparative Law 1, 3-6.

11 Melissa Crouch, 'Ahmadiyah in Indonesia: A history of religious tolerance under threat' (2011) 36 AltL J 56, 56.

have several provisions that are specifically formed to target Ahmadiyya, namely Sections 298B and 298C, wherein these two provisions Ahmadiyya was prohibited to self-identified themselves as a Muslim, they also were prohibited to propagate or to disseminate their faith and calling their places of worship as a mosque. Meanwhile, in Indonesia, Law No. 1/PNPS/1965 on the Prevention of the Misuse/Insulting of a Religion (Also known as "*UU Penodaan Agama*" or "the Blasphemy Law") does not have provisions that specifically target Ahmadiyya, but this Law, especially its first article which prohibits spreading religious interpretations that deemed as deviant,[12] becomes the basis for the Indonesian government to promulgate a Joint Ministerial Regulation in 2008 that prohibits Ahmadiyya followers to spread their teachings or exercising their religious activities.

This paper wants to challenge the discrimination directed against the Ahmadiyya community through these blasphemy laws, especially in the perspective of constitutional equality, because it cannot be denied that Indonesia and Pakistan positioned equality and freedom of religion as two of the most important fundamental rights in their constitutions. Therefore, the existence of a laws that specifically prohibits Ahmadiyya, shows that there is inequality in the implementation of freedom of religion in both states.

12 See Art. 1 of the Blasphemy Law that prohibit people to publicly interpreting religion or to conduct religious activities which deviates with the core teachings of the religion.

## B. DISCUSSION

### 1. The History of Blasphemy Laws and Ahmadiyya Religious Community

The existence of blasphemy laws actually has a long history in these two nations, especially in Pakistan, because these provisions have existed in the Pakistan Penal Code since Pakistan was still part of the British colony with India. Initially, the blasphemy laws were created to prevent conflicts between Hindus and Muslims under British rule.[13] That is why, in its early days the contents of the Pakistan Penal Code do not have provisions that specifically prohibit the religious activities of the Ahmadiyya, but it only regulates the prohibition for individuals to speak or write anything that can provoke conflict between different religious groups in the society.[14]

A similar situation can also be found in Indonesia when the Blasphemy Law was enacted in 1965. Initially, this Law was only intended to prevent the offense of insulting religion which could lead to a conflict between different religious groups, therefore no provision specifically targets Ahmadiyya. However, it should also be noted that since this Law was enacted, it already has a provision that prohibits conducting religious activities which deviate from the core teachings of the religions that are officially recognized in Indonesia – a provision that later provides a legal basis to ban Ahmadiyya community.[15]

13 Raouf (n 5) 78.

14 Ibid 79.

15 Crouch (n 10) 3-4.

Provisions specifically prohibiting Ahmadiyya only emerged after the process of Islamization in the two states. In Pakistan, this Islamization process began after General Zia ul-Haq seized power in 1977, Zia who ruled without a democratic mandate needed the support of the Muslim population, which is the majority in Pakistan.[16] One of the ways that Zia used to gain their support was by accommodating anti-Ahmadiyya sentiments that are already rooted in the Pakistan Muslim population since most of them come from the Sunni sect.[17] This then prompted Zia's government in 1984 to introduce provisions in the Pakistan Penal Code – especially in the chapter that deals with blasphemous conduct – that prohibit the Ahmadiyya community from professing their beliefs.[18]

Meanwhile, in Indonesia, an explicit ban on the Ahmadiyya community only emerged in 2008, or 43 years after the Blasphemy Law was enacted. And similar to Pakistan, the emergence of this prohibition was related to the Islamization process that took place in Indonesian society since early 2000s. Having previously been under the leadership of a military dictatorship from 1965 to 1998 that view Islamic political groups as a threat to their regime, the democratic transition that happens in 1998 opened up an

16 See Osama Siddique and Zahra Hayat, 'Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan - Controversial Origins, Design Defects, and Free Speech Implication' (2008) 17 Minn J Intl L 303, 319.

17 Peter Gottschalk, 'Who are Pakistan's Ahmadis and why haven't they voted in 30 years' (August 8, 2018) The Conversation. <https://theconversation.com/who-are-pakistans-ahmadis-and-why-havent-they-voted-in-30-years-100797>

18 Raouf (n 5) 86.

opportunity for Islamic political groups to influence Indonesian politics.[19] One of the results of this Islamization process is the success of the Islamic political groups – which majority belong to the Sunni sect – forcing the government of President Susilo Bambang Yudhoyono in 2008 to stipulate a Join Ministerial Regulation as an implementing regulation to the Blasphemy Laws, which prohibit Ahmadiyya from exercising their religious activities.[20]

## 2. The Right to Equality and (Religious) Discrimination

Talking about the concept of equality obviously cannot be separated from discrimination, because as argued by Susanne Baer "equality is a right to address the fundamental similarity of human beings as well as the differences among them, to eventually target discrimination".[21] However, the concept of equality itself still raises many questions, because this concept cannot be separated from the perception that "all human beings are inherently equal",[22] whereas in many conditions there are certain differences that make a person need to be treated

19 Tim Lindsey and Helen Pausacker, 'Introduction' in Tim Lindsey and Helen Pausacker (Eds*.), Religion, Law and Intolerance in Indonesia* (Routledge 2016) 2.

20 Crouch (n 11) 56.

21 Susanne Baer, 'Equality' in Michel Rosenfeld and András Sajó (Eds.) *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 994.

22 Norman Dorsen, Michel Rosenfeld, Andras Sajo, Susanne Baer and Susanna Mancini, *Comparative Constitutionalism: Cases and Materials* (West Publishing 2016) 839.

differently.[23] This makes Michel Rosenfeld consider that the struggle to achieve constitutional equality must also come to the principle of "different correlated to equality", which means that each person or group will be treated differently according to their needs.[24]

Given that equality cannot be separated from difference, then what makes an action could be considered as discrimination? This is a difficult question to answer since the difference of treatment does not necessarily make something was considered as inequality that lead to discrimination, according to Justice McIntyre from the Supreme Court of Canada in his dissenting opinion in *Andrew v. Law Society of British Columbia*, discrimination is:[25]

> "a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society."

The above argument emphasized that the difference of treatment should be considered as discrimination if it brings disadvantages to the groups or individuals who are subject to that treatment. In addition to the effect of the treatment, a difference

23 Ibid.

24 Ibid 841.

25 Andrews v. Law Society of British Columbia, Supreme Court (Canada) [1989] 1 S.C.R. 143. See Ibid 873.

of treatment would also be considered as discrimination if the distinction is based on the personal characteristics of the individual or group. Many constitutions and international legal documents declared several personal characteristics that when used as a basis for differentiating treatment between individuals or groups will make such treatment be considered as discriminatory. These characteristics usually include race, ethnicity, religion, and sex.[26] In the case of Indonesia and Pakistan, the blasphemy laws that specifically prohibiting the Ahmadiyya community from practicing their beliefs is certainly an example of "direct discrimination",[27] because the different of treatment was performed to a specific group in the society based on the ground of religion.

## 3. Challenging the Ban Toward Ahmadiyya from Constitutional Equality Grounds

Constitutionally, the laws that specifically prohibit the Ahmadiyya community from exercising their religious activities contradict the guarantees for freedom of religion in both countries' constitutions,[28] especially for the Indonesian Constitution, since it

26 See Art. 3(3) of the German Basic Law, Section 15(2) of the Canadian Charter of Rights and Freedom, Art. 9(3) of the South African Constitution, and Art. 26 of the International Covenant on Civil and Political Rights. In Ibid 862; See also Baer (n 13) 998.

27 Dorsen, Rosenfeld, Sajo, Baer and Mancini (n 22) 862.

28 See Art. 20 (a) of the Pakistan Constitution, which states that: every citizen shall have the right to profess, practice and propagate his religion; See also Art. 29 (2) of the Indonesian Constitution: "The state guarantees

categorized freedom of religion as one of the fundamental rights that cannot be restricted under any circumstances.[29]

Besides that, the violations toward the religious rights of the Ahmadiyya community has also contradicted the principle of equality. As argued by Rosenfeld, any concern toward equality will "permeate other constitutional rights",[30] and during this case, inequality occurs because the Ahmadiyya community cannot exercise their religious rights, even though both countries' constitutions have firmly stated that every citizen has the right to embrace a religion and to conduct worship as well as guarantee equal treatment for its citizens,[31] that is why the prohibition toward the Ahmadiyya community is certainly an example of discrimination since it places them at a disadvantage compared to other religious groups in the two societies. For this reason, the blasphemy laws that specifically prohibit the Ahmadiyya community from practicing their beliefs must be repealed because these laws contradict the guarantee of equality in the constitutions of both countries.

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the freedom of every inhabitant to embrace his/her respective religion and to worship according to his/her religion and faith as such."

29 See Art. 28I (1) of the Indonesian Constitution: The right to live, the right not to be tortured, the right of freedom of thought and conscience, the right of religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under a retroactive law are human rights that cannot be reduced under any circumstance whatsoever.

30 Dorsen, Rosenfeld, Sajo, Baer and Mancini (n 22) 840.

31 See Art. 25 (1) of the Pakistan Constitution: See also Art. 27 (1) of the Indonesian Constitution.

The problem is, in Pakistan, discrimination against Ahmadiyya is not only contained in the Penal Code but also in the Pakistan Constitution, specifically in Art. 260 Clause 3, which categorized Ahmadiyya as a non-Muslim.[32] The existence of this provision is certainly an obstacle to revoke the article in the Penal Code because it provides a constitutional basis for discrimination against Ahmadiyya. In addition to that, in 1994, the Supreme Court of Pakistan in *Zaheerudin v. State* also asserted that the provisions in the Pakistan Penal Code which restrict Ahmadiyya religious practices are constitutional since it was a duty for the state to maintain law and order.[33] Because Ahmadiyya religious practices – even though it was conducted peacefully – offended the religious sentiment of Pakistan's majority Sunni population.[34]

This decision from the Pakistan Supreme Court, apart from ignoring Article 20 of the Pakistan Constitution – which explicitly declares that every citizen has the right to practice his religion – is also problematic, because the majority opinion written by Justice Abdul Qadeer Chaudhry uses the US trademark law – which prohibits people from using trade names or trade marks of others for commercial purposes – as an analogy to justify the prohibition for the Ahmadiyya community to use Islamic

32 See Art. 260 (3) which defines non-Muslim as a "person who is not a Muslim and includes a person belonging to the…. a person of the Quadiani group or the Lahori group (who call themselves Ahmadis' or by any other name)…"

33 Zaheeruddin v. State, [1993] 26 SCMR, Supreme Court (Pakistan), 1718.

34 Amjad M. Khan, 'Misuse and Abuse of Legal Argument by Analogy in Transjudicial Communication: The Case of Zaheeruddin v. State' (2011) 10 Rich J Global L & Bus 497, 509.

identity.[35] In his opinion Justice Chaudry gave an example of how "Coca Cola Company will not permit anyone to sell, even a few ounces of his own product in his own bottles or other receptacles, marked Coca Cola",[36] according to Justice Chaudry if a commercial property can be protected under trademark law, then religion should also have the same level of protection under trademark law. This argument is certainly flawed, because as explained by Amjad Mahmood Khan, the majority justices fail to recognize that the US trademark law "makes clear that religious prayers and names cannot be trademarked".[37]

In Indonesia, the main obstacle to remove the regulation that discriminates against the Ahmadiyya community is the decision of the Indonesian Constitutional Court in 2010 and 2013 which upheld the constitutionality of the Blasphemy Law.[38] In the 2010 decision, the Indonesian Constitutional Court determined that the state has the right to ban a person or group from spreading religious teachings that are considered heretical, on the grounds of Art. 28J of the Indonesian Constitution, which declares that the state can limit a person's freedom to protect religious values.[39]

35 Ibid.

36 Zaheeruddin, [1993] 26 SCMR, 1753–1754.

37 Khan (n 34) 510.

38 See the Indonesian Constitutional Court Decision No. 140/PUU-VII/2009; The Indonesian Constitutional Court Decision No. 84/PUU-X/2012.

39 Ibid 291-292; For a more discussion about this decision see also Melissa Crouch, 'Constitutionalism, Islam and the Practice of Religious Deference: The Case of the Indonesian Constitutional Court' (2016) 16 Australian Journal of Asian Law 1.

This interpretation was reaffirmed by the Constitutional Court in their 2013 decision, where the Court cited their previous decision in 2010 which claimed that the Blasphemy Law did not limit religious freedom but only limits behaviour that degrades or misuses the teachings of a religion recognized by the state.[40] Both of these decisions were controversial because, aside from giving constitutional justification for regulation that discriminate certain groups based on their religion, the Court indirectly overrides the existence of Art. 28I (1) of the Indonesian Constitution which categorized freedom of religion as a right that cannot be restricted under any circumstances.

## C. CONCLUSION

The explanations above reveal that the existence of blasphemy laws is not only problematic from the perspectives of religious freedom, but it can also contradict the principle of equality which currently can be found in most constitutions around the world.[41] Because as exhibited by the experiences of Pakistan and Indonesia with their treatment to the Ahmadiyya community, blasphemy laws have the potential to be used to imposed state-sanctioned interpretations of religious doctrine on the member of the minority sect which has been considered as deviant. As a result, minority sects could be prohibited from exercising their religious activities if their religious understanding

40 Crouch (n 39) 11.

41 David S. Law, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 Calif Law Rev 1163, 1200.

was considered heretical by the state and majority populations. This prohibition is certainly an example of direct discrimination since it makes their religious rights be treated differently based on their religious beliefs.

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