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Construction of Law Enforcement Against Money Laundering Crime with Cyber Laundering Mode

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Abstract

If it is understood that all economic crimes (financial crimes) will lead to money laundering, then there should also be a lot of UUTPPU applications for economic crime cases. But in reality the court's decision on financial crimes related to UUTPPU is not up to 20 decisions, even though the economic crimes that reached the court were very large (especially those that are still in the investigation stage, the number is far more), namely corruption, banking crime, illegal logging, smuggling and others. Based on these data, it can be imagined how long a case must be settled through a judicial process. Not infrequently a criminal case requires three to six years to get a decision. The problem does not stop here, although the decision has been obtained, it is likely that the parties who are dissatisfied with the decision will submit other legal remedies such as appeal or reconsideration. When added up, the total time needed for a decision to have permanent legal force is fifteen to twenty years. Various technological advances were then anticipated with the birth of Law No. 11 of 2008 concerning Information and Electronic Transactions and subsequently written ITE Law. Information, Documents and Electronic Signature Arrangements are set forth in Articles 5 through 12 of the ITE Law. In general, it is said that Electronic Information, and/or Electronic Documents, and/or printouts, are valid legal evidence, which is an extension of legal evidence in accordance with the applicable Procedure Law in Indonesia. Likewise, Electronic Signatures have legal force and legal effect. However, the making of an electronic signature must meet the specified requirements. The threat of using information technology to encourage money laundering has been recognized by many. Professor of Information Technology at the University of Paramadina, Marsudi W. Kisworo stressed that currently the world is trying to fight money laundering through the Internet media, and even the biggest crime on the Internet is money laundering with a percentage of more than 30% of cybercrime.

Keywords: law enforcement, money laundering, cybercrime.

1. Introduction

The problem of money laundering has just been declared a criminal offense by Law No. 15 of 2002 concerning Criminal Acts of Money Laundering (TPPU) which was passed and enacted on 17 April 2002. With the TPPU Law, the legislators intend to criminalize¹ money laundering crimes (Money Laundering) into an act prohibited by law criminal.

¹ Criminalization is a rather new term in the science of law. Criminalization is part of criminal policy using the means of punishment. The definition of criminalization based on the Indonesian dictionary is: "A

As a new law, of course it contains new problems for the Republic of Indonesia (Indonesia). The issuance of Law No. 15 of 2002 this TPPU is to overcome the effects of Indonesia being blacklisted, which is categorized as a non-cooperative Country, or a Non-Cooperative Countries and Territories (NCCT's) country since 2001 by the Developed Countries group incorporated in the Financial Action Task Force (FATF) on Money Laundering.²

Increasing money laundering crimes, the State of Indonesia, which is a hotbed for money laundering, received enormous attention from governments, international organizations and those who carry out transnational business practices. The organization that first paid attention to money laundering was Task the Financial Action Force on Money Laundering (FATF). FATF has the function of developing and disseminating policies to eradicate money laundering, processing assets – assets from criminal acts in hiding their illegal origins.

One of the roles of the Financial Action Task Force on Money Laundering (FATF) is to determine the policies and steps needed in the form of recommended actions to prevent and eradicate money laundering. In Indonesia's input into the NCCT's based on the FATF decision due to the existing TPPU Law considered too weak, the government made efforts to amend the law with the birth of Law No. 25 of 2003 concerning Criminal Acts of Money Laundering, then precisely on 12 February 2005, Indonesia officially left the NCCT's list.

Why did the Republic of Indonesia twice make the TPPU Law?, the argument made by the makers of the TPPU Law was in the framework of preventing and eradicating TPPU, Indonesia already had Law No. 15 of 2002 concerning TPPU. However, it is felt that the provisions in the Act do not meet international standards and the development of judicial processes of money laundering, so it needs to be changed so that efforts to prevent and eradicate TPPU can run effectively.³

There is a reason why Indonesia immediately has an anti-money laundering law, even in a very fast time Indonesia changed it TTPU Law, and the most logical reason is because the practice of money laundering is very detrimental to society, why it harms the community. In this case Sutan Remy Sjahdeini,⁴ said that:

1. Money laundering allows criminals or criminal organizations to expand their operations, this will increase the cost of law enforcement to eradicate it;
2. Money laundering activities have the potential to undermine the public to continue to commit these crimes;
3. As a result of money laundering, it is likely that corruption will increase along with the circulation of large amounts of illicit money;

process that shows the behavior was not initially considered a criminal event, but later classified as a criminal event by the community". According to Sudarto, what is meant by criminalization is as: "The process of determining an act of a person as an act that can be convicted, this process ends with the formation of a law where the act is threatened with a criminal sanction." Look in: Sudarto, *Hukum Dan Hukum Pidana*. PT. Alumni: Bandung, 1986: 31-32.

² Adrian Sutedi, *Tindak Pidana Pencucian Uang*, PT. Citra Aditya Bakti: Bandung, 2008: 175-176.

³ Compare with Considering Law No. 25/2003 concerning Amendment to Law No. 15/2002 concerning TPPU, which states that in order to prevent and eradicate the TPPU effectively, the Law No. 15 of 2002 concerning TPPU needs to be adjusted to the development of criminal law regarding money laundering and international standards. So it is clear that Indonesia in changing Law No. 15 of 2002, only following the development of the international world, although during Law No. 15 of 2002 is valid until it is replaced, the case of Money Laundering has never been revealed by law enforcement officials in Indonesia.

⁴ Sutan Remy Sjahdeini, *Pemberantasan Tindak Pidana Pencuciang Uang* (Makalah), Disampaikan pada Sosialisasi RUU-TPU, yang diselenggarakan leh Depkim dan HAM dari Tanggal 6-10 November 2000: 1.

4. Money laundering activities reduce government revenue from taxes and indirectly harm honest taxpayers and reduce legitimate employment opportunities;
5. Ease of money entering a country has attracted unwanted elements through the country's borders, lowered the level of quality of life, as well as raising concerns about the national security of the country concerned.

But in reality, even though Indonesia already has legal instruments to eradicate money laundering, why is Indonesia still labeled a "money laundering" paradise? There are still many legal instruments that have weaknesses. There are still many gaps that can be penetrated by the perpetrators of money laundering (Money laundering). As a result, this law remains powerless in the face of money laundering practices that are so sophisticated and almost perfect. These weaknesses must be overcome immediately and Indonesia revised with Law No. 25 of 2003 concerning Amendments to Law No. 15 of 2002 concerning Criminal Acts of Money Laundering.

Considering that this crime is a crime in a new and contemporary form, the law enforcement is not yet effective enough to be carried out. The problem that is the source of the trigger is not solely caused by factors that affect law enforcement not enough to be able to reach the problem of law enforcement in the field of money laundering crimes, but also born and sourced from the lack of willingness of law enforcement officials to reveal these crimes to surface.

In general, when talking about law enforcement, there are several factors that influence it, so that the law can be upheld, those factors are:⁵

1. The legal factor itself, in the present condition the legal factor itself, can be identified with the factor of the presence or absence of laws;
2. Law enforcement factors, namely those who form and apply the law;
3. Factors of facilities or facilities that support law enforcement;
4. Community factors, namely the environment in which the law applies or is applied;
5. Cultural factors, namely as a result of work, creativity, and taste based on human initiative in the association of life.

Talking about the legal factors (Law / Positive Law), Indonesia already has laws regarding money laundering, namely Law No. 15 of 2002; Law No. 25 of 2003. Regarding changes to Law No. 15 of 2002 concerning Criminal Acts of Money Laundering. With legal instruments like this, Indonesia is sufficient to combat money laundering.

There are several things, why money laundering crimes need to be fought and declared a criminal offense, so that Indonesia makes changes to Law No. 15 of 2002. In this case Guy Stessen,⁶ stated that in general there are several reasons why the crime of money laundering needs to be fought and declared a criminal offense:

1. Money laundering can affect the financial and economic system which is believed to have a negative impact on the effectiveness of the use of resources and funds by money laundering resources and funds are widely used for illegal activities and can be detrimental to the community, in addition to that many funds are lacking used optimally;
2. Criminalizing money laundering as a crime will make it easier for law enforcement officials to confiscate the proceeds of crime which are sometimes

⁵ Soerjono Soekanto, *Faktor - Faktor Yang Mempengaruhi Penegakan Hukum*, PT. Raja Grafindo Persada: Jakarta, 2004: 7-9.

⁶ Guy Stessen, *Money laundering: A new international law enforcement model*, Cambridge Study in International and Comparative Law, Cambridge University Press, 2000, P-82-85.

difficult to confiscate, for example assets that are difficult to trace or have been transferred to third parties. In this way the escape from the proceeds of crime can be prevented. This means that eradicating money laundering has shifted its orientation from cracking down on perpetrators to confiscating “proceeds of crime”. In many countries declaring money laundering as a criminal offense is the basis for law enforcement to criminalize third parties who are considered to obstruct law enforcement efforts;

3. Criminalization of money laundering as a criminal offense and with the fact that there are also a number of transaction reporting systems and a number of suspicious and suspicious transactions, this will make it easier for legal officials to investigate criminal cases up to the figures behind them.

Entering the current era of technology and information, crime is increasingly sophisticated to do and increasingly difficult for law enforcement officials to enforce the rules. Because the criminals are no longer conventional, but advancing towards the digital world by utilizing the Internet media.

With the existence of the Internet media, it is seen here that efforts to prevent money laundering (money laundering) seen from the mode of operation using cyber laundering is a problem that deserves to be discussed, bearing in mind the crime of money laundering will grow chalky if done using technology very sophisticated, this is what researchers mean that money laundering criminals make use of legal loopholes or the TPPU Law which is still empty and still has a very wide range of space for money laundering.

With the Internet, which has a new world or what is called “virtual word” or cyberspace, which is often referred to as “Cyberspace”, money laundering starts with Cyber laundering techniques, even techniques like this are becoming more prevalent and becoming a trend for money laundering criminals.

Cyber laundering technique, one of which is by using electronic transfer (wire transfer), this technique allows criminal organizations and legitimate business people and legitimate banking customers to move funds quickly from their accounts (accounts) from one bank to another bank others throughout the world. So thus the practice of money laundering can be done by someone without having to go abroad, for example, this can be achieved by advancing information technology through the Internet, where dissemination through banks electronically can be done, as well as a money launderer can deposit dirty money to a bank without mentioning their identity.⁷

Moving on from the description above, which describes the phenomenon of money laundering crimes using Cyber laundering techniques, the authors identify the problem as follows: What forms of misuse of Cyber laundering for money laundering purposes?, What is the model of law enforcement in dealing with money laundering (Money laundering) with using Cyber laundering Technique?

2. Literature review

The basic theory used is, Law Enforcement Theory, what is called law (in the sense of positive law), must go through several stages, namely the making of law; law enforcement, justice and administration of justice. Law making is the beginning of the legal process. It is a momentum that separates the state without law from the state governed by law. It is also a separator between

⁷ Through the digital world, money transfer can be made by not mentioning their identity, but by using or can be done anonymously, or with a pseudonym that the public does not know about.

the social world and the legal world.⁸ After the making of the law is finished, the next step is that the law must be upheld.

The law enforcement process, as a complement to the next stage regarding the law-making process. This indicates that the law-making process must still be followed concretely in the implementation stage in people's daily lives. After this stage is still not finished, because there is still a judicial stage that must be carried out. The law will not be upheld, if without a judicial process,⁹ because with this judicial process the law can be upheld.

The last legal process is the administration of justice stage, in this case what appears more prominent is the administrative approach compared to the legal approach. In this stage of performance, it is more dominant to think about the work efficiency of the institutions involved in the judicial process. This means that this process is closer to the bureaucratic process.¹⁰

Then what exactly is law enforcement, is it quite like what was meant above. In Indonesian terminology, law enforcement is known in several terms, *such as the application of law*;¹¹ *Implementation of law*,¹² and *the formation of law*. But it seems that the term law enforcement is the term most often used and thus in the future the term will be more established. In foreign languages the term law enforcement is known as *rechtstoepassing*; *rechtshanhaving*; (Netherlands); law enforcement; application (American).

Some of these terms, the meaning can be seen as follows: What is meant by the formation of law (*Rechtsvorming*) is:¹³

“Formulating general rules for everyone. Which is usually done by legislators. Judges are also possible to form law (judge made law) if the decision becomes

⁸ Satjipto Rahardjo, *Ilmu Hukum*, PT. Citra Aditya Bakti: Bandung, 2000: 176.

⁹ It should be distinguished between the term “justice” with the term “court”. The court comes from the word “Fair” obtaining the prefix “Pe” and the suffix “An”. Look in the: Anton M. Moeliono, Dkk, *Kamus Besar Bahasa Indonesia*, Balai Pustaka, Jakarta, 1990: 6-7. The court of translation of the Court, designates a forum, body, institution, or institution. Whereas judicial translation from judiciary is used to show the function, process or method of providing justice. In this case Satjipto Rahardjo, means that “The judiciary shows the process of hearing, while the court is one of the institutions in the process of hearing. Other institutions involved in the judicial process are the Police, Attorney General's Office and Advocates. The final result of the judicial process is in the form of a court decision, or often referred to as a judge's decision, which is why the judge presides over the trial”. Look inside: Satjipto Rahardjo, *Ilmu Hukum. Ibid.*: 182.

¹⁰ La Patra said that the bureaucratic approach is closer and supported by a system analysis approach or a systems approach. See: J. W. La Patra, *Analzing the Criminal Justice System*. Lexington Mass; Lexington Books, 1987. See also in: Satjipto Rahardjo. *Ilmu Hukum. Ibid.*: 183. Just look at the application of this system approach in “criminal justice in system” for example we see the definition of the criminal justice system according to Romli Atmasasmita, the term Criminal justice system or criminal justice system (SPP) has now become a term that shows the mechanism of action in overcoming crime by using the basis system approach. The understanding put forward by Romli actually shows that the law is a system, and part of the system. The one whose performance is always to use bureaucracy. This can be seen from the following matters: (1) The emphasis is on the coordination and synchronization of the components of the criminal justice (Attorney Police, Courts, and Corrections); (2) Supervision and control over the use of power by the criminal justice component; (3) The effectiveness of the crime prevention system is more important than the efficiency of the settlement of the case; and (4) The use of law as an instrument to strengthen the administration of justice. Look in: Yesmil Anwar & Adang, *Sistem Peradilan Pidana: Konsep, Komponen, & Pelaksanaannya dalam Penegakan Hukum di Indonesia*, Widya Padjajaran: Bandung, 2009: 33-dst.

¹¹ Satjipto Rahardjo. *Ilmu Hukum. Op. cit.*: 181.

¹² Sudikno Mertokusumo. *Penemuan Hukum: Sebuah Pengantar*. Liberty: Yogyakarta, 2004: 36-37.

¹³ Sudikno Metokusumo. *Penemuan Hukum Sebuah Pengantar. Ibid.*: 36.

permanent jurisprudence (vast jurisprudence) followed by the judges and is a guideline for the legal community in general.”

Application of law (Rechtstoepassing)

“Applying abstract legal regulations to events, for that a concrete event must be made a legal event first so that the rule of law can be applied.”

Law enforcement (Rechtshandhaving)

“Running the law whether there is a dispute or violation or without dispute. This includes the implementation of the law by every citizen every day which is often not realized by the citizen apparatus, such as a police officer standing at a crossroads to regulate the flow of traffic.”

Creation of Law (Rechtshepping)

“That the law does not exist at all then created a new law, that is, from nothing to being.”

From the various terms of law enforcement above, the writer can draw a conclusion that law enforcement is an attempt to realize abstract ideas in a reality. The process of realizing that abstract idea, according to the writer, is the essence of law enforcement. While the core of the process is to apply discretion that involves making decisions that are not strictly governed by the rule of law, but have an element of personal judgment.

The harmonization of values in law enforcement must be adjusted to the authority of the enforcers, because the law will run well if there is power to implement it. However, on the other hand, it is often the power that ravages the law, that is, if power is not strictly restricted by law. The destruction of the law because of power is also clearly seen in the implementation of the law. Then how can law and power be upheld. About this reminiscent of the views of Mochtar Kusumaatmadja who said that: “*Law without power is wishful thinking, while rule without law is tyranny*”,¹⁴ to create fair order from the implementation of law,¹⁵ or from law enforcement through power, then there must be something watch out for¹⁶

1. Modeling law enforcement by law enforcers;
2. A straightforward attitude (Zakelijk) from law enforcers;
3. Adjustment of applicable regulations with the latest technological developments;
4. Information and information about regulations that apply to the community;
5. Give enough time for the community to understand the new rules made.

From the applicable requirements above, the essence of law enforcement is increased, namely that law enforcement is not merely the implementation of the law, although in reality the tendency is in Indonesia. So, the notion of law enforcement is so popular. In addition, there is a strong tendency to interpret law enforcement as implementing judges' decisions. If this is only

¹⁴ Mochtar Kusumaatmadja. *Konsep - Konsep Hukum Dalam Pembangunan*. Alumni: Bandung, 2002: 199.

¹⁵ The term is taken from Budiono Kusumohamidjojo. He further said, that about what is fair and what is unjust becomes increasingly complex, this is in line with the increasing and also the increasingly complex patterns of human life needs and the increasingly limited resources needed to fulfill it. From this proposition, the writer can say this is “fair order”. Furthermore, Budiono defines what is referred to as public order, according to him is: “the conditions concerning the implementation of human life as a life together”. See in: Budiono Kusumohamidjojo, *Filsafat Hukum: Problematika Ketertiban Yang Adil*. PT. Grasindo: Jakarta, 2004: 166.

¹⁶ Soerjono Soekanto, Penegakan Hukum Lalu Lintas Dan Kepatuhan Terhadapnya. *Majalah Hukum & Pembangunan*, No. 1, January 1978: Jakarta, FH-UI, Jakarta, 1978: 534.

limited to the implementation of judges' decisions, then law enforcement is biased, inconsistent because such opinions are too narrow in nature.

According to Soerjono Soekanto,¹⁷ law enforcement actually lies in the factors that might influence it. These factors have a neutral meaning, so the positive or negative impact lies in the substance (content) of these factors. The intended factors are:

1. The legal factors themselves (Positive Law);
2. Law enforcement factors or parties who form or implement the law (Law enforcement);
3. Factors of facilities or facilities that support law enforcement;
4. Community factors, is the legal environment can be applied;
5. Cultural factors, namely as a result of work, creativity and taste based on human initiative in the association of life.

These five factors are closely related to each other, therefore, these factors are the essence of law enforcement, also a benchmark of law enforcement effectiveness.

Internet and crime or what is commonly called *dentgan* Cyber law. To arrive at a discussion on cyber law, it is first necessary to explain one term that is very closely related to cyber law, namely cyberspace (cyberspace), because cyberspace will be the object or concern of cyber law. The term cyberspace was first introduced by William Gibson, a science fiction writer in his novel *Neuromancer*. The same term was then repeated in another novel called *Virtual Light*.

According to W. Gibson, cyberspace is:

*"... was a consensual hallucination that felt and looked like a physical space but actually was a computer-generated construct representing abstract data."*¹⁸

In subsequent developments along with the widespread use of computers this term is then used to designate an electronic space (electronic space), which is a virtual society that is formed through communication that is intertwined in a computer network (interconnected computer networks). At this time, cyberspace as stated by Cavazos and Morin is: ... "represents a vast array of computer systems accessible from remote physical locations".

Potential activities to do in cyberspace cannot be predicted with certainty given the rapid advancement of information technology and which may be difficult to predict. However, currently there are several main activities that have been carried out in cyberspace such as Commercial On-line Services, Bulletin Board Systems, Conferencing Systems, Internet Relay Chat, Usenet, Email lists, and entertainment.

A number of these activities can now be easily understood by most people as activities carried out via the Internet. Therefore it can be concluded that what is called cyberspace is nothing else but the Internet which is also often referred to as a *network of networks*. With characteristics like this then there is also a mention of cyber space with the term virtual community (virtual

¹⁷ Soerjono Soekanto. *Faktor-Faktor Yang Mempengaruhi Penegakan Hukum*. Op. cit.: 8-9

¹⁸ William Gibson, *Neuromancer*, Ace, New York, 1984: 51. See also William Gibson, *Virtuallight*, Viking, London, 1993. Gibson, in essence in both of his books, wants to say that cyberspace, is a hallucination experienced by millions of people every day, in the form of complex graphical representations of data in the human mind system abstracted from computer system data banks. For an initial understanding of William Gibson's theory, it is recommended to read Mark Slouka, *War of the World; Cyberspace and the High-Tech Assault on Reality*, which has been translated into Indonesian, *Ruang yang hilang: pandangan Humanis tentang budaya cyberspace yang merisaukan*, Mizan: Bandung, 1999. Atau dapat juga dibaca bukunya Jeff Zaleski, *Spiritualitas Cyberspace*, Mizan: Bandung, 1999.

society) or virtual world (virtual world). Cyberspace will be called the Internet. Assuming that activities on the Internet cannot be separated from humans and the legal consequences are also on the community (humans) in the physical word (real world), then the thought arises about the need for legal rules to regulate these activities. However, given the characteristics of activities on the Internet that are different from those in the real world, then there are pros and cons about whether or not the traditional/conventional legal system (the existing law) regulates these activities. Thus, this polemic is actually not about the necessity of a legal rule regarding activities on the Internet, but rather questioning the existence of traditional legal systems in regulating activities on the Internet.

If we talk about the Internet (especially in Indonesia) (read: *Understanding the Internet by Indonesians*), in essence, the Internet is a computer network that is connected to each other through communication media, such as telephone cables, optical fibers, satellites or frequency waves. But sometimes, the rights possessed by each person are abused by some people who are not responsible, causing anxiety for some people who feel disadvantaged by the abuse of these rights.

Ahmad M. Ramli¹⁹ said that:

“At this time a new legal regime has been born known as Cyber Law. The term “cyber law” is interpreted as the equivalent of the word Cyber Law, which is currently internationally used for legal terms related to the use of information technology.”

Other terms that are also used by Ahmad M. Ramli²⁰ are: Law of Information Technology, Law of the Virtual World and Mayantara Law. These terms were born in view of Internet activities and the use of virtual-based information technology. The term cyber law is based on the idea that cyber is identified with the “virtual world” will be sufficient to face problems when related to proof and law enforcement. Considering that law enforcers will face difficulties if they have to prove a problem that is assumed to be “virtual”, something invisible and pseudo.

The legal world has long since broadened the interpretation of its principles and norms when confronting intangible issues, As Ahmad M. Ramli said:

“Electricity theft cases are initially difficult to categorize as theft crimes, but eventually they can be accepted as criminal acts.”

The current reality relating to cyber activities is no longer that simple, considering that their activities can no longer be limited by a country’s territory, its access can easily be done from any part of the world, losses can occur both to Internet actors and other people who have never been connected even for example in the theft of credit card funds through Internet purchases.

According to Abu Bakar Munir²¹ that:

“In addition, the issue of proof is a very important factor, considering that electronic data is not only not yet accommodated in the Indonesian procedural law system, but in reality the data referred to are also very vulnerable to be changed, tapped, falsified and sent to various parts of the world within seconds . So that the impact can be so fast, even very terrible.”

Information technology has become an effective instrument in global trade. For example, banking transactions through Internet media are closely related to promotion issues. Where behind the convenience can occur problems regarding breaking into customer accounts

¹⁹ Ahmad M. Ramli, *Cyber Law dan HAKI dalam Sistem Hukum Indonesia*, Ibid.: 1-2.

²⁰ Ahmad M. Ramli, *Cyber Law dan HAKI dalam Sistem Hukum Indonesia*, Ibid.: 1-2.

²¹ Abu Bakar Munir, *Cyber Law Policies and Challenges*, Rajawali Pers, Jakarta, Cet.Pertama, 1999: 205.

through transactions via the Internet? Another example, is trading transactions through electronic media or also called electronic commerce which is currently often found.

Cyber activities, although virtual, can be categorized as real legal actions and actions. Juridical for cyber space is no longer in place to categorize something with the size and qualifications of conventional law to be used as objects and deeds, because if this method is taken there will be too many difficulties and things that escape from the snares of the law.

In the Draft Law on Information and Electronic Transactions it is said that:²²

“Cyber activities are virtual activities that have a very real impact even though the evidence is electronic. Thus, the subject of the culprit must also qualify as someone who has committed a real legal act.”

According to Ahmad M. Ramli²³ there are three approaches to maintaining security in cyberspace:

1. *A technological approach;*
2. *Socio-cultural-ethical approach;*
3. *Legal approach.*

To overcome security problems, the technological approach is absolutely necessary, because without a network security it will be very easily infiltrated, intercepted, or accessed illegally and without rights. Technological and industrial progress which is the result of human culture in addition to having a positive impact, in the sense that it can be utilized for the benefit of humanity also has a negative impact on human development and civilization itself. The negative impact in question is related to the world of crime. It was stated by criminal law expert, Andi Hamzah,²⁴ that

“The development of technology is very influential on the attitude of action and mental attitude of every member of the community. Progress in technology will also affect changes in people’s lives. Every society will always change from time to time. The greater the influence of the environment, the more rapid changes will occur within the community itself, both positive and negative changes.”

In cyberspace, perpetrators of violations often become difficult to prosecute because Indonesian law and courts do not have jurisdiction over perpetrators and legal actions that occur, bearing in mind that violations of the law are transnational but as a result have legal implications in Indonesia. Therefore, for cyber space a new law is needed which uses a different approach to the law made based on regional boundaries. As contained in the general explanation of the Draft Law on Information and Electronic Transactions (ITE) paragraph 8 which states:²⁵

“Domain names used as addresses and identities on the Internet have their own problems. Domain naming has a close relationship with the name of the company, product or service (service) it has. Often these products or services are registered as trademarks or service marks. This domain name problem is quite complicated because in this world there are several independent domain name managers. There are more than two hundred domain-based domain managers (often referred to as country code Top Level Domains or ccTLDs). For example the domain manager for Indonesia (.id).”

²² Kementerian Komunikasi dan Informasi RI, *Rancangan Undang-undang tentang Informasi dan Transaksi Elektronik (RUU ITE)*, Jakarta, 2004: 5.

²³ Ahmad M. Ramli, *Cyber Law dan HAKI dalam Sistem Hukum Indonesia*, Op. cit.: 3.

²⁴ Andi Hamzah, *Hukum Acara Pidana Indonesia*, Saptar Artha Jaya, Jakarta, Cet. Pertama, 1992: 22.

²⁵ Kementerian Komunikasi dan Informasi RI, *Penjelasan Rancangan Undang-undang ITE*, Op. cit.: 19.

Why domain names are a problem because, anyone who can run the Internet can make his own domain name as an identity in cyberspace. However, sometimes there are some people who use other people's domain names for their own interests. The method used is by impersonating a domain name.

Understanding cyberspace is not limited to the world that is created when there is a relationship through the Internet. Bruce Sterling defines cyberspace as the "place" where a telephone conversation appears to occur. The Internet is also a good tool for people at work, at home and in other places of public service as stated by D. Beckers:²⁶

*"Information and communication technology has invaded all domains of our society: at work, at home and in public places. In modern culture is profoundly mediated. Current innovations in computers and telecommunications made new types of social interaction and cultural transmission possible across previously impossible distances. There is little doubt that these rapid advances in modern telecommunication and computers are changing the way we live our lives, but the direction of change is still uncertain."*²⁷

Cyberspace whose reality is a virtual reality, is a world that transcends existing reality, a hyper-real, a virtual reality. This transcendent and artificial world of reality colonizes almost every reality that exists and will one day take over these realities. Reality itself is now engineered in such a way that it can no longer be distinguished between original and imitation realities (simulacra). Jean Baudrillard in *Simulations* defines that simulation as: "The creation of models of reality without origin and reality, or hyper-real".²⁸

These models may seem cursory at first glance, but in fact do not describe the actual reality. Instead, it hides the true reality. Reality is covered by symbols of reality in such a way that between symbols and reality, between models and reality can no longer be distinguished. Simulation does not describe reality as it is, then the reality produced by simulation is reality that transcends or hyper-reality, meaning that reality can no longer be judged based on the measurements (rational-moral) that exist in the actual reality.

However, at this time we are trapped in a network of symbols that are so confusing that they lose their importance. These symbols come from many directions, and are so diverse, changing fast and contradictory, that the affirmation of the messages contained therein is dimmed. On the other hand, the recipients of these symbols are very creative, self-aware and reflective, so that the symbols are greeted with skepticism and one eye.

²⁶ Bruce Sterling, *The hacker crackdown, law and disorder on the electronic frontier*, Massmarket Paperback, electronic version available at <http://www.lysator.liu.se/etexts/hacker>. Assessed 10 October 2008.

²⁷ D. Beckers, *Research on virtual communities: An empirical approach*, and it can be find at <http://www.swi.psy.nl/usr/beckers/publication/seattle.html>. Assessed 10 October 2008.

²⁸ Jean Baudrillard, *Simulation*, Semiotext(e): New York, 1981, an initial understanding of his book can be read in Yasraf Amir Piliang, *Posrealitas: Cultural realities in the Postmetaphysical era*, Jalasutra: Yogyakarta, 2004. In the glossary, Simulation is defined as, the process of creating forms real through models that do not have the origin or reference to reality, so that it enables humans to make the supernatural, illusory, fantasy, fictional appear real. In a previous article, Yasraf A Piliang, said that what was meant by these models did at first glance seem real, but he actually did not describe the actual reality. He instead hides the true reality. Reality (real) is covered by the signs of reality (sign of the real) such that between signs and reality, between models and reality can no longer be distinguished. Look in: Yasraf Amir Piling. *Mesin-Mesin Kepalsuan*, Kompas, 14 June 2000; Agus Rahardjo, *Cybercrime: Pemahaman dan upaya pencegahan kejahatan Berteknologi*. PT. Citra Aditya Bakti: Bandung, 2002: 103.

By them the symbols were easily reversed, reinterpreted and distorted their original meaning. The symbols have lost their credibility.²⁹ In its development, the Internet turned out to bring a negative side, by opening up opportunities for the emergence of anti-social actions that had been considered impossible or could not have occurred. A theory says, crime is product society.

3. Findings and discussion

3.1 *Forms of misuse of cyber laundering*

Studying the development of cyber laundering crimes, is part of the study of computer crime in general, but cyber laundering is more focused on money laundering activities (money laundering). This kind of crime is actually a contemporary crime, a crime that combines science and technology. Speaking of contemporary crime, our study is entering a condition in which, the veil between reality and fantasy is getting thinner. Many things that were previously considered fantasy have now become a reality, and this will affect the culture and human life. An object can represent reality through its signifier, which has a specific meaning or signified. In this case, reality is a reference from the signifier. However, it can also happen that an object does not refer to a particular reference or reality at all, because it itself is a fantasy or hallucination that has become reality.

That is in the language of Jean Baudrillard and Umberto Eco³⁰ said to be hyper-reality. According to Baudrillard the “hyper-reality” era was marked by the disappearance of the signifier, and the metaphysics of representation; the collapse of ideology, and the collapse of reality itself which is taken over by the duplication of the world of nostalgia and fantasy or becomes a reality substitute for reality, the worship of the lost object is no longer the object of representation, but the ecstasy of denial and annihilation of its own ritual. The hyper-realistic world is a world that is filled with successive reproduction of simulacrum objects, objects that are purely “appearances”, deprived of their past social reality, or have absolutely no social reality as a reference. In a world like this the subject as a consumer is herded into a hyper-real “space experience” the experience of alternating “appearances” in space, mingling and melting reality with fantasy, fiction, hallucinations and nostalgia, so differences between one another are hard to find, in this hyper-reality in Baudrillard’s view emphasizes both nostalgia and science fiction.

The essence of the explanation, is the author wants to show that the first characteristic of computer crime (cybercrime), is that there is a shift from reality toward hyper-reality, its relation to cyber laundering, then the characteristics of the first cyber laundering are related to objects and subjects that are immaterial / unreal / intangible. So that’s why cyber laundering activities, it is difficult to trace the surface or to the realm of reality. In addition to being difficult to track, cyber laundering is also difficult to prove and always develops by adapting to technological and system developments so that it is difficult to reach by positive law.

The launderer who are in this era are trapped in the condition of schizophrenia, remembering they do not need to reflect signs, messages, meanings or norms. Launderer was also treated to a reproduction of the appearance values but not the reproduction of ideological or mythological values. So, it can be said that cyber laundering techniques do not ignore the differences between manual systems and electronic systems that influence the form and nature of money-based crime-based technology.

²⁹ Soni Yuliar et al., *Memotret Telematika Indonesia Menyongsong Masyarakat Informasi Nusantara*, Pustaka Hidayah, Bandung, 2001: 64.

³⁰ Umberto Eco, *Tamasya Dalam Hiperealitas*, Jalasutra: Yogyakarta, 9-10

Then it can be said that cyber laundering is actually a conventional crime in money laundering that uses sophisticated technology as a means, so that after joining the sophisticated technology, money laundering crime can be called a cybercrime. At this point, the second characteristic emphasizes the different characteristics between conventional money laundering crimes based on manual systems and computerized / electronic / digitalized based cyber laundering crimes.³¹ The difference in the characteristics of the crime begins with the difference in the process or procedure between the traditional money laundering system and cyber laundering (current money laundering).

The following is a display of the characteristics of money laundering and cyber laundering crimes.

Money laundering	Cyber laundering
<ol style="list-style-type: none"> 1. It is obvious that money which is placed in a certain place and then exchanged it in the form of clothes, metal and horses (for example) is clearly visible and easy to trace; 2. It is easy to trace its tracks so that the launderers are easily caught by the kings. 	<ol style="list-style-type: none"> 1. Money invested in a bank is not easily seen because launderers break the money in digital, electronic form, making it difficult for officers to track it down, because the ability of launderers to use computers is already very advanced; 2. Not easy to trace, because of his traces in the digital world that are in computer chiefs connected to the Internet.

In the cyber laundering process, launderers are consumers who absorb material values, imaging / appearance values. This condition can be found when a person is in the Internet space unconsciously they have been trapped in the world of hyper-visual reality (media) with awareness, then he will realize that what he witnessed is nothing more than a fantasy, fiction or mirage. According to Baudrillard the world of reality and the world of hyper-reality media / television / Internet are difficult to distinguish, both are equally real.³²

In fact, now many of the launderers have entered into the realm of the hyper-world, from the people who switch there to its negative impact on that world. One of them is the problem of cyber laundering activities which with this cyber media are rapidly evolving. If money laundering crime is only conventional in the real world. In this cybercrime has changed its form into a hyper-crime, in the view of postmodernism experts, this kind of crime is called a crime of hyper-criminality.³³

The launderers so far, use technology in a very broad concept but with a meaning that is sometimes very limited. If technology is applied in a limited context where technology is only regarded as having technical, mechanical and knowledge matters, then cultural and organizational values will be an external factor and be set aside. However, if applied in a broader context then the technology is said to be impartial because it has an impact both directly and indirectly on cultural values, traditions and the environment.

Thus, from the description above can be taken the definition that the application of technology is the application of science and other sciences to the practice of cyber laundering in daily life by social systems involving people and organizations, living things and machines. Until

³¹ The reader can compare the results of my research with those of Susan W. Brenner, Cybercrimes: New Crimes or Old Wine in New Bottles, in R. D. Clifford (Ed.), *Cybercrime: The investigation, prosecution and defense of a computer-related crime*, Durham-North Carolina Academic Press, pp. 12-15.

³² Yasraf Amir Piliang, *Dunia Yang Dilipat*, Bandung: Mizan, 1998: 330.

³³ Hyper-criminality means that crime has become a perfectly planned, organized and controlled discourse through high technology and towards the management of high-level politics, so that it bypasses legal authority, transcends common sense, and skips the reach of cultural values and morality.

now technology has often been made without considering cultural aspects, even though a technology should be designed in accordance with the pattern of community activities that have certain lifestyle and cultural values. From this it is clear that cultural aspects are often ignored. A technology that is intended for a community with certain values and culture, requires efforts that are not easy to be able to also be applied to other communities. The socio-cultural reality that exists in cyberspace is a counterpoint to the existing socio-cultural reality and the resulting boundary between the two eventually becomes blurred. Cyberspace as one form of communication network and global interaction has offered its own form of community, namely virtual community.

From the description above, the virtual community is the third characteristic of cyber laundering crime. In science and technology the idea of a virtual community has become a common view because virtual communication really exists. Cyberspace has interconnected many people, but this does not guarantee the community because the connection created by cyberspace is often one direction or in other words the flow of information is still broadcast. However, with the existence of interactive Internet facilities (online) people can exchange information and here there is a community in a broader sense. People in the virtual world do not present their physicality to communicate with other people, but instead use words on a computer screen. With the development of Voice of Internet Protocol (VoIP) and web cameras it allows the presence of voice and face in communication so that communication takes place in the form of computer conferencing. In virtual communities can communicate with any identity because real identity in the real world (real life) can be left behind, as Howard Rheingold said: "People in virtual communities do just about everything people do in real life, but we leave our bodies behind".³⁴

In most countries, money laundering and financing of terrorism are significant issues in terms of prevention, eradication and prosecution.³⁵ The issue of money laundering in the last few years has always been raised and become a public concern especially in Indonesia or precisely since June 2001, namely the first time that Indonesia was included in the list of countries that were not cooperative in eradicating money laundering or Non Cooperative Countries and Territories (NCCTs) by FATF.³⁶

Since this time academics, observers, and the public with the help of the mass media, paid great attention to the study of money laundering and its effects. Meanwhile, regulators such as Bank Indonesia, BAPEPAM and the Ministry of Finance have prepared themselves to make regulations for the development of an anti-money laundering regime in Indonesia.

Cyber laundering was created because of computer crimes in the current telecommunications era, computers that are united with the Internet, can indirectly be said to be cybercrime, as well as cyber laundering. If our study is directed to cyber laundering, then the use of banks will be more dominant as a form of cyber laundering itself. To find out some form of cyber laundering, we should first look at how the development of computer crime problems today.

If we follow the cases of computer and cybercrime that occur, and if it is examined using the criteria of conventional criminal law, then it turns out that in terms of law, computer and cybercrime is not a simple crime.³⁷ In connection with this matter, when viewed from conventional laws and regulations, the criminal acts that can be used in the computer and cyber fields are fraud, fraud, theft, and destruction, which are essentially carried out directly (using

³⁴ Howard Rheingold, *Virtual reality*, Mandarin, 1991, Versi elektronik dapat dijumpai dalam <http://www.rheingold.com/vc/book/intro/html>.

³⁵ Paul Allan Schott, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*, The International Bank for Reconstruction/The World Bank, 2003.

³⁶ Paul Allan Schott, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism*, The International Bank for Reconstruction/The World Bank, 2003.

³⁷ Bainbridge David I, *Komputer & Hukum Sinar Grafika*: Jakarta, 1993: 161.

physical parts of the body and mind) by my slave. Meanwhile, if this is done through cyber facilities, then computer and cybercrime may take the following forms:³⁸

1. *Computer fraud (computer fraud);*
2. *Acts of embezzlement;*
3. *Hacking;*
4. *Criminal deeds of communication;*
5. *The criminal act of damaging a computer system;*
6. *Criminal conduct relating to intellectual property, copyrights and patents.*

The development of the use of computer technology, telecommunications and information in daily activities has encouraged the development of transactions via the Internet in the business world, or what people often call E-Commerce.³⁹ The link with cyber laundering as already mentioned is that universal money laundering is classified as a crime. Even because the *modus operandi* is generally cross country, money laundering has been considered an international crime. Because the crime of money laundering is also regulated internationally. As seen in article 3 of the UN convention which was ratified since 19 December 1988, and came into force since November 1990. Indonesia has ratified this convention since 31 January 1997 with Law No. 8 of 1996. Until the birth of this UN convention, UN member states (including Indonesia) have held several meetings to prepare a convention that replaces the old convention on narcotics. The meeting was a follow-up step and the consequences of the adoption of UN resolution 39/41 of 1984 consensus. If the 1961 convention emphasizes more on efforts to increase the legal force of each UN member, including confiscating the results of the illicit trade.

In ASEAN countries, activities to eradicate money laundering are also intensively carried out. Even the Philippines is one step ahead of other ASEAN member countries, because the first Philippines had special laws governing the confiscation of assets illegally obtained from drug trafficking traffic.

Money laundering arrangements in Indonesia according to Law Number 25 Year 2003 are in Article 44 which according to that article is in the framework of preventing and eradicating money laundering (money laundering) conducted in accordance with statutory provisions. What is meant by “statutory regulations” is this law, the law regarding criminal procedure law, the law on foreign relations and the law on international treaties.

3.2 Law enforcement model

Recognizing the threat of TPPU as a serious crime that can disrupt the stability of the financial system and economic system and have a wide impact on the lives of the people and nation, efforts to prevent and eradicate must be carried out through conceptual, sporadic, and comprehensive measures. Considering that money laundering crimes are mostly committed by transnational organized crimes that cross national borders, international cooperation between PPATK and law enforcement agencies and institutions similar to PPATK abroad is needed. The role of PPATK as Indonesia’s Financial Intelligence Unit (FIU) is expected to contribute to the public in handling TPPU cases, especially after the rampant cases of money laundering. The

³⁸ Compare with Niniek Suparni, *Cyberspace problems and anticipating its arrangements*, Sinar Grafika: Jakarta, 2009, pp. 4-6.

³⁹ According to statistical data on E-Commerce Transactions between companies (business to business), according to estimates, it rose to US \$ 145 billion in 1999 to US \$ 7.29 trillion in 2004 or 7% of total worldwide sales transactions estimated at US \$ 105 trillion. Kompas, 21 July 2000.

existence of the PPATK institution in providing input for the benefit of the investigation process on TPPU cases is the spearhead for law enforcement officials, PPATK acts as an informant who is considered to have access to the research focus. Good cooperation between law enforcers (Polri) and PPATK is very much needed in handling money laundering cases, because these two agencies are part of the anti-money laundering regime in Indonesia in addition to the Prosecutor's Office, Justice, and the PJK and Bank Indonesia as regulators.

In our criminal justice system, the police and prosecutors are entitled to carry out investigations and prosecutions of crimes, this is based on the provisions in the Criminal Procedure Code, as well as on the TPPU, as stated in Article 30 of Law No. 25 of 2003 concerning TPPU which states:

"Investigations, prosecutions, and hearings in court hearings against criminal offenses referred to in this law, are carried out based on the provisions in the Criminal Procedure Code, unless otherwise stipulated in this law."

Based on this, Yunus Husein argues:

"The authority of investigations is not owned by PPATK, even investigations are not clearly mentioned in the law, so the authority of PPATK is limited to the authority of investigators or before the examination is conducted."

The advantage of the PPATK institution is that in addition to receiving reports from the PJK and the community which are then analyzed and then handed over to the police and prosecutors, the PPATK can work to use the database for the authorities if law enforcement officials require it. Then PPATK can seek cooperation with other countries if information from other countries is needed, this is as stated in Article 25 paragraph 3 of Law No. 25 of 2003 concerning TPPU which states that:

"PPATK in conducting prevention and eradication of TPPU, can cooperate with related parties, both national and international."

PPATK's contribution in providing input to the interests of the investigation process for investigators is very large, especially in supporting financial investigations and the flow of funds transactions of actors who are not the expertise of police investigators, and the role of PPATK is very helpful in terms of coordination with the PJK in terms of finding evidence in the form of evidence bank products relating to suspects' accounts to prove suspicious transactions, so it is unfortunate if this institution is limited to pre-investigation and not an investigative institution.

Problems that often arise since the formation and operation of PPATK in 2002, Polri has received 252 STR (Suspicious Transaction Reports) from the new PPATK as many as 181 cases carried out by investigations by the remaining Polri as many as 73 cases cannot be followed up because of reasons for insufficient evidence. Of the 181 cases investigated by the National Police 47 have been completed, while 134 cases are still under investigation.

Many cases reported by PPATK to the National Police have not reached 50% of these cases, even maybe only 20% of reports submitted by PPATK. Researchers see obstacles in handling cases that indicate TPPU because there are insufficient investigators, limited investigators in the field of money laundering have resulted in obstacles that have been reported by PPATK.

Limited human resources in the Criminal Investigation Body of the Police, especially on investigators against the TPPU resulting in the STR-STR being transferred to the Regional Police, sometimes because the TPPU investigator is lacking then it is combined by other investigators so that the investigation process can be completed quickly. Things like this should be of concern to various groups, especially the government, to take even more wise steps, that in the TPPU problem, people cannot deal with it arbitrarily because TPPU is a special crime, the

people or institutions that accompany it must be specialized institutions also, in the sense of people or institutions who understand and understand correctly about this crime

The PPATK Institution was established as a FIU in Indonesia, as one of the institutions dealing with money laundering issues, therefore this institution should be able to directly deal with money laundering problems that occur in Indonesia. Aside from being an informant institution PPATK can contribute even more if given the trust to carry out its function as an investigator. Considering that investigators lacking in the National Police force the investigation process to be protracted.

Therefore, the PPATK needs to be given more authority, namely the authority as a TPPU investigator to assist police investigators if there are suspicious financial transaction reports and the search for financial evidence in the form of funds. So that cases that have not been resolved will not accumulate and can be resolved.

PPATK is not part of the criminal justice system, but the existence of PPATK can complement the criminal justice system in Indonesia, especially in assisting police agencies and prosecutors in conducting investigations, investigations and prosecutions of TPPU. It is time for PPATK to also expand the criteria for parties who must report suspicious financial transactions, it is better for those who must report not only PJK but also other professions such as public accountants, lawyers, notaries, and property agents, because the professions This enables closeness to the process of money laundering.

In the example of the Adrian Herling Waworuntu PPATK case in collaboration with the National Police, the two institutions were able to complete and submit their case files to the public prosecutor. PPATK assisted the National Police in the process of investigating money laundering cases conducted by Adrian Herling Waworuntu, so it was revealed that Adrian had conducted a TPPU. Compared to other countries, institutions such as PPATK are also owned by the Philippines, Thailand, and Malaysia, these institutions together function as FIUs with the aim of handling and responsible in preventing and eradicating TPPU. But there are differences between PPATK and FIU institutions from each of the countries above, it is due to the different conditions of each country. One of the differences between PPATK and FIU in the Philippines, Thailand and Malaysia in terms of the criteria of the parties who are obliged to report suspicious financial transactions can be seen from:

1. Philippines, the name of the institution that handles or is responsible for preventing and eradicating TPPU is Anti Money Laundering Council (AMLC). There are parties who are obliged to submit suspicious financial transaction reports, namely:
 - a. Securities companies, salesmen, and investment institutions;
 - b. Companies engaged in the field of commodities and other monetary instruments.

The difference between PPATK and AMLC in terms of duties and authority is that AMLC can investigate all suspicious financial transactions and all deviations of the law, and carry out an action needed to eradicate TPPU, whereas PPATK cannot conduct investigations only until pre-investigation only and the pre-investigation is only a matter of suspicious financial transactions, the deviation of the law is not the duty and authority of the PPATK to conduct an investigation.

2. Thailand, the name of the institution that handles or is responsible for preventing and eradicating TPPU is the Anti Money Laundering Office (AMLO) of those who are obliged to submit suspicious financial statements, namely:
 - a. Credit distributor;
 - b. Saving and loan cooperative.

In terms of the authority of AMLO and PPATK differences, AMLO has the authority to provide educational programs to disseminate information, educate, and provide training or help the public and private sectors to spread the program, while PPATK only issues guidelines and publications to PJK regarding its obligation to assist in detecting the behavior of customers suspicious.

3. Malaysia, the institution tasked with preventing and eradicating money laundering is the Money Inserting Unit. The parties that are obliged to submit suspicious financial statements are:

- a. Housing business and electronic funds transfer;
- b. Business development financing and factory business.

In terms of tasks, this institution provides training to reporting institutions related to reporting obligations and suspicious transactions, while PPATK is limited to issuing guidelines and publications and information to reporting institutions relating to suspicious transaction reporting obligations, the form of socializing is not in the form of training.

When compared to FIU from other countries, PPATK still has shortcomings in carrying out its duties and authority. Compared to AMLC FIU from the Philippines, AMLC can conduct an investigation of all suspicious financial transactions and can carry out an action necessary to eradicate TPPU while PPATK cannot. Expansion of the criteria for parties must report the above countries have run it, while in Indonesia it is still fixed on the PJK only. Indonesia, especially the PPATK, needs to emulate the systems of the Philippines, Thailand and Malaysia so that this Indonesian-owned institution (PPATK) is clearer in its existence and is equal to the FIU institutions of other countries.

4. Conclusions

Cyber laundering crimes are created because of computer crimes in the current era of telecommunications, computers that are united with the Internet, so it can indirectly be said to be cybercrime, as well as cyber laundering. If our study is directed to cyber laundering, then the use of banks will be more dominant as a form of cyber laundering itself. To find out the mode of cyber laundering, we first know the *modus operandi* that is often used in committing money laundering, itself. The modes of money laundering itself are: Investment Cooperation; Swiss Bank Credit Collateral; Overseas Transfer; Disguised in Gambling; Disguising Documents; Foreign Loans; Foreign Loan Engineering. Based on the results of the author's library research on the use of banks in cyber laundering, obtained a number of banking activities that support the occurrence of cyber laundering for money laundering crimes, namely as follows Saving money from criminal acts under false names (identification); Keep money in the bank in the form of deposits / savings / accounts / demand deposits in some accounts so as to avoid suspicion; Exchange bills of crime-related money with other large or small bills; The bank in question may be asked to provide credit to customers who hold deposits with a guarantee of money deposited at the bank concerned; Using transfer facilities or EFT (Electronic Fund Transfer) with very high technology; Carry out fictitious export and import transactions using L/C (letter of credit) facilities by falsifying documents carried out in collaboration with relevant officials; Establishment or use of illegal banks. From a number of banking activities and the banking financial system that launched the cyber laundering, there are several forms of cyber laundering activities in money laundering activities, which include cybersquatting; E-Commerce; and the Illegal banking business.

The model of law enforcement in dealing with cyber laundering crimes, namely the model of law enforcement in a progressive manner, namely in its enforcement, the police, prosecutors, and judges not only involve elements that are factual in nature, but also the judge must be able to present the spiritual in society, meaning judges must act in accordance with the

wishes and care of the community. Even though the ITE and Anti Money Laundering Laws do not specifically regulate cyber laundering, on the basis of the demands of the community the judge must have the courage to open a progressive model of law enforcement, which is not based on existing laws alone, but must be based on the conscience of the community. Of course, judges are needed who understand the sociological problems of the community, why because the main goal is law enforcement in the broadest sense, namely law enforcement involving elements of society in it.

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Legal Certainty Value in Pre-Accusation Institute to Optimize Justice for Justice Seekers: Reconstruction of Pre-Accusation in the Criminal Procedure Code

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Abstract

The pre-accusation institute is currently facing an extraordinary problem. The imbalance with the lack of communication between the investigation and the prosecutor is very obvious. Beside the legal vacuum must be how long and how many pre-prosecutions do. Between norms and the relationship and communication between law enforcement officers in the prosecution institution, it can cause the value of justice and legal certainty to be harmed, so that justice seekers receive treatment that does not respect the values of human rights. Concrete step as an effort to restore the function of this pre-prosecution institution is to carry out reconstruction of this institution. The consequence is fixing positive rules as in the Criminal Procedure Code, which can be implemented in the establishment of the Criminal Procedure Code Bill.

Keywords: pre-accusation, reconstruction, certainty and justice, human rights.

1. Introduction

Provisions before the entry into force of the Criminal Procedure Code, namely HIR (Het Herziene Inland Reglement) that the authority to investigate all criminal acts is a prosecutor (magistraat), while the police act as “assistant prosecutors” (hulp magistraat).² In fact, it is clear in the HIR that the police are assistant prosecutors in the investigation process. This means that the investigative institution is fully under the authority and power of the prosecutor’s office, so that in the body of the prosecutor’s office there is a so-called Central Investigation Service that is headed by a police officer.³ However, in the current system, prosecutors only function as case file researchers and it is difficult to assess whether a case is included in the prosecution or not because the entire set of investigations is only carried out by the Police.

His friendship with the position of the Attorney General’s Office (Procureur Generaal bij de Hoge Raad), which is under one roof together with the Supreme Court (MA). This position is reminiscent of the legal position (recht positie) of the Attorney General and the Attorney

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² Andi Hamzah, *Hukum Acara Pidana Indonesia*, Sinar Grafika: Jakarta, 2010, 132.

³ Sutherweim, *Dwi Windu Sejarah Kejaksaan*, Kejaksaan RI: Jakarta, 1991.

General's Office in the Netherlands which prevails until now.⁴ Through the mechanism of the full authority of the investigation under the authority of the Prosecutor's Office, "pre-prosecution" institutions are not recognized. Coordination between investigators and prosecutors is personal and close because when investigations begin, prosecutors can be directly involved together with the police. This situation is similar to the investigations and prosecutions in force in the Corruption Eradication Commission (KPK), namely investigators and public prosecutors under one roof (current roof system) at this time.⁵ Since the enactment of the Criminal Procedure Code the criminal justice sub-system relations namely the Police, Prosecutors and Courts (Judiciary) apply compartmentalization, namely the source of the separation of powers and powers of investigation, prosecution and examination as well as verification in court. Or it can be said that there is a function differentiation⁶ in the Indonesian Criminal Justice System (SPP). As a consequence of functional differentiation, the activities of investigating general criminal offenses are entirely the duties and responsibilities of the police, while the prosecutor's office is in the prosecution. There is functional relationship.⁷ The police and prosecutors in investigating activities for prosecution are called pre-prosecution.⁸

The concept of functional differentiation, implies that the Criminal Justice System (SPP) in Indonesia, especially in the investigation and prosecution phase, is divided into compartments as excesses of the concept of functional differentiation. This boxing is reflected in the pre-prosecution mechanism. The prosecution mechanism is a coordination space between the investigator and the public prosecutor that must be taken after the investigator has finished conducting an investigation. Investigation results from investigators in the form of case files will be submitted to the public prosecutor for investigation. If the public prosecutor believes that the case file is complete, the process will proceed to the prosecution stage, but if the public prosecutor feels the case file is incomplete, the public prosecutor will provide instructions to the investigator in order to complete the case file.⁹

This pretrial mechanism directly impacts the limited active role of the public prosecutor in following or directing the course of the investigation. The role of the public prosecutor is minimized to the extent of examining the results of the investigation, and giving

⁴ Tolib Effendi, *Sistem Peradilan Pidana: Perbandingan Komponen dan Proses Sistem Peradilan Pidana di Beberapa Negara*, Pustaka Yustisia: Yogyakarta, 2013.

⁵ Raja Mohamad Rozi, Revitalisasi Lembaga Pra Penuntutan Guna Menyokong Kepastian Hukum & Keadilan Dalam Sistem Peradilan Pidana Indonesia. *Rechvinding*, Volume 6, Number 1, April 2017, 90.

⁶ The concept of functional differentiation (different functions) is adopted in the Criminal Procedure Code, among law enforcement components that carry out functions related to judicial power, namely: investigation, prosecution, implementation of court decisions, and provision of legal services. This functional differentiation can result in law enforcement practices by law enforcement officials being fragmented and fragmentary (in accordance with their functions), because each component of law enforcement has different perceptions and meanings. This has an impact on the difficulty of realizing an integrated and integrated criminal justice system because there are often conflicts of interest and differences in interpretation among law enforcement components so that the products of the judiciary have not been able to meet the expectations of justice seekers.

⁷ The functional relationship can be carried out through correspondence media (P1-P21), so that all investigative activities are directed and monitored horizontally by the case research prosecutor through file correspondence not directly (on site).

⁸ This pre-prosecution is regulated in Article 139 of the Criminal Procedure Code (KUHP), which reads: After the public prosecutor accepts or receives the results of a full investigation from the investigator, he immediately determines whether the case file meets the requirements to be able or not submitted to court.

⁹ Ichsan Zikry et al., *Prapenuntutan Sekarang, Ratusan Ribu Perkara Disimpan, Puluhan Ribu Perkara Hilang: Penelitian pelaksanaan mekanisme prapenuntutan di Indonesia sepanjang tahun 2012-2014*, Lembaga Bantuan Hukum Jakarta – MaPPI FHUI, 2.

instructions if there are deficiencies. As a result, the investigation process only becomes the territory of the investigator and there is no check and balance in the exercise of that authority, which should be carried out by the public prosecutor as *dominus litis* or case controller. This situation will certainly have a direct impact on the rights of suspects and victims, because without checks and balances in the use of an authority, there will be wide open spaces for abuse of authority and or very large arbitrariness for investigators in carrying out investigations.

Regarding the terminology of this prosecution, it cannot actually be found in the substance of Article 1 of the Criminal Procedure Code which contains authentic interpretations.¹⁰ The term pre-prosecution can be found in articles governing the authority of the Public Prosecutor, namely Article 14 of the Criminal Procedure Code, where in paragraph *b* of this article it is determined that as one of the authorities of the Public Prosecutor is to conduct a prosecution if there is a lack of investigation by taking into account the provisions of Article 110 paragraph 3, and paragraph 4, by giving instructions in the context of perfecting the investigation of the investigator. This means that in a general criminal act, if the Prosecutor considers that there is still a shortage in the results of the investigation conducted by the Police, then what he can do is called pre-prosecution.

The provisions of the substance in Article 14 letter *b* of the Criminal Procedure Code, it is said that the Public Prosecutor has the authority to conduct pre-prosecution if there is a shortage in the investigation by giving instructions in order to improve the investigation of the investigator. The critical question in this regard is whether through such a work relationship arrangement does not create obstacles to the smooth process of criminal proceedings. Will it not actually slow down the settlement of a case?

Through the enactment of Law Number 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia, article 30, paragraph 1, letter *e* of this law confirms that, in the Criminal field, the Prosecutor's Office has the duty and authority to complete certain case files and for that reason can carry out additional examinations before being handed over to the court which in its implementation is coordinated with the investigator. Provisions regarding the additional authority of the prosecutor's examination are new developments that raise questions about how much influence on the division of authority between the Police and prosecutors as stipulated in the Criminal Procedure Code and the work relations between the two agencies.

The existence of the pre-prosecution institution today, we might have to criticize, because the problem is that this pre-prosecution institution can cause ineffective law enforcement processes. It is very possible that the public prosecutor prosecuting a person (suspect) does not have in-depth knowledge of a case. This is because there is no active involvement of the public prosecutor in the investigation stage, and the limited understanding of a case is limited to the case file received from the investigator, which is not necessarily justified. Already a legal entity, the Indonesian criminal justice system, especially in the pre-trial phase, contains many structural problems.

The pre-prosecution institution in its development still has problems, so the purpose of the Criminal Procedure Code is to protect the dignity of every human being. Therefore, the purpose of justice in law is still a mere discourse of delusion. Reality in the field, the authors found that there are people who feel disadvantaged because of problems in this pre-prosecution submitting Judicial Review (JR) to the Constitutional Court (MK).¹¹

¹⁰ Authentic interpretation is an interpretation made by the legislators themselves, to a number of terms used in the Criminal Procedure Code.

¹¹ "7 Hari Penyerahan Spdp Ke Penuntut Umum", *Hukumonline.com*, 11 January 2017, assessed 13 February 2020 – See at <http://www.hukumonline.com/berita/baca/lt58763386dea5a/mk-tetapkan-7-hari-penyerahan-spdp-ke-penuntut-umum>.

Provisions in Article 109 paragraph 1 of the Criminal Procedure Code that reads in the event that an investigator has begun an investigation into an event which constitutes a criminal offense, the investigator shall notify the prosecutor of this matter. Based on the decision of the Constitutional Court No. 130 / PUU-XIII / 2015 states Article 109 paragraph 1 is contrary to the 1945 Constitution and does not have binding legal force, unless interpreted as the investigator must inform and submit the SPDP of the investigation to the public prosecutor, the reported, and the victim/reporter within 7 days after the issuance of an investigation warrant.

The investigator has an obligation to notify and submit the SPDP to the public prosecutor, the reported party, and the victim/reporter, no later than 7 days after the issuance of an investigation warrant. Making the investigation process under the control of the public prosecutor and monitoring of the reported and victim/reporter. This means that the Constitutional Court's decision invites the values of reconstruction to present legal certainty for both the reported party and the reporter so that the case can be resolved as soon as possible in this decision. However, despite the Constitutional Court's ruling, there are still weaknesses in the prosecution process.

Another weakness, that the Police and the Prosecutors' Office is deemed not to have the ability to "coordinate",¹² so that the files and suspects seem to be "taken in" means, the case was thrown here and there. In Andi Hamzah's perception, this practice is not in line with the essence of integrated criminal justice system. Ideally, since investigators issue SPDP, prosecutors have been intensely involved in assisting the investigation process, so that from the beginning the prosecutor has been able to monitor the weaknesses of the investigation process, or find out who else witnesses need to be questioned.

As a result of inadequate coordination between the police and the Prosecutors' Office, of course it can lead to cases of criminalization, "undue delay", life-long suspects, wrongful arrests, and the practice of "buying and selling" cases which are almost every day we hear in law enforcement in Indonesia. This is indeed caused by various factors, both the substance of the law, the structure, and also the culture of law enforcement officers. However, one thing that is certain from the emergence of these problems is due to the use of so much power and is not accompanied by effective control mechanisms over that power.

2. Literature review

The writing of this simple article is based on the paradigm of thought through the use of the Criminal Justice System (SPP) theory, Legal Certainty Theory, and Integrative Legal Theory, which carry the concept of reconstruction.¹³ In Remington and Ohlin's thinking, "The Criminal Justice System can be interpreted as the use of a system approach to the administration of criminal justice, and criminal justice as a system is the result of interactions between laws and regulations, administrative practices and social attitudes or behavior. Understanding the system itself contains the implications of processes that are prepared rationally and in an efficient way to provide certain results and with all its limitations".

Another case with Hagan distinguishes the notions of "criminal justice process" and "criminal justice system". Criminal justice process is every stage of a decision that confronts a suspect in the process that brings him to the criminal provisions for him, whereas the criminal justice system is an interconnection between each decision of every agency involved in the criminal

¹² RUU KUHAP Bakal Hapus Prapenuntutan, *Hukumonline.com*, 10 December 2017. Assessed 27 December 2017 at <http://www.hukumonline.com/berita/baca/lt4b208a7dd85bc/prapenuntutan>.

¹³ Romli Atmasasmita, *Sistem Peradilan Pidana*, Putra Bardin: Jakarta, 2002, 14.

justice process.¹⁴ Mardjono Reksodiputro provides a limitation that what is meant by the criminal justice system (SPP) is, a crime control system consisting of police institutions, prosecutors, courts and prison inmates.¹⁵ On another occasion, Marjono stated that: "The criminal justice system is a system in a society to tackle the problem of crime. Tackling means here an attempt to control crime. In order to be within the limits of community tolerance, this system is considered successful if most of the reports and complaints of people who are victims of crime can be "resolved" by bringing the perpetrators to court and found guilty and get criminal."¹⁶

It was further stated that the objectives of the criminal justice system could be formulated as follows: "Preventing the public from becoming victims of crime; Resolving cases of crimes that occur so that the community is satisfied that justice has been upheld and the guilty convicted; and Make sure that those who have committed a crime do not repeat the crime again."

Regarding the Pre-Prosecution, it is an integral part of the Criminal Justice System (SPP), the meaning of the prosecution itself implicitly in the Criminal Procedure Code is defined in the Attorney General's Regulation Number Per-36 / A / JA / 09/2011, concerning Operational Standards for Procedures for Handling General Crimes Cases, namely as a public prosecutor's action to follow the progress of the investigation, after receiving notification of the start of the investigation from the investigator, study or examine the completeness of the case file of the investigation received by the investigator and provide instructions to be completed by the investigator, to be able to determine whether the case file is complete or not. Thus it can be concluded, both from the provisions in the Criminal Procedure Code and the Attorney General's Regulation, basically the prosecution is an act of the public prosecutor to: (1) following the development of the investigation; (2) receive case files; (3) studying and examining case files, and (4) providing instructions to investigators to complete case files. The entrance to the commencement of prosecution is to notify investigations carried out by investigators to the prosecutor or referred to as Notification of Commencement of Investigation (SPDP).

The legal objectives are theoretically namely justice, certainty, and expediency.¹⁷ The purpose of the law, has the first and foremost position than legal certainty and expediency. Historically, initially according to Gustav Radburch the goal of legal certainty was ranked highest above the other goals. However, after seeing the fact that with his theory in Germany under Nazi rule legalized the inhumane practices during World War II by making laws that validate the practices of war cruelty at that time.

The three elements (legal objectives) must be compromised, and must receive proportionally balanced attention. But in practice it is not always easy to work out a proportionally balanced compromise between the three elements. Without legal certainty, people do not know what to do and finally anxiety arises. But too much emphasis on legal certainty, too strict to obey the rule of law consequently rigid will cause a feeling of injustice.

The existence of legal certainty is a hope for justice seekers of the arbitrary actions of law enforcement officers who sometimes are always arrogant in carrying out their duties as law enforcers. Because with the existence of legal certainty the public will know the clarity of their rights and obligations according to law. Without legal certainty, people will not know what to do, do not know what is right or wrong, and what are prohibited or not prohibited by law.

¹⁴ Romli Atmasasmita, *Ibid.*, 14.

¹⁵ Mardjono Reksodiputro, *Op. cit.*, 1.

¹⁶ Mardjono Reksodiputro, *Op. cit.*, 84-85.

¹⁷ Sudikno Mertokusumo, *Mengenal Hukum: suatu Pengantar*, Universitas Atma Jaya Yogyakarta: 2010, 161.

This legal certainty can be realized through a good and clear naming in a law and its implementation will be clear. In other words, legal certainty means that the law is correct, the subject and the object and the legal threat. However, legal certainty might not be considered as an absolute element at all times, but the means used in accordance with the situation and conditions by taking into account the principles of benefit and efficiency.

Justice is one of the most discussed legal goals throughout the history of legal philosophy. The purpose of law is not only justice, but also legal certainty and legal usefulness. Ideally, the law must accommodate all three. Judges' decisions, for example, are as far as possible the resultant of the three. Even so, there are still those who argue that among the three legal objectives justice is the most important legal objective, some even argue, that justice is the only legal goal.

The benefit of the law needs to be considered because everyone expects a benefit in the implementation of law enforcement. Do not let law enforcement actually cause public unrest. Because when we talk about law, we tend only to look at the laws and regulations, which sometimes the rules are not perfect and not aspirational to people's lives. In accordance with the above principles, I am very interested in reading the statement of Satjipto Raharjo, which states that: justice is indeed one of the main values, but it is still beside others – something like utility and efficiency (*doelmatigheid*). Therefore, in law enforcement, the comparison between benefits and sacrifice must be proportional.

The final paradigm in the writing of this article is Integrative Legal Theory, understanding the law shows that to understand law holistically not only consists of "principles" and "rules", but must also include the institutions needed to "realize the rules" in reality. The four legal components, namely principle, rules, institutions, and processes work together integrally to bring these rules into reality, in the sense that the first legal development is done through written law in the form of laws and regulations. The four components of law that are needed to "realize the law" in reality, means legal development after going through legal reforms of jurisprudence.¹⁸ In the formation of law according to the criminal law system, according to Romli Atmasasmita in integrative legal theory, states the performance of BSE with the norm system, behavior system, and value system, can be explained:¹⁹

"Every step of the government in the formation of law and law enforcement is a policy based on a system of norms and logic in the form of principles and rules, and the normative power of law must be realized in changing people's behavior and bureaucracy towards the ideals of building a democratic rule of law. A democratic rule of law can be formed if it is consistently met with three pillars namely rule by law, protection of human rights, and access to justice."

The view of integrative legal theory is not only a basis for the study of national development problems in the context of inward looking, but also in the context of the influence of international relations into the life systems of a nation, especially the Indonesian nation.²⁰ Therefore, in the practice of international relations in the midst of the globalization era, developing countries often become victims of hypocritical developed countries that are more selfish than the common progress of developing countries. Government actions are limited by law. Because according to integrative legal theory, the function of law as a means of renewal is not as a means of coercing the will of the authorities to its people (dark engineering), but as a modifier of the values that live in society towards new values that reflect legal certainty, usefulness and justice. In the field of bureaucracy, integrative legal theory requires the existence of bureaucratic engineering

¹⁸ Romli Atmasasmita, *Teori Hukum Integratif*, 90-91.

¹⁹ Romli Atmasasmita, *Teori Hukum Integratif*, *Ibid.*, 97.

²⁰ Romli Atmasasmita, *Teori Hukum Integratif*, *Ibid.*, 97.

and community engineering. Bureaucratic engineering through norms and behavior systems, while community engineering is done through value systems. The three systems originated from the main source of the living law in their society, especially in Indonesia originating from the country's and nation's main source, *Pancasila*.

3. Discussion

Initially the establishment of the *Prapuntutan* institution is expected to be able to be a check and balance facility, but in reality, it has become one of the sources of problems in the Criminal Procedure Code itself. This condition is not too surprising because the process of establishing a pre-prosecution mechanism is indeed full of political interests. Daniel S. Lev once gave a picture of the formation of a pre-prosecuting institution that is full of the interests of power and is a reflection of the sectorial ego of law enforcement agencies. Stephen C. Thaman explained that in various parts of the world ideally the public prosecutor would always have control over the investigator or at least the course of the investigation. This is due to several reasons, one of which is to maintain checks and balances during the investigation stage, and also "patch" the shortcomings of investigators who in general are not equipped with sufficient legal knowledge. So that the active role of public prosecutors as controllers of investigations is expected to be able to minimize the abuse of authority and to streamline the law enforcement process. Therefore, through this research, the writer tries to look back on the current situation of the implementation of the pre-prosecution mechanism. This research will highlight several aspects that cause problems from the prosecution mechanism.

Reality shows the unwillingness of the investigator to be transparent and accountable in carrying out the authority of the investigation, by observing the tendency of the investigator to notify the investigation to the public prosecutor. Notification of the start of an investigation is the entrance of the pre-prosecution mechanism, and without the notification of the investigation, of course there will be no pre-prosecution mechanism. Without pre-prosecution, there is of course also no check and balance. In addition, this research also tries to see the effect of the implementation of the prosecution mechanism in the absence of an active role from the public prosecutor.

The current positive law regulates that, as in the Criminal Procedure Code, a case submitted by an investigator to the public prosecutor in the prosecution process can take more than 6 (six) months. The lowest point of this problem is, the regulation itself, KUHAP is weak so that it has the potential to cause different interpretations. Differences in interpretation between investigators and prosecutors in the pre-prosecution process will slow the process of handling a case, so that it can cause a case to be protracted. Criminal procedural law that prevailed in Indonesia before the Criminal Procedure Code (KUHAP) was *Het Herziene Inlandsch Regulation* (HIR) as a legacy from the Dutch colonial. After HIR it is in Indonesia Law No. 1 Drt. In 1951 several articles contained criminal procedure. The formulation of the criminal procedure code in the HIR is no longer in accordance with what is mandated in the *Pancasila* and the 1945 Constitution.²¹ Cultural differences between Indonesia and the Netherlands, of course, also resulted in incompatible contents of the adoption regulations with the aspirations of national law.

²¹ *Pancasila* is the ideal foundation of the Indonesian nation, the term ideology comes from the word "idea", which means concept ideas, basic understandings, ideals, and *logos* which means knowledge. The word idea comes from the Greek, "eidos" which means form. Beside that there is the word "idein" which means "look". So literally, ideology means the knowledge of ideas (science of ideas) or the teachings of basic understandings. Meanwhile, the substance of the 1945 Constitution is the constituent foundation of the State of Indonesia as a state of law. The rule of law is a doctrine in the science of law that began to emerge in the 19th century in Europe, along with the birth of a constitutional and democratic state. The rule of law is a translation of the rule of law or *rechtstaat*.

Realizing this difference, the Indonesian government made a legal reform by changing the Indonesian criminal procedure code by revoking the criminal procedure law provisions contained in the HIR (*Saatsblad*, 1941, Number 44) and then declaring the enactment of Law No. 8 of 1981 concerning Criminal Procedure Law on 31 December 1981 (*State Gazette* Number 76 of 1981) concerning the Criminal Procedure Code.²²

In relation to the prosecution, there are currently many problems which not less invite legal experts to do criticism. In the functional relationship between the police and prosecutors, as law enforcement officers, which often causes problems is the implementation of prosecution. Normatively, the problem arises from the weakness in the Criminal Procedure Code regarding pre-prosecution. One of these weaknesses is the issue of submitting and perfecting case files. This weakness is seen in the coordination of tasks between the investigator and the public prosecutor in compiling case files. The coordination is clearly stated in the following articles:

1. Article 8 paragraph 3 – Submission of case files as referred to in paragraph 2 is carried out: In the first stage the investigator only submits case files; In the event that the investigation is deemed completed, the investigator hands over responsibility for the suspect and evidence to the public prosecutor;
2. Article 110 paragraph 2 and paragraph 3 – Paragraph 2: In the event that the public prosecutor believes that the results of the investigation are still incomplete, the public prosecutor immediately returns the case file to the investigator accompanied by instructions to be completed;
3. Paragraph 3 – In the event that a public prosecutor returns the results of an investigation to be completed, the investigator must immediately conduct additional investigations in accordance with the instructions of the public prosecutor;
4. Article 138 paragraph 2 – In the case that the investigation is incomplete, the public prosecutor returns the case file to the investigator with instructions on what must be done to be completed and within fourteen days from the date of receipt of the file, the investigator must have returned the case file to the public prosecutor.

That is, if the case file has been received by the public prosecutor, but the public prosecutor views the case file as incomplete or incomplete or lacks of evidence, the public prosecutor immediately returns the case file to the investigator accompanied by notes or instructions about what must be done by the investigator so that the case file is complete. This process is referred to as pre-prosecution, whose arrangements are contained in Article 138 paragraph 2 of the Criminal Procedure Code. The term of prosecution can be found in Article 14 letter *b* of the Criminal Procedure Code concerning the authority of public prosecutors.

Other problems related to the prosecution are the following:²³

1. With no limit on the number of times the submission or re-submission of case files is reciprocally from the investigator to the public prosecutor or vice versa, it is always possible that, based on the opinion of the prosecutor, the results of the

²² The Department of Justice of the Republic of Indonesia, 1982, *Guidelines for Implementing the Criminal Procedure Code*, the Attorney General's Office of the Republic of Indonesia, p. 1981. The law is based on the provisions of Article 285 referred to as the "Criminal Procedure Code", or in judicial practice commonly abbreviated with the term Criminal Procedure Code. Since its enactment, many people have "praised" the Criminal Procedure Code by calling it a "masterpiece" of the Indonesian people, but there are also those who argue that the law called "the book" is not quite right. The codification should be named after the book. So, it should: "This codification is named after the Criminal Procedure Code." Not the law called "the book" but the codification. Read more: Andi Hamzah, *Hukum Acara Pidana Indonesia*, Edisi Revisi, Penerbit Sinar Grafika, Jakarta, 2005, 1.

²³ Keputusan Menteri Kehakiman Republik Indonesia Nomor: M.01.PW.07.03 Tahun 1982, Field of Investigation, Chapter III, item 4.

investigator's additional investigation have not been completed, the case file can be protracted pacing from the investigator to the public prosecutor or vice versa;

2. Furthermore, if it is related to the time limit as specified in Article 138 paragraph 2, where within fourteen days from the date of receipt of the investigator's file must have completed the results of the investigation in accordance with the instructions of the public prosecutor. If during this time the investigator has not succeeded in completing the results of the investigation or additional investigations in accordance with the instructions of the public prosecutor, whether the investigator must immediately return the case file back in an incomplete condition or continue to be sought by the investigator to be completed, even though the time limit has been passed.

On the basis of the functional relationship between the Police Investigator and the Prosecutor's Office, the impact on economic values in correspondence has an impact on the back and forth²⁴ of the file cases between investigators and prosecutors / case prosecutors. This means that from the economic aspect, such reality is ineffective and inefficient, while from the aspect of the legal certainty that the lack of formal case files and legal evidence collected by investigators will weaken the evidence and prosecution activities in the court. Whereas the prosecutor will assume a great responsibility in proving his indictment and convincing the judge that there is a criminal offense, there is a culprit, covering up mistakes, there is evidence and evidence then there is a reason for forgiveness and justification, so the perpetrator must be punished for responsibility.

The value of justice from this lack of completeness can lead to misguided justice which punishes innocent people ("miscarriage of justice"). Whereas the functioning of the Indonesian Criminal Justice System must not be separated from the spirit of the Second Precepts namely "Humanity that is just and civilized" and "Fifth, namely Social Justice for All Indonesian People". Then also must heed Article 28D paragraph 1 of the 1945 Constitution of the Republic of Indonesia which states: "Every person has the right to recognition, guarantees, protection, and certainty of the law just and equal treatment before the law" and must also pay attention to the principle of legal justice intended in Article 24 paragraph 1 of the 1945 Constitution of the Republic of Indonesia: "Judicial power is an independent power to administer justice to enforce law and justice".

As a more humane step, projections of reconstruction in the pretreatment must be carried out progressively, integratively and systematically. Why should a pre-prosecution institution be reconstructed? Because in practice, the return of cases can occur several times, even the investigation process marked by the submission of Notice of Commencement of Investigation (SPDP) is not mandatory, often not submitted to public prosecutor. The phenomenon of alternating case files between investigators and public prosecutors occurs because of the limited role of public prosecutors in the case investigation process.

As a more humane step, the public prosecutor should also have the authority in the process of investigating a case because the prosecutor will conduct the prosecution in court. Not directly proportional, the current reality, the investigation process is only the authority of the investigator. The public prosecutor does not have the authority to control or oversee how the investigation process works. So, as a result the Prosecutor did not know whether the investigation process was in accordance with the procedure or not.

²⁴ The term "back and forth" is actually not known in the Criminal Procedure Code, but the term back and forth case file is already commonly used at the time of the prosecution of a case. The case files go back and forth because each has a logical and justifiable argument, but it is not necessarily accountable. Returning case files from the public prosecutor to be corrected by the investigator in accordance with the instructions given by the public prosecutor is sometimes difficult for the investigator to fulfill because they may be seen as making it up, and outside the context of the case.

The value of legal certainty becomes abnormal, when the article also does not clearly stipulate the limit on the number of times the case file can be returned from the public prosecutor to the investigator or vice versa. So, this can be called a violation of Human Rights. The ambiguity of the meaning regarding this matter, concerning this limit, will cause or potentially violate the rights of the suspect while opening up the practice space for abuse of authority by law enforcement officials. Why not, because the rules don't necessarily regulate how long the pre-prosecution period is.

The alternating case between the investigator and the public prosecutor actually has a solution with the agreed mechanism, if the police investigator is unable to develop his investigation then the investigator states that the investigation is optimal, and then the public prosecutor uses the mechanism in Law No. 16 of 2004 concerning the Attorney General's Office Article 30 paragraph 1 letter *d*, namely conducting additional examinations. The problem is that this additional audit authority is limited to both the object of examination and the time, so that in the end the practice cannot be carried out optimally.

To overcome the back and forth case files from the investigator to the public prosecutor, so once the investigator has begun to conduct an investigation, the investigator informs him that an investigation has been carried out to the prosecutor's office and then the prosecutor's office in addition to sending P.16 to the investigator also conveyed that the investigator in the case was able to coordinate at any time with the P.16 prosecutor so that the investigator and the P.16 prosecutor can immediately coordinate during the pre-prosecution. Because with the enthusiasm and willingness to coordinate both juridical and non-juridical, a good relationship will be created and can be of one view in the case and will eliminate the selfish values between investigators and prosecutors in carrying out a law enforcement process.

The coordinating relationship between investigators and public prosecutors is very important because it will have an impact on the handling of criminal cases themselves, especially at the pre-prosecution stage. For this reason, it is necessary to build an integration system between investigators and public prosecutors at the pre-prosecution stage.

Difficult to grow the value of justice, legal certainty in the pre-prosecution institution for justice seekers. One of them is due to an error/misconception in designing the relationship between investigators and public prosecutors at the Criminal Procedure Code. The relationship between investigators and public prosecutors in the Criminal Procedure Code, in principle is based on the principle of functional differentiation which is a foothold in the relationship between subsystems/agencies that are in the Criminal Procedure Code.

The above description further confirms that the pre-prosecution institution is not prepared in design to bridge the investigation and prosecution, but is only a "win-win solution" between the investigating institution (the police) and the prosecution (the prosecutor). That is, the concept of pre-prosecution is an agreement. The author views the weakness of the prosecution, also caused by mistakes in understanding Article 110 and Article 138 of the Criminal Procedure Code, so as if the investigator and the public prosecutor were in a different room, then related to the prosecution mechanism. That is what causes the problem of alternating case files or not the completion of a case file at the pre-prosecution stage. If the framework of this misconception is maintained, it will create an ineffective criminal justice system.

Criminal Procedure Code sees currently the prosecution is placed as an "ending process" of the investigation. As a preliminary analysis of this simple research, that by using the theory of progressive legal reconstruction, this pre-prosecution institution, apparently will not solve the problem of cohesiveness between investigators and public prosecutors. This is because the investigator in conducting the investigation process uses an approach with a field implementation framework. After the investigation is complete, the results of the investigation

with the approach used by the investigator, then appear to be “tested” by the public prosecutor with a jurist’s approach.

The consequence is that many cases will not be synchronized, because between the point of view of the investigator and the point of view of the prosecutor using different glasses. Then for the discrepancy in the results of the investigation, the prosecutor asked the investigator to complete the investigation with the viewpoint of the public prosecutor. Furthermore, this is a problem that arises, apparently the instructions given by the public prosecutor will overhaul many of the results of the investigation, while the time given according to Article 138 of the Criminal Procedure Code is only 14 days. How is it possible for the investigator to complete according to the wishes of the public prosecutor and suddenly change the results of the investigation with an approach similar to a public prosecutor, in which the investigation has been prepared so long with the investigator approach model?

What happened, with this inconsistency, led to many cases which were ultimately difficult for investigators to complete and ultimately the victims who were harmed? According to the author, this incident was caused by a misunderstanding of the relationship between the investigator and the public prosecutor who seemed to negate each other not to complement each other. Certainly, the value of legal certainty in this case is starting to melt again, as if there is no just law.

4. Conclusion

The results of this study are quite broad dimensions, namely how to reconstruct pre-prosecution institutions to fit the values of certainty and fairness. Relationships and constructive communication between law enforcement officers, in this case the police and the prosecutors’ Office, must be in harmony. Indeed, the law is for the benefit of the community, the relationship between the two law enforcement agencies must be built through integrated communication. That is, in an ideal concept, the public prosecutor cooperates with the investigator since the start of an investigation. So that the different approaches between investigators and prosecutors have been elaborated since the beginning of the investigation. Or it can be said that the relationship between investigators and public prosecutors is a communication space, not like a post box between investigators and public prosecutors.

If good relations through building communication can take place, then the examination of case files back and forth becomes unnecessary, because the investigator and the public prosecutor already have a harmonized view and need for proof. Reconstruction in the future is to fix the rules as the basis for norms in pre-prosecution institutions. So that the implementation of the investigation, the two can complement each other, no need to wait until the end of the investigation process which is only limited to 14 days.

As a more actual step is the implementation of the relationship between the prosecutor and the ideal investigator conceptually can be implemented, if the subsystems are not limited by the boundaries of subsystems (functional differentiation). In the future, if the barriers between subsystems are not interpreted by clarifying each function (investigation), it will become possible for the public prosecutor to be involved from the beginning of the investigation. This conception will not work with the current Criminal Procedure Code, because the Criminal Procedure Code does not have a public prosecutor involved in the investigation stage, and the possibility of a public prosecutor being involved only in the pre-prosecution stage, which is the ending process of the investigation.

The value of legal certainty and justice in the pre-prosecution institution can be realized, if there is no difference in function in the law enforcement agency between the authority of the investigator and the public prosecutor. The authority of investigators and prosecutors must

be integrated. The concept of integration between investigators and prosecutors is the solution of legal reconstruction offered from the results of this study. Because the conception of the existence of a box of authority makes many human rights violations occur.

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Arrangement of Authority for Investigators of the National Drug and Food Control Agency (BPOM) in Law Enforcement in the Field of Drugs, Food and Beverages

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Abstract

Some of the problems faced by the National Drug and Food Control Agency (BPOM) in carrying out their duties, include philosophical problematic of the BPOM's authority as a drug and food supervisor, does not seem to provide a tendency for justice but has the potential to reverse, theoretical problems with the regulation of BPOM's authority in the form of a Presidential Regulation, and juridical problematics, namely the lack of synchronization regarding the authority of BPOM. The purpose of this research is to analyze the regulatory authority of BPOM in law enforcement in the fields of medicine, food and beverages. This research uses normative legal research methods with the statute approach, and conceptual approach. The analytic technique of this research is using evaluative analysis. The results showed that BPOM investigators' authority can be carried out with 2 (two) schemes, namely strengthening the authority of BPOM investigators and forming institutions for preventing and eradicating criminal acts in the field of medicine and food, including elements of BPOM, Police and Prosecutors, which regulate the speedy judicial process.

Keywords: National Drug and Food Control Agency (BPOM), regulation, authority, investigations.

1. Introduction

The establishment of the National Food and Drug Control Agency (BPOM) is an institutional realization in guaranteeing the protection of consumer rights and as a technical implementer of the laws and regulations above. BPOM was established based on Presidential Decree No. 103/2001 concerning Position, Duties, Functions, Authority, Organizational Structure, and Work Procedures of Non-Departmental Government Institutions. Before the existence of BPOM, the function of drug and food control was also carried out by the Directorate General of Drug and Food Supervision under the Ministry of Health, as outlined in Decree of the Minister of Health of the Republic of Indonesia Number 130/Menkes/SR/I/2000 concerning organization and work procedures of the Ministry of Health, which conveys one of the duties and functions of the Directorate General of Drug and Food Control, exercises authority in the field of drug and food control. Then after the reformation, the existence of the role of the Director General of Drug and Food Control was established by a new agency to become BPOM which was determined to be a Non-Departmental Government Institution (LPND) to carry out the functions and duties of drug

and food control which were previously carried out by the Directorate General of Drug and Food Control.

In the context of drug and food control carried out by BPOM constrained, among others:

- a. "Legislation (Health Law, Consumer Protection Act, Narcotics Act, Psychotropic Law, and implementing regulations) has not fully supported national policies in the field of drug and food control".
- b. "Differences in interpretation of laws and regulations that apply in the field of medicine and food, causing conflicts of norms or ambiguity of norms in their implementation which results in less effective supervision of drugs and food".
- c. "The authority of Civil Servant Investigator (PPNS) BPOM has not been supported by a set of norms which are contained in a special law governing drug and food control, so there is no maximum investigation into drug and food criminal acts".
- d. "Cross-sectoral coordination is not optimal, especially at the regional level in drug and food surveillance".
- e. "The scope of work of drug and food supervisors covers all provinces and districts/cities throughout Indonesia, while BPOM only has UPT organizations at the provincial level".
- f. "The involvement of international crime networks in the fields of medicine and food".

Potentials that can pose a threat from drug and food crimes in addition to the main problems for health, also have an impact on the economy in the country, these impacts can be demonstrated by the loss or reduction of tax revenues and import duties and will lead to depressed competitiveness in the business world. Long-term potential for security and order in society including national security. "The Head of the Police Criminal Investigation Agency Commissioner General Ari Dono Sukmanto together with BPOM guards in Bogor on 22 August 2016 stated that preventing the circulation of illegal food was one of the focuses of the Police and BPOM" (Tempo.co, 2016).

Organizational restructuring efforts to accelerate the handling of drug and food crime cases and harmonization with law enforcement institutions, was shown in 2018 BPOM recruited three new directors in security and intelligence from the State Intelligence Agency (BIN), the Attorney General's Office, and the National Police Headquarters. The filling of this position is to strengthen BPOM's capacity in preventing cross-border drug and illegal food distribution.

The investigation function carried out by BPOM in its implementation must still coordinate with the National Police to file a filing which is then carried out the file submission to be prosecuted by the prosecutor from the Public Prosecutor's Office, so that the existence of the role of BPOM is only limited to investigation, for that a scientific study is needed in the case of BPOM's authority more broadly in the process of law enforcement, this is in line with the implementation of the function of the criminal justice system for law enforcement, which gives BPOM authority in investigations and even independent prosecutions. With this study, it aims to find the ideal law, as written by Satjipto Rahardjo, that legal products are not final, but which must be continuously built (law in making), so that renewal or legal formation is needed by looking at the needs of the community (Rahardjo, 2008).

From the description above, we can catch that there are several philosophical problems to be investigated, namely among others ontologically, epithymologically, and axiologically from the existence of this BPOM. Based on the ontology aspect, which is the essence that the existence of food, drinks and medicines requires supervision in order to maintain safe, healthy and quality food so that consumption of food and medicine is maintained and healthy human quality achieved both short and long term for the development of the Indonesian nation. In terms of epithymology or methods in achieving quality food, drinks and medicines that are

quality and safe, it requires supervision and prosecution of anyone who is cheating on food and drugs, especially in taking action by giving authority to make BPOM part of criminal justice system. As for the axiology or the benefits of the existence of the BPOM later is to be able to take maximum action for actions that can be snared maximally in law enforcement, because the ability of BPOM in mastering the problem is quite deep, so it can ensnare legally and participate in preventing crime in the field of food and medicine.

Based on the descriptions above, the researcher wants to find out and analyze the regulatory authority of BPOM in law enforcement in the fields of medicine, food and drink.

2. Research method

This type of research is normative juridical research, normative legal research or also called doctrinal law research (Amirudin, 2012; Asikin, 2012). In this type of research, the law is conceptualized as what is written in the legislation (law in books) or the law is conceptualized as a rule or norm which is a benchmark of human behavior that is considered appropriate (Ibrahim, 2011). The research approach used is the statute approach and conceptual approach. The legal material from normative research can be divided into three, namely,

1. Primary legal material, legal material that is authoritative consisting of statutory regulations, official records or minutes in the making of legislation and decisions of judges, which are relevant to the legal issues of this study (Marzuki, 2011);
2. Secondary legal law, obtained from publications on laws that are not official documents. Publications about this document include textbooks, legal journals, and comments on court decisions; and
3. Tertiary law materials are legal materials that provide an understanding of primary and secondary legal materials, including legal and political dictionaries, encyclopedias, empirical data, and others.

The technique of searching primary and secondary legal materials is done by studying literature and internet searching (Rahardjo, 2000). The analysis technique in this research is evaluative analysis, which is an analysis that provides justification for the results of the study, the researcher will provide an assessment of the results of the study, whether the hypothesis of the proposed legal theory is accepted or rejected (Rahardjo, 2000).

3. Results and discussion

3.1 *Basis for BPOM regulation through Presidential Regulation*

Based on the philosophical basis for regulating the health sector, namely the 1945 Constitution of the Republic of Indonesia through the basic norms of Article 28H paragraph (1), that:

“Every person has the right to live in physical and spiritual prosperity, to live, and to have a good and healthy living environment and the right to health services”.

Further efforts in fulfilling human rights to health were formed in health legislation, the latest being replaced with Law Number 36 of 2009 on health, this was also emphasized in the preamble (philosophical basis) which contained that:

“Health is a human right and one of the elements of well-being that must be realized in accordance with the ideals of the Indonesian people as intended in the Pancasila and the 1945 Constitution of the Republic of Indonesia”.

Then also stated in the provisions of Article 4, that “Every person has the right to health”. The right to health referred to in that article is the right to obtain various forms of state

efforts in the realization of health, both health services from health service facilities through hospitals, as well as various state institutions that strive to guarantee the right of citizens to get good and healthy. To support the Government's performance as an effort to realize these philosophical values, based on empirical (sociological) conditions, BPOM is held to carry out the Government's function in controlling drugs, food and beverages.

Based on these provisions, the basis of PERPRES No. 80 of 2017 is a philosophical provision of the 1945 Constitution of the Republic of Indonesia. Based on the order of the laws and regulations, the position of BPOM was formed by a type of Presidential Regulation, hierarchically the laws in Indonesia are regulated through Law Number 10 of 2004 concerning the Formation of Regulations that have been replaced with Law Number 12 of 2011 concerning Formation Regulation of Legislation, contained in Article 7:

1. The 1945 Constitution of the Republic of Indonesia;
2. Decree of the People's Consultative Assembly;
3. Government Act/Regulation in Lieu of Law;
4. Government regulations;
5. Presidential decree;
6. Provincial Regional Regulations; and
7. Regency/City Regulations.

In addition, Article 8 of Law Number 12 of 2011 concerning Formation Regulation of Legislation also regulates the types and hierarchy of other laws and regulations, which reads as follows:

Types of legislation other than Article 7 paragraph (1) include regulations established by the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Supreme Audit Board, the Judicial Commission, Bank Indonesia, Ministers, agencies, institutions, or commissions of the same level formed by Law or Government on the orders of the Law, Provincial Regional Representative Council, Governor, Regency/City Regional Representative Council, Regent/Mayor, Village Head or equivalent.

Legislation as referred to paragraph (1) is recognized and has binding legal force insofar as it is ordered by a higher statutory regulation or formed based on authority. Based on the provisions above, the Presidential Regulation has a hierarchical basis or sequence of rules and regulations. Bagir Manan writes that every statutory regulation must have a legal basis in the higher-level regulations (Manan, 2004).

Based on the Indonesian legal structure, the provisions of the BPOM in the Presidential Regulation then became the basis for the formation of policies underneath which were formed by administrative officials, also still based on the *Staatsfundamentalnorm* namely Pancasila which was affirmed in the Opening of the 1945 NRI Constitution, then *Staatsgrundgesetz* namely the 1945 Constitution Body, *Formell Gesetz* namely Constitution.

The establishment of BPOM, namely through a Presidential Regulation, compared to other institutions established by law, has a stronger position in the wider scope of authority. Procedural provisions can then be formed with the head regulation as a policy regulation. The making of policy regulations is needed in order to ensure the consistency of administrative actions. This compliance does not only apply to actions that originate from or are based on statutory regulations, it also applies to actions that are based on freedom of action, including the principle of equality (*gelijkheidsbeginsel*), the principle of legal certainty (*rechtszekerheidsbeginsel*) and the principle of trustworthiness (*vertrouwenbeginsel*). With the existence of these policy regulations, it will be guaranteed compliance with state administrative actions and for each event

that contains equality, legal certainty, and actions can be trusted because it is based on certain regulations.

3.2 Strengthening BPOM's Authority through Law Products

Some previous studies show the weakness of supervision and law enforcement by BPOM, more and more illegal food/drinks/cosmetics are found that threaten people's safety.

"Data on cases of illegal drug criminal acts from 2010 to 2016 also showed that only 52.11% entered the investigation stage; 32.39% prosecution stage; and 11.27% of court proceedings, but efforts to recommend follow-up actions on BPOM findings are still given to the Health and Police Services. The results of drug control in 2015 showed that there were 19.53% of district/city pharmaceutical service facilities and pharmaceutical installations that did not meet the requirements. Of the 5,553 recommendations of the POM Agency for local governments, only 18.10% were followed up with court decisions which were considered by various parties to not have a deterrent effect. Under the Health Act, producers and distributors of illegal drugs will be charged under Article 196 through Article 198 with a maximum penalty of 15 years imprisonment and a maximum fine of Rp1.5 billion. But what has happened so far is that the highest court decision is only in the form of eight months' imprisonment with a Rp5 million fine in Medan" (Yuningsih, 2016).

In recent times, BPOM has become the most highlighted institution because it is considered weak in the supervision of drug distribution. Previously, many similar cases were troubling the public, including cases of fake vaccines, fake drug factories and expired drug cases. So that raises the desire to strengthen the POM to be more effective in overseeing the circulation of drugs and food. Some DPR members stated that the weakness in strengthening BPOM's authority was motivated by BPOM's weak supervision performance. Irma Suryani Chaniago, member of the House of Representatives Commission IX, stated that:

"So far, even though BPOM has been assigned to oversee the distribution of medicines and food, they have been unable to do anything. When BPOM discovers dangerous food and medicines, the agency can only submit findings to the police. They cannot oversee the continuation of drug and food distribution irregularities, because these weaknesses of authority are often suspects who should be fined, jailed for their cheating, receive light sanctions and some are just released" (Triyono, 2018; Rosalina, 2016).

In addition, Dede Yusuf, Chair of the House of Representatives Commission IX, said:

"The formulation of the Drug and Food Control Bill is generally carried out to protect the public from the distribution of dangerous food and drugs. The formulation of the Act is still in its early stages and all sorts of points contained in the draft are likely to be subject to change. Specifically for BPOM, there is indeed a desire for authority from upstream to downstream, but we realize this is not easy because there is a Ministry of Trade, Ministry of Industry, Police, National Police, so we ask for input from many parties."

The plan to strengthen BPOM received support from House of Representatives Commission IX Member Irma Suryani Chaniago explained that:

"If BPOM is given the authority to take action to impose sanctions. Strengthening can give authority to BPOM to provide sanctions. Because, so far BPOM only oversees the circulation of drugs. When there are findings, BPOM only publishes without any follow-up. Meanwhile, the findings are given to the police. BPOM must have a legal basis (Law) to strengthen its function and authority. I support the additional authority of BPOM. The rise of cases that have arisen lately shows that increasing authority for BPOM is very urgent. BPOM must be given the authority to

investigate such as the KPK. This is because BPOM's authority is more preventive by only conducting unannounced inspections and not being able to conduct seizures and investigations. Many drug and food cases have passed because BPOM cannot oversee the legal process. During this time, if there are findings from BPOM, the case is submitted to the police for handling. In fact, the punishment of drug dealers and counterfeit drug makers and does not create a deterrent effect. At this point, the Amendment to the Law on BPOM is urged to give full spectrum oversight authority to BPOM so that it can carry out supervision from upstream (registration to post production) to downstream (post market). Previously, in the bill related to BPOM, the willingness of pharmacy and drug control had been inserted. So now the House of Representatives Commission IX says BPOM must have its own law. At present, the DPR has proposed a bill on Drug and Food Control through the Legislative Body (Baleg). However, because the discussion process of the old bill while the case is urgent, Irma hopes the President will issue a Presidential Regulation first. The presidential regulation is expected to provide additional authority for BPOM while waiting for the completion of the law that is now rolling in the DPR" (Rafael, 2018; Winarto, 2018).

These various empirical conditions require strengthening of BPOM's authority in supervision and law enforcement through strengthening the types of laws and regulations. If regulated in the Law, the PPNS enforcement authority has clarity, legal certainty, and legal force.

In essence BPOM shows as a body that has its own field and also has an important function in conducting order, legal certainty and circulation of drugs, food and drinks. Therefore, the provisions of BPOM as "rules of the game" in addition to containing the value of legal certainty, also contain elements of justice and usefulness, this is because BPOM in carrying out its functions and duties has implications for the ongoing supervision of drugs, food and beverages. Noting the legal implications above, the renewal of investigative law by BPOM can be displayed in the following table.

Tabel 1. Direction of BPOM legal renewal

No.	Type	Content	Updates/Improvements
1	Presidential Regulation No. 80 of 2017		
		Types of Presidential Regulation	Law/Mandate BPOM in the Act
		Position	Describe the position to carry out the tasks of the Government
		Duties, Functions, and Authority	Content in the Law
		Authority of investigation	A description of the scope of authority and position with the Police
		Judicial Process	Quick justice
		Prosecution	Prosecution authority
		Coordination Procedure	1. The law regulates in general, spelled out in technical regulations by ensuring the establishment of BPOM regulations 2. Establishment of new technical regulations
2	BPOM Regulation on Organization and Working Procedure of BPOM		
		Organizational structure	Description of the technical provisions of the organizational structure
		The authority of investigation, prosecution, coordination and justice is fast	More detailed description based on the mandate of the Act

Renewal of the legal content above is needed for legal certainty which is expected to be able to improve order, which leads to justice, considering the function of law in development is as a means of community renewal, this is based on the assumption that there is order in development, is something that is considered important and very is required. Theo Huijbers

stated that the function of law is to preserve the public interest in society, protect human rights, realize justice in living together. These three goals are not contradictory, but constitute the filling of one basic concept, namely that humans must live in a society, and that the community must be well regulated (Huijbers, 1982).

Observing the increasingly developing role of BPOM with the development of types of crime, it needs to be balanced with various forms of regulations that must be directed to the purpose of the law, BPOM regulation must aim to avoid various problems that will arise from all aspects of functional units. Formation of laws and regulations in the context of harmonizing responsive legal laws, is carried out through a democratic and integrated process which is guided by Pancasila and sourced in the 1945 Constitution of the Republic of Indonesia, to produce harmonious laws and regulations up to the level of implementing regulations. Formation of laws and regulations that must pay attention to the provisions that fulfill philosophical values with core sense of justice and truth, sociological in accordance with the cultural values prevailing in society, and juridical values in accordance with the provisions of applicable laws and regulations.

Structuring a comprehensive and integrated national legal system, it is important to harmonize the law with the intention of structuring and adjusting elements of the national legal order, by placing a mindset that underlies the formulation of a national legal system framework that is imbued with Pancasila and the 1945 Constitution. referred to, intersect with the target program of the formation of laws and regulations, namely the creation of harmonization of laws in accordance with the aspirations of the community and development needs.

The structuring and adjustment of the elements of the national legal system and the renewal of national laws, especially general and neutral legal fields, are efforts in the context of harmonizing the law. The field of law as a legal basis for dealing with change. As a foundation and problem in dealing with all of that, steps can be overcome and taken by harmonizing law and practice through efforts to develop legal regulations proposed through one of the government agencies.

To maintain synchronization between the Perpres and national development policies, the application of the principle of “lex superior derogat legi inferiori” has become a fundamental requirement. This principle results in the law having a higher position removing the law under it, or in other words the lower level law must be in accordance with the provisions above it (Marwan, 2011). Although in this case, it is emphasized that the use of this principle must also take into account aspects of equality with the specificity of the Perpres based on the principle of “lex specialis derogat legi generali”. However, what needs to be underlined is that the Presidential Regulation is a technical provision that further regulates the provisions of the law above it.

3.3 Strengthening BPOM's authority in the integrated Criminal Justice System

The criminal justice system is often interpreted narrowly as “a court system that administers justice on behalf of the state or as a mechanism to resolve a case/dispute” (Arief, 2008). Furthermore, Barda Nawawi Arief, said that the understanding is in the narrow sense, because it only sees from the structural aspects of the “system of courts” as an institution and from the aspect of power to judge/resolve cases (*administer justicela* mechanism for the resolution of disputes). The justice system is essentially identical to the law enforcement system, because the judicial process is essentially a process of enforcing the law. The Criminal Justice System is known as the SPP or Criminal Justice System/CJS, in essence a Criminal Law Enforcement System (SPHP), is identical to the judicial power system in the field of Criminal Law (SKK-HP).

Criminal law enforcement is carried out through criminal justice processes based on criminal procedural law (KUHAP. Law No. 8 of 1981). Speaking of criminal law enforcement, it is impossible to break away from talking about the criminal justice system, as a system that operates criminal law in real terms.

The judicial system or law enforcement system, hereinafter referred to as SPH, is seen as an integral, integrated unit of various sub-systems (components) consisting of components of legal substance, legal structure, and legal culture. As a system of law enforcement, the judicial process/law enforcement is closely related to those three, namely legal norms/legislation (substantive/normative component), institutions/structures/law enforcement officers (structural/institutional component and procedural/administrative mechanisms – trait), and legal cultural values (cultural component). What is meant by the values of legal culture (legal culture). In the context of law enforcement, of course, it is more focused on the values of legal philosophy, legal values that live in society and awareness/attitudes of legal behavior/social behavior, and education/legal science (Arief, 2008).

Integrated Criminal Justice System (SPP) covering:

1. The criminal justice system (SPP) is essentially identical to the criminal law enforcement system (SPHP). The system of “law enforcement” is basically a “system of power/authority to enforce the law”. The power/authority to enforce this law can also be identified with the term “judicial power”, therefore, SPP or SPHP is essentially identical to the “Judicial Power System in the field of Criminal Law” (SKKHP).
2. SPP which is essentially a “system of enforcing criminal law” or “a system of judicial power in the field of criminal law”, is manifested implied in 4 (four) subsystems: (1) the authority of the investigator (by the agency/investigative institution); (2) power of “prosecution” (by public prosecuting bodies/institutions); (3) the power of “adjudicating and passing judgment/penalties” (by a court); and (4) powers of “enforcement of decisions/penalties” (by executing/executing bodies/apparatus). The four stages/subsystems constitute an integral whole of the criminal law enforcement system or often referred to as “SPP (Integrated Criminal Justice System)”.

Based on the understanding of the justice system (SPH) it can be seen from various aspects: Judging from the aspect/component of legal substance, the justice system is essentially a substantive system of law enforcement (in the field of criminal law covering material criminal law, formal criminal law, and criminal law of criminal conduct), this is an “integrated legal system” or integrated legal substance. The use of criminal law to settle a criminal case is actually a criminal law enforcement. Criminal law enforcement is a process to turn legal (criminal) desires into reality.

According to Satjipto Rahardjo, what is referred to as legal desires here is none other than the thoughts of the legislature formulated in the legal regulations (Rahardjo, 2006). Meanwhile, according to Loebby Loqman, law enforcement activities are first intended to improve order and legal certainty in society. In the framework of this endeavor, the coordination and improvement of tasks between law enforcement agencies will be strengthened. This is done, among others, by disciplining the functions, duties, powers, and authorities of the institutions tasked with enforcing the law according to the proportions of each scope, and based on a good system of cooperation (LoebbyLoqman, 2001).

The criminal justice system is actually a criminal law enforcement process. In the criminal justice system process there are various law enforcement agencies which are components or sub-systems of criminal justice. According to V. N. Pillai (1978) criminal justice system can be interpreted as follows:

“By the criminal justice system is meant the police, the prosecutorial services, the courts and correctional departments, which are the component elements of the structure of the criminal process, and it has been describe as a continuum and orderly progression of event.”

Furthermore, Muladi said, the meaning of an integrated criminal justice system was synchronization or harmony and harmony. Synchronization can be distinguished by structural synchronization, substantial and cultural (Herbert, 1978). Structural synchronization is the synchronization and harmony of the framework of relations between law enforcement agencies (police-prosecutors-courts-correctional institutions), while the substantial synchronization is the existence of vertical and horizontal synchronization and harmony in relation to positive law. While cultural synchronization, namely the existence of harmony and harmony in living the views, attitudes and philosophies that thoroughly underlie the running of the criminal justice system.

However, completely relying on the settlement of criminal cases or handling crime in the field of drugs and food on the utilization of criminal law is not appropriate. The ability of criminal law has limitations as said by Donald R. Taft and Ralph W. England (1964), that:

“The effectiveness of criminal law cannot be measured accurately. Law is only one means of social control. Habits, beliefs, religion, group support and criticism, emphasis from interest groups and the influence of public opinion are more efficient means of regulating human behavior than legal sanctions.”

Seen from the other side, that the settlement of cases through criminal justice (penal) has many weaknesses. Among them, the settlement of cases attached to the justice system is very long (the delay inherent in a system) in ways that are very detrimental, namely wasting time, expensive costs, making people hostile (enemies), questioning other times, not solving problems the future and paralyze the parties (Harahap, 1997).

In relation to the criminal justice process creating hostility between the parties, Steven Vago said that:

“Judicial resolution of individual dispute’s also effects the distribution of values. Some people gain, others lose, some individuals are honoured, others are stigmatized, and as with all types disputes, a court decision seldom resolves the underlying condition for conflict.”

Meanwhile, Barda Nawawi Arief identified (2008) the causes of the limited ability of criminal law in tackling crime:

1. The causes of such crimes are beyond the scope of criminal law;
2. Criminal law is only a small part (subsystem) of the means of social control that is impossible to overcome the problem of crime as a very complex human and social problem (as a socio-psychological, socio-political, socio-economic, socio-cultural, etc.);
3. The use of criminal law in overcoming crime is only a curier am symptom, therefore criminal law is only a “symptomatic treatment” and not a “causative treatment”;
4. Criminal law sanctions are “remedium” which contain contradictory/paradoxical nature and contain negative elements and side effects;
5. Criminal system is fragmental and individual/personal, not structural/functional;
6. Limitations of types of criminal sanctions and the formulation of criminal sanctions systems that are rigid and imperative;
7. The operation/functioning of criminal law requires supporting facilities that are more varied and more demanding “high costs”.

Joseph Goldstein (1976) distinguish criminal law enforcement into three parts. Namely: first, “total enforcement”, namely the scope of criminal law enforcement as formulated

by substantive criminal law. This total criminal law enforcement is not possible, because law enforcers are strictly limited by criminal procedural law which includes the rules of arrest, search, confiscation and preliminary examination.

In the process of implementing criminal law enforcement in the health sector in a consistent and consistent manner, it is necessary to increase the quality of the apparatus that is responsible, professional and proportional, disciplined as well as providing adequate supporting infrastructure through strengthening the authority of BPOM investigators, implementing and enforcing the law in a strict and straightforward manner, but humane based on the principles of justice and legal certainty. This is important considering that the health sector is an important instrument in achieving the country's goals.

In examining the strengthening of the authority of investigators BPOM can be understood as one form of policy or crime prevention efforts (criminal policy) which is essentially an integral part of efforts to protect society (social welfare) therefore it can be said that, the main objective of criminal politics is protection community to achieve community welfare (Arief, 2008).

All aspects of life and state power are determined by the rules of the state administrators and the guidelines for the rules of the state administration which are called the law as a norm of rules that are agreed upon and universally applicable, besides that in society there are rules that live and develop as guidelines for living together. Then in the criminal justice system as a system in the framework of law enforcement it contains systemic motion between sub-systems or functional components which include the Police, Attorney's Office, Courts and Penitentiary to each other is one unity (totality) which is always related and coordinated and seeks to transform input into output to achieve the goal of the criminal justice system or the criminal justice system.

In implementing the criminal justice system, the systemic motion between the functional components that are related to each other and is a totality needs to exist within the framework of criminal law enforcement purposes. According to William Friedman (1984), criminal law enforcement is strongly influenced by 3 elements or components, as "elements of legal system", namely the legal structure, legal substance, and legal culture.

The three components influence each other in law enforcement efforts. Whereas law as substance is the result or "output" of the system itself, in this sense it includes laws and regulations, doctrines, and regulations used by the organizer in carrying out its duties and authorities.

Legal culture by Friedman is defined as values and attitudes that have to do with the legal system, and which will have an effect, both positive and negative, on behavior related to law, he said, other elements in the system are cultural. These are values and attitudes which bind the system together and ethic determine the place of the legal system in the culture of the society as a whole. That is, values and attitudes will bind the system together and determine the place of the system itself in the culture of society as a whole.

Understanding of the legal culture of society, cannot be separated from archer on the culture of society as a whole, given that the law is part (sub-culture) of the culture of society, in the perspective of legal culture, law can be seen more realistic, not limited to the content and legal institutions that are there is only, but as it is the law in people's lives. This means that the law is obeyed or not obeyed, used or avoided, even abused or misuse of the law, legal culture, Friedman said, is the driving force for the operation of law (court) in society. Whether or not a court works is highly dependent on the legal culture of the community (Sidmen, 1978).

In law enforcement, it cannot be separated from the police. According to Sadjijono (2008), the duties and authority of the police are as follows:

“The ability of the police profession is grouped in the main tasks of the police, namely: (a) maintaining security and public order, (b) enforcing the law, and (c) providing protection, protection and service to the community, which then in carrying out these basic tasks broken down into tasks and authorities, both in general and specifically.”

When seen the ability of the police and the scope of their duties, the police are considered capable of solving various problems in the community, but in reality there are still weaknesses. According to Alfons Loemau et al. (2005), “the police is a living rule of law, meaning that the law will remain as a death letter if the police do not act in the name of the law to be enforced”.

The use of criminal law to settle criminal cases is actually criminal law enforcement. Criminal law enforcement is a process to turn legal (criminal) desires into reality. Satjipto Rahardjo referred to as legal desires here is none other than the thoughts of the legislature formulated in the legal regulations. Satjipto Rahardjo (2006) and Loebby Loqman (2001) said that law enforcement activities were first intended to improve order and legal certainty in society.

In the framework of this endeavor, the coordination and improvement of tasks between law enforcement agencies will be strengthened. This is done, among others, by disciplining the functions, duties, powers, and authorities of the institutions tasked with enforcing the law according to the proportions of each scope, and based on a good system of cooperation. In carrying out its duties and functions, BPOM cannot run alone, it requires cooperation or partnership with other stakeholders. In the era of regional autonomy, especially related to the health sector, the role of regions in developing development plans and policies has a very big influence on the achievement of national goals in the health sector.

4. Conclusion

Law Number 36 of 2009 does not strengthen the authority of BPOM investigators in law enforcement in the field of drugs, food and beverages with consideration of the authority of the investigation held by the National Police as a law enforcement agency in the criminal justice system, the authority of law enforcement is contained in the 1945 Constitution of the Republic of Indonesia, the authority in the criminal justice process is listed in the Criminal Procedure Code as the main criminal procedure law and the National Police Act which also states the authority of law enforcement and investigation. Future arrangements for the authority of BPOM investigators can be done with 2 (two) schemes. First, strengthening the authority of BPOM investigators through the establishment of a law that clearly states the authority of BPOM investigations to provide strength and legal certainty. Second, the law can establish institutions for the prevention and eradication of criminal acts in the field of drugs and food in which there are elements of BPOM, the Police and Prosecutors Office, which regulates the speedy judicial process.

The 1945 Constitution of the Republic of Indonesia NRI determines the National Police as an element of the state that functions as law enforcement, then the Criminal Procedure Code as the main criminal procedure law determines the authority of the National Police investigator in the process of working on criminal law, but in addition it is also given the authority of PPNS in conducting investigations with restrictions still having to coordinate with investigators of the National Police, so Law No. 36 of 2009 also provides space for PPNS in law enforcement in the field of medicine and food. This authority needs to be strengthened in the law given that the field of medicine and food is one of the basic needs which is the main element of national security. The Government and the Parliament need to immediately ratify the Draft Drug and Food Law which contains the substance of strengthening the enforcement authority through investigations by BPOM investigators, the substance containing the main tasks, authorities, and responsibilities,

the coordination mechanism with Police and Prosecutors investigators, thus, any BPOM findings can reach criminal justice processes.

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Bulgaria and the Istanbul Convention – Law, Politics and Propaganda vs. the Rights of Victims of Gender-based Violence

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Abstract

The following article deals with the debate among institutions, victim support NGOs and various religiously affiliated entities protecting “family values”, as regards the ratification by Bulgaria of the Council of Europe Convention on preventing and combating violence against women (Istanbul Convention). The debate was deeply influenced by an active campaign against the document, which was ultimately declared by the country’s Constitutional Court unconstitutional. The article then examines the long-lasting consequences of the campaign, having led to the rejection of several other key victim protection documents and to the overall undermining of the protection of victims of gender-based violence in Bulgaria.

Keywords: Istanbul Convention, debate, Constitutional Court, victim protection.

1. Introduction

Bulgaria signed the Council of Europe Convention on preventing and combating violence against women (Istanbul Convention) on 21 April 2016² as part of its chairing the Committee of Ministers of the Council of Europe. It became the 40th member state of the Council of Europe to sign the document. The move earned the praise of human rights and victim protection NGOs as the country pledged to prevent and counter all forms of gender-based violence.³ Political

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² Council of Europe (2016). *Bulgaria signs the Istanbul Convention*. Retrieved 27 February 2020, from https://www.coe.int/en/web/istanbul-convention/newsroom/-/asset_publisher/anInZ5mw6yX/content/bulgaria-signs-the-istanbul-convention?inheritRedirect=false.

³ See, for example, Bulgarian Gender Research Foundation (2016). *Bulgaria signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)* (България подписа Конвенцията на Съвета на Европа за превенция и борба с насилието срещу жени и домашното насилие (Истанбулската конвенция)). Retrieved 27 February 2020, from

will to ratify the Convention was profusely expressed by various officials on different occasions⁴ and at the beginning of 2018 the Council of Ministers officially proposed to the National Assembly to ratify the document. Already at this stage, it noted that the ratification would require amendments not only in the victims protection legislation, but also in norms of the Criminal Code, concerning gender-based violence, therefore such amendments were being prepared in relevant criminal and also civil legislation.⁵ However, around the same time a wide propaganda-inspired campaign ensued on the topic of ratification, resulting, among others, in a heated public discussion organized by the Speaker of the Bulgarian Parliament.⁶ In February 2018 75 MPs from the then ruling party seized the Constitutional Court on the constitutionality of the Convention and in July 2018 it was pronounced unconstitutional.⁷ Thus, the ratification was effectively barred and the only option before the country to counter gender-based violence remained to adopt its own, not Convention-based legislative amendments, which, as will be shown in Section 3.4., it did rather fragmentarily. Most recently, the European Parliament urged the six Member States (and the UK) not having ratified the document to do so without delay.⁸ However, Bulgaria sustained its position by adopting a negative opinion⁹ on the absence of mutual agreement between all the Member

<http://bgrf.org/articles/%D0%B1%D1%8A%D0%BB%D0%B3%D0%B0%D1%80%D0%B8%D1%8F-%D0%BF%D0%BE%D0%B4%D0%BF%D0%B8%D1%81%D0%B0-%D0%BA%D0%BE%D0%BD%D0%B2%D0%B5%D0%BD%D1%86%D0%B8%D1%8F%D1%82%D0%B0-%D0%BD%D0%B0-%D1%81%D1%8A%D0%B2%D0%B5%D1%82%D0%B0-%D0%BD%D0%B0-%D0%B5%D0%B2%D1%80%D0%BE%D0%BF%D0%B0-%D0%B7%D0%B0-%D0%BF%D1%80%D0%B5%D0%B2%D0%B5%D0%BD%D1%86%D0%B8%D1%8F-%D0%B8-%D0%B1%D0%BE%D1%80%D0%B1%D0%B0-%D1%81-%D0%BD%D0%B0%D1%81%D0%B8%D0%BB%D0%B8%D0%B5%D1%82%D0%BE-%D1%81%D1%80%D0%B5%D1%89%D1%83-%D0%B6%D0%B5%D0%BD%D0%B8-%D0%B8-%D0%B4%D0%BE%D0%BC%D0%B0%D1%88%D0%BD%D0%BE%D1%82%D0%BE-%D0%BD%D0%B0%D1%81%D0%B8%D0%BB%D0%B8%D0%B5-%D0%B8%D1%81%D1%82%D0%B0%D0%BD%D0%B1%D1%83%D0%BB%D1%81%D0%BA%D0%B0%D1%82%D0%B0-%D0%BA%D0%BE%D0%BD%D0%B2%D0%B5%D0%BD%D1%86%D0%B8%D1%8F-507>.

⁴ See, for example, Ministry of Justice of the Republic of Bulgaria (2017). *Deputy Minister Ahladova: Bulgaria is going to ratify the Istanbul Convention* (Зам.-министър Ахладова: България ще ратифицира Истанбулската конвенция). Retrieved on 27 February 2020, from <https://webcache.googleusercontent.com/search?q=cache:cvGgejflNpEJ:https://justice.government.bg/117/13759/+&cd=1&hl=en&ct=clnk&gl=bg>.

⁵ Council of Ministers of the Republic of Bulgaria (2018). *Agenda of the Council of Ministers session of 3 January 2018* (Дневен ред на заседанието на Министерския съвет на 03.01.2018 г.). Retrieved on 27 February 2020, from <https://government.bg/bg/prestentat/zasedaniya-na-ms/dneven-red-na-zasedanieto-na-ministerskiya-savet-na-03-01-2018-g>.

⁶ National Assembly of the Republic of Bulgaria (2018). *Public discussion on the Draft Law on the Ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence* (Обществена дискусия по Законопроекта за ратифициране на Конвенцията на Съвета на Европа за превенция и борба с насилието над жени и домашното насилие). Retrieved on 27 February 2020, from <https://parliament.bg/bg/discussion>.

⁷ Constitutional Court of the Republic of Bulgaria (2018). Decision No 13, Sofia, 27 July 2018, promulgated SG issue 65/7 August 2018 (Решение № 13, София, 27 юли 2018 г., (обн., ДВ, бр. 65 от 07.08.2018 г.)). Retrieved on 27 February 2020, from <http://constcourt.bg/bg/Acts/GetHtmlContent/f278a156-9d25-412d-a064-6ffd6f997310>.

⁸ European Parliament (2019). *EU accession to the Istanbul Convention and other measures to combat gender-based violence*. Retrieved on 27 February 2020, from https://www.europarl.europa.eu/doceo/document/TA-9-2019-0080_EN.html.

⁹ Council of Ministers of the Republic of Bulgaria (2019). *Agenda of the Council of Ministers session of 11 December 2019* (Дневен ред на заседанието на Министерския съвет на 11.12.2019 г.). Retrieved on 27

States concerning their consent to be bound by that convention, regarding the Request for an opinion submitted by the European Parliament pursuant to Article 218(11) TFEU to the Court of Justice of the European Union.¹⁰ It thus allegedly barred the implementation of the Convention by the whole Union. The following article aims to firstly outline the legal and socio-political arguments by which the norms of the document were effectively rejected, which recurred at different stages of the campaign against it and, relatively uncritically, in the decision of the Constitutional Court. The (yet unsuccessful) efforts of institutions, human rights and victim support NGOs in favor of the document will also be shortly noted. Then, an overview will be provided of the immediate and long-term consequences of rejecting the Convention against the background of the substantial difficulties Bulgaria faces in protecting gender-based violence victims. As a result, the article will hopefully contribute to proving the (in)direct, yet visible, long-term detrimental effect the anti-Convention process has had on supporting this extremely vulnerable group of victims.

- A debate surrounded the ratification of the Istanbul Convention in Bulgaria.
- The Constitutional Court declared the Convention unconstitutional.
- The debate led to several subsequent campaigns against key documents.
- The process has had lasting consequences for protecting victims of violence.

2. Methodology

This article has relied on desk research of legislation, case law and various related statements by stakeholders, as well as public discussions on various acts. It also reflects the author's practical perspective as a think tank legal and policy analyst gathered throughout various events and personal meetings with interested actors.

3. National contradictions around an international treaty – Between law, politics and propaganda

3.1 *Arguments against the Istanbul Convention – Third sex and gender ideology*

Generally, the 2018 debate around the impending ratification of the Istanbul Convention by Bulgaria focused on whether the document indeed protected women against violence or simultaneously, as maintained by many, including a major political party, proclaimed a “third sex” and “gender ideology”.¹¹

Early on in the societal contradiction, the public discussion organized by Bulgarian Parliament (see introduction), comprising short interventions by various stakeholders, succinctly

February 2020, from <https://government.bg/bg/prestsentar/zasedaniya-na-ms/dneven-red-na-zasedanieto-na-ministerskiya-savet-na-11-12-2019-g>.

¹⁰ Court of Justice of the European Union (2019). *Request for an opinion submitted by the European Parliament pursuant to Article 218(11) TFEU*. Retrieved on 27 February, from <http://curia.europa.eu/juris/document/document.jsf?jsessionid=2BC30754500BC2A3CFF3F47B03D00157?text=&docid=221362&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6150317>.

¹¹ Bulgarian Socialist Party (2018). *Kornelia Ninova: When people say “No” to the Istanbul Convention, this chapter will be closed forever* (Корнелия Нинова: Когато хората кажат “не” на Истанбулската конвенция, въпросът се затваря завинаги). Retrieved 28 February 2020, from <http://bsp.bg/news/view/13815-korneliya-ninova-kogato-horata-kajat-ne-na-istanbulската-konventsia-vyprosyat-se-zatvaryazav-inagi.html>.

indicated the leading counterarguments by religious denominations and NGOs of religious affiliation upholding “family values”. Those were later developed into longer argumentative narratives via detailed opinions before the Parliament as part of the process to adopt the Convention’s ratification law.¹²

First and foremost, a *sociological* line of argument was introduced. According to many, the document allegedly *introduces the notion of “gender” which is different from “sex”* and unknown to Bulgarian legal order, *pursuing aims “different” from protecting women from violence and redefining the notions of sex*;¹³ thus motivating people to choose their sex/gender themselves.¹⁴ As it will be shown in Section 3.2. and 3.3., the interplay between sex and gender proves the main bone of contention in the debate around the Convention and the decisive argument to pronounce it unconstitutional. Indeed, in their later opinions before the Parliament, religious denominations were worried about the new meaning of “sex”, different from the generally accepted notion, and the expectation to “uproot” customs and traditions, based on traditional roles of men and women. Moreover, conceptual contradictions were allegedly partly due to incorrect translation of the original texts into the Bulgarian language. Therefore, according to the religious entity authoring one statement, the initial Bulgarian text should not be ratified, but corrected, wide public discussion should ensue and, in case the document is ultimately not ratified, amendments should be introduced to national legislation based on the consensual parts of the document.¹⁵

Further, from an allegedly *human rights perspective, the Convention’s norms concerning education on all levels about stereotyped gender roles are deemed to go against the idea of marriage between men and women*, while family, according to the Universal Declaration of Human Rights, is the natural and fundamental group unit of society and is entitled to protection by society and the State.¹⁶ *Such teachings would, according to some, effectively popularize a*

¹² National Assembly of the Republic of Bulgaria (2018). *Draft Law on the Ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence* (Законопроект за ратифициране на Конвенцията на Съвета на Европа за превенция и борба с насилието над жени и домашното насилие). Retrieved on 28 February 2020, from <https://parliament.bg/bg/bills/ID/77944/>.

¹³ See, for example, religious representatives’ statements on National Assembly of the Republic of Bulgaria (2018). *Public discussion on the Draft Law on the Ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence* (Обществена дискусия по Законопроекта за ратифициране на Конвенцията на Съвета на Европа за превенция и борба с насилието над жени и домашното насилие). Retrieved on 27 February 2020, from <https://parliament.bg/bg/discussion>, p. 14-15, 17.

¹⁴ *Ibid.*, p. 51.

¹⁵ See, for example, the opinion by the United Evangelical Churches. The opinion by the Seventh Day Adventist Churches Union also expressed worries about the sex/gender/sexual orientation/gender identity concepts interplay and deemed the definition of gender “subjective and insufficient”. National Assembly of the Republic of Bulgaria (2018). *Draft Law on the Ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence* (Законопроект за ратифициране на Конвенцията на Съвета на Европа за превенция и борба с насилието над жени и домашното насилие). Retrieved on 28 February 2020, from <https://parliament.bg/bg/bills/ID/77944/>.

¹⁶ See, for example, religious representatives’ statements on National Assembly of the Republic of Bulgaria (2018). *Public discussion on the Draft Law on the Ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence* (Обществена дискусия по Законопроекта за ратифициране на Конвенцията на Съвета на Европа за превенция и борба с насилието над жени и домашното насилие). Retrieved on 27 February 2020, from <https://parliament.bg/bg/discussion>, p. 14-15, 64.

“gender ideology” which is a type of “psychological violence” towards children.¹⁷ This argument is used repeatedly throughout the counter-Convention narrative and, although not given by the Constitutional Court, becomes the basis for further attacks against educational tools to counter gender-based violence (see Section 3.4.). To support this line, in its opinion before the Parliament, a religiously affiliated international lawyers’ NGO¹⁸ mentioned that the efforts to change social and cultural models and introduce education on gender equality and non-stereotyped gender roles contradicted the primary role of parents in the raising and education of their children. As the document practically opposed major religious denomination teachings, it thus also violated the freedom of religion and the professional secrecy of confession due to the duty to report it introduced for various religious professionals.

Moreover, in an *additional, more legalistic line* of argument, it is claimed that *violence does not only victimize women, but also children, as well as men and older people*.¹⁹ *There is allegedly sufficient national legislation, and international standards*,²⁰ *to fulfil the aims of the Convention*,²¹ and what is possibly needed is only some additional criminalization of acts of violence in the Criminal Code.²² This argument seems to downplay the specifics of gender-based violence and, even when the need for some legislative amendments is admitted, refuses to acknowledge the deep sweeping reform the country needs to undertake in the protection of that category of victims. Following this legalistic line, the religiously affiliated, international lawyers’ NGO just mentioned²³ insisted there was sufficient legislation to meet the aims of the Convention. The Convention allegedly introduced ideological reformulations of traditional notions like sex, family, men and women, codifying the contradictory notion of gender as social construct independent from biological reality. The entity doubted the support for the Convention among CoE Member States and stated the “useful” provisions of the document were already well covered by national legislation, but there were a number of “problematic” ones. The opinion contrasted the Convention with the ICC Rome Statute, where “gender” only refers to the two sexes and stated that the subjective nature of gender undermines the predictability of the Convention’s norms.

Finally, from a seemingly more *political perspective*, the monitoring mechanism the document proposes, GREVIO, is claimed to undermine national sovereignty.²⁴

¹⁷ *Ibid.*, p. 53.

¹⁸ See the opinion by the Alliance Defending Freedom. National Assembly of the Republic of Bulgaria (2018). *Draft Law on the Ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence* (Законопроект за ратифициране на Конвенцията на Съвета на Европа за превенция и борба с насилието над жени и домашното насилие). Retrieved on 28 February 2020, from <https://parliament.bg/bg/bills/ID/77944/>.

¹⁹ See, for example, National Assembly of the Republic of Bulgaria (2018). *Public discussion on the Draft Law on the Ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence* (Обществена дискусия по Законопроекта за ратифициране на Конвенцията на Съвета на Европа за превенция и борба с насилието над жени и домашното насилие). Retrieved on 27 February 2020, from <https://parliament.bg/bg/discussion>, p. 44-46.

²⁰ *Ibid.*, p. 56.

²¹ *Ibid.*, p. 38, 60.

²² *Ibid.*, p. 48.

²³ See the opinion by the Alliance Defending Freedom. National Assembly of the Republic of Bulgaria (2018). *Draft Law on the Ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence* (Законопроект за ратифициране на Конвенцията на Съвета на Европа за превенция и борба с насилието над жени и домашното насилие). Retrieved on 28 February 2020, from <https://parliament.bg/bg/bills/ID/77944/>.

²⁴ See, for example, National Assembly of the Republic of Bulgaria. Public discussion on the Draft Law on the Ratification of the Council of Europe Convention on preventing and combating violence against women

As shown above, the arguments against the ratification of the Convention seem to go along a thin line between law and human rights, politics and religion. They fluctuate among statements like, on the one hand, “contradiction with established legal order”, “lack of predictability of legal norms” and, on the other hand, “undermining traditional family values” and “the rights of parents to have the primary responsibility for children’s education”. (Attempts at) arguments from legal theory and international (human rights) law are mixed with categories about “national sovereignty” and “hidden aims” of a document only “seemingly” countering violence against women.

3.2 Pro-Convention – institutional effort and NGO campaigns

On the other end of the spectrum, besides the expressions of political will (see introduction), the Istanbul Convention actually enjoyed, at least on paper, quite wide institutional support.

Pro-Convention opinions were also expressed at the public discussion in the Bulgarian Parliament by the Ombudsman, the British Ambassador, the UNICEF representative to Bulgaria.²⁵

Most institutional opinions on the case before the Constitutional Court (see Section 3.3.)²⁶ showed significant effort on the part of government stakeholders to justify the strive towards ratification and prove the document’s constitutionality.

The Minister of Foreign Affairs (who actually signed the Convention in her preceding capacity as Minister of Justice) used *international law arguments* on interpretation from the Vienna Convention on the Law of Treaties, and from other treaties, to point out that the Convention had nothing to do with regulating marriage, civil status, social security etc., and the definition of gender should be strictly perceived within the context of the act. Moreover, *in the realm of national law*, it was stated that the notion was already known to Bulgarian law due to its use in the Rome Statute the country had ratified and in acts of the European Union. The opinion also noted that countries had discretion in what measures to undertake to implement the document, while the Convention was in full compliance with the national Constitution’s key values – humanity, equality, justice and tolerance, guaranteeing human rights, dignity and security. Moreover, stereotyped gender roles were already known to Bulgaria’s legislation on equality between men and women and were profusely looked at in documents like the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) the country had ratified. Finally, education on gender stereotypes was already postulated in Bulgarian anti-discrimination legislation and is much needed due to the fact that gender stereotypes appear at a very early age. Like the Minister of Foreign Affairs, the Minister of Justice sustained that *gender did not replace the notion of sex and only referred to stereotyped roles and models which nurture violence against women*. The Minister of Justice stated the Convention did not require the recognition of a “third sex”, and its provisions on education basically referred to equality between men and women, respectively boys and girls, while under current Bulgarian Constitution same sex marriages could not be recognized in any case. The State Agency for Child Protection elaborated on the argument that gender had long been part of Bulgarian legislation on equality between men and women and showed with *concrete examples that girls were indeed vulnerable to various forms of violence*, including alarming statistics on forced marriages. The Agency also pointed out

and domestic violence (*Обществена дискусия по Законопроекта за ратифициране на Конвенцията на Съвета на Европа за превенция и борба с насилието над жени и домашното насилие*) (2018). Retrieved on 27 February 2020, from <https://parliament.bg/bg/discussion>, p. 38.

²⁵ *Ibid.*

²⁶ Constitutional Court of the Republic of Bulgaria. Case N 3/2018 (*Дело № 3/2018 г.*) (2018). Retrieved on 28 February 2020, from <http://constcourt.bg/bg/Cases/Details/541>.

the gaps in criminalization of domestic violence, the law on protection against domestic violence and its civil protection order procedure and the fact that not all gender-based violence is domestic, therefore the protection, offered by the Convention, is badly needed. The opinion also recalled that gender equality is among the sustainable development goals Bulgaria has committed to uphold and reiterates countries have discretion in shaping its preventive and educational practices in the area.

Parallel to institutional support, NGOs have campaigned continuously in favor of the document. In January 2018, a number of organizations sent an open letter to institutions supporting the actions to ratify the Convention and standing against all statements or interpretations, based on lack of knowledge and will to undertake decisive measures against violence against women.²⁷ A number of pro-Convention NGO opinions were expressed at the public discussion in the Bulgarian Parliament,²⁸ emphasizing the pervasive nature of domestic violence and the gaps existing in its prevention and counteraction. Aspects outlined were the relationship between domestic violence and violence against children and the fact that violence is not a “family value”.²⁹ Social workers recalled alarming statistics about women and children killed by acts of domestic and gender-based violence.³⁰ Human rights organizations criticized the non-transparent process of preparation of legislative amendments, related to the Convention.³¹ The campaign in favor of the Convention continued via statements before the Constitutional Court.³² The Bulgarian Lawyers for Human Rights *defended the Convention along the (constitutional) lines of gender equality, prohibition of discrimination and countering gender-based violence as form of discrimination* and stated that gender was only a social role, which was already known to Bulgarian legislation on gender equality, and there was actually no “third sex”, as transgender people also identified themselves as men or women. The Animus Association Foundation *emphasized on the widespread gender stereotypes among Bulgarians* and recalled the CEDAW committee decisions against Bulgaria, criticizing the country on the matter. *The Alliance for Protection against Gender-Based Violence noted that the Convention was primarily concerned with violence against women and girls and did not in any way introduce a “third sex”*. The Alliance reiterated that countries were free in choosing the measures by which to implement the document in domestic legislation and practice and that gender was actually an element of a three-component notion (gender, violence, and women) and not a separate concept related to biological sex. The Alliance also made a detailed, comparative overview of the Convention’s English and French texts to explain the notion of gender and cited leading Bulgarian sociologists on the matter to explain that the document did not introduce a “third sex”.

²⁷ Alliance for Protection against Gender-Based Violence. Open Letter for Support of the Actions by the Bulgarian State for Ratification of the Istanbul Convention (*Отворено писмо за подкрепа на предприетите действия от българската държава за ратифициране на Истанбулската конвенция*) (2018). Retrieved on 28 February 2020, from <http://www.alliancedv.org/articles/отворено-писмо-за-подкрепа-на-предприетите-действия-от-българската-държава-за-ратифициране-на-истанбулската-конвенция-конвенция-на-съвета-на-европа-за-превенция-и-борба-с-насилието-над-жени-и-домашното-насилие-416>.

²⁸ National Assembly of the Republic of Bulgaria (2018). *Public discussion on the Draft Law on the Ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence* (*Обществена дискусия по Законопроекта за ратифициране на Конвенцията на Съвета на Европа за превенция и борба с насилието над жени и домашното насилие*). Retrieved on 27 February 2020, from <https://parliament.bg/bg/discussion>.

²⁹ See, for example, the statement by the Social Activities and Practices Institute, *Ibid.*, p. 34-35.

³⁰ *Ibid.*, p. 52-53.

³¹ *Ibid.*, p. 69-70.

³² Constitutional Court of the Republic of Bulgaria (2018). *Case N 3/2018 (Дело № 3/2018 г.)*. Retrieved on 28 February 2020, from <http://constcourt.bg/bg/Cases/Details/541>.

The campaign in favor of the Convention enjoyed a much wider support by institutions, as well as international backing by ambassadors and intergovernmental organizations. It relied on detailed argumentation from international law and further attempted to show that the norms of the Convention were “foreign” neither to constitutional values, nor to national legislation on equality of men and women and countering discrimination. However, as it will be shown in Section 3.4., statistics on pervasive domestic violence were not sufficient to counter referrals to marriage and family values, while the argument on the primary responsibility of parents to educate their children seemed to overrule the alarming data on early age gender stereotypes, victimization of children by violence and necessity for prevention by education.

It is in this highly divisive and politicized environment that the case about the ratification of the Convention went to its next, and decisive, stage – the review by the country’s Constitutional Court.

3.3 The case before the Constitutional Court

A case before the Constitutional Court³³ was initiated in February 2018 upon motion by 75 (ruling party) MPs in view of the Convention’s impending ratification to assess its compliance with Bulgarian Constitution. In the face of accusations for “passing the hot potato” of rejecting the Convention to the Court, the parliamentarians³⁴ cited the deep social divide and fears of recognizing a “third sex” and same-sex marriages as main reasons for motioning the Court. They did mention the nature of “gender” was unknown in Bulgarian legal order, while it was crucial to assess the compliance of the treaty with Bulgarian Constitution. Other than that, the motion actually defended the treaty by inferring from its Articles 3c and 3d (“gender” shall mean the socially constructed roles... a given society considers appropriate for women and men; “gender-based violence against women” shall mean violence that is directed against a woman because she is a woman) that gender only referred to the two sexes. Furthermore, the motion stated the Convention was not an instrument to shape the perception of sex/gender or various ideologies. Nor did it require from states to allow same-sex marriages or recognize a “third sex”, which would contradict the Bulgarian Constitution recognizing only marriages between men and women. In the view of the MPs, the case was just the opposite – the Convention called for a gender-based understanding of violence to protect women and girls against such acts.

At the end of July 2018, the Constitutional Court, in an eight to four vote, with four dissenting opinions, came out with a highly criticised decision, proclaiming the Convention unconstitutional.³⁵ Apart from the multitude of institutional opinions supporting the document (see Section 3.2. on pro-Convention opinions), the President took a critical stance and strictly opposed the document as going “beyond the values of the Bulgarian Constitution”, while the Minister of Health tentatively referred to the well-known argument about contradictions between the concepts of sex and gender. Only one NGO deemed the Convention unconstitutional, as well as three law professors, who proclaimed the document unconstitutional and “in conflict with Bulgarian constitutional identity”.

In its argumentation, the Court looked at the continuous efforts of the Council of Europe to counter violence against women and the development of international legal regulation

³³ *Ibid.*

³⁴ See the Motion by MPs from the 44th National Assembly.

³⁵ Constitutional Court of the Republic of Bulgaria (2018). *Decision N 13, Sofia, 27 July 2018, promulgated in SG 65/7 August 2018 (Решение № 13, София, 27 юли 2018 г., обн. ДВ, бр. 65 от 07.08.2018 г.)*. Retrieved on 28 February 2020, from <http://constcourt.bg/bg/Acts/GetHtmlContent/f278a156-9d25-412d-a064-6ffd6f997310>.

in the area. Parallel to those, and conspicuously similar to the counter-Convention arguments, the Court noted that the Council led a policy against discrimination based on gender identity and in favour of recognising the rights of transgender people. According to the Court, the Convention's main objectives to counter violence against women and domestic violence were in full compliance with Bulgarian Constitution, and pieces of legislation like the Criminal Code, legislation on discrimination and equality between men and women, as well as for protection against domestic violence.

However, again in line with the arguments from the counter-Convention campaign, the document was also found to have internal contradictions which created a "second layer" to its text going outside its declared objectives and name, due to, among others, the interplay between the concepts of sex and gender. On this point, the Court seemed to rely heavily on the main pillars of the sex/gender argumentation and develop it along further lines of discriminatory undertone. Sex and gender, justices noted, were understood through one another to the extent that "gender" could exclude what was biologically determined as male or female – the basis of the "gender ideology", actively debated for more than 20 years throughout Europe. The Court proclaimed the gender dimension counterproductive in protecting women against violence. It stated that the Bulgarian Constitution was based on the binary existence of the human species and what was biologically determined and socially constructed were in actual unity, in contrast to the alleged independence of the "gender". The Rome Statute, equalizing the gender and the two sexes, was also cited.

The Court upheld the binary nature of sex – men and women and stated that biological sex is at the basis of the "civil" sex/gender. The related regulation of marriage and parenthood required clarity, stability and security. Concurring with the counter-Convention campaigners, justices held that the Convention offered protection to people who went outside of what the society determined as "men" or "women" and would oblige Bulgaria to create procedures to recognise "genders" different from the biological sex. Due to the concept of "gender" relativizing the boundaries between the two biological sexes, the scope of the Convention went beyond its proclaimed objectives and opened space for contradictory application. At the same time, the rule of law state required legal security and predictability and would not allow the existence of two parallel, "mutually excluding" concepts, sex and gender. Due to those definitional and procedural problems, the Convention was proclaimed unconstitutional which effectively barred its ratification.

Deep criticism towards the decision was expressed already in the dissenting opinions. Two of the dissenters³⁶ noted that, through its acts, the Constitutional Court could not possibly take part into the fight for public support. They reiterated that the Convention is fully compliant with the Constitution's main principles and elaborated that the current notion in the Bulgarian language "sex" (*пол*) contained all biological, psychological and social aspects of sex/gender. Sexual minorities were in any case protected by legislation, but the Convention did not open doors to recognizing "third" sex or heterosexual/homosexual partnerships. Like the document's supporters, the dissenters noted that gender only referred to the social roles of men and women as the two only sexes and no "third" sex is suggested for recognition. The Convention's norms served only the fight against gender-based violence, while stereotyped gender roles were known already in the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). Finally, the two justices critically mentioned that the decision's motivation, based on politics and ideology, went beyond the legal analysis required from the Court. Justices feared the "binary" division of men and women may leave intersexual individuals without protection based on gender/sexual identity, condemned the political undertone of the social debate on the Convention and the "service" the Court's decision did to politicians from the whole spectrum.

³⁶ See dissenting opinion by Justices Nenkov and Angelov.

Another justice³⁷ noted the negative emotional attitude of society towards the Convention may influence the political decision for its ratification, but not the legal analysis on its compliance with the Constitution.

3.4 In the aftermath of the Constitutional Court decision

The Constitutional Court decision came as quite a shock to the civil society and other actors concerned. A number of NGOs came out with a declaration, calling it “humiliating” and “the worst decision in the Court’s history”.³⁸ (Bulgarian-born) European academics criticized the decision as having “peculiar legal arguments and untidy, repetitive narrative”. A critical question was posed “if the majority were not influenced by public opinion or even by their personal values since intolerance towards the LGBTI community as well as a stereotypical view of the role of women seem to show through the legal reasoning.”³⁹ However, no new steps have been publicised for possible ratification of the Convention.

In the absence of other options, Bulgaria had to adopt its own, non-Convention based legal amendments. It did so in February 2019, almost a year after the debate on ratifying the Convention and six months after the decision of the Constitutional Court. By amending the Criminal Code, domestic violence was proclaimed aggravating circumstance for murder, incitement towards suicide, bodily injury, kidnapping, illegal deprivation of liberty, coercion, threat to commit a crime against someone. In a special provision, it was defined as systematic physical, sexual, or mental violence, economic dependence, forceful limitation of personal life, freedom and rights against a relative, (ex-)spouse, person with whom the perpetrator has a child, (ex-)co-habitant or person with whom the perpetrator lives or has lived in the same household. The amendments marked the definition and criminalisation of stalking and took a step towards ex officio penalisation of all medium bodily injuries⁴⁰ between relatives and spouses, but still left those in a state of vexation (strong irritation) caused by the victim committing violence, serious insult, defamation or another illegal act to be tried upon complaint by the victim. Forced marriages were further criminalised. Whereas non-compliance with domestic violence protection orders and European Protection Orders had been criminalised previously, aggravated punishment for repeated non-compliance was provided for.⁴¹

³⁷ See dissenting opinion by Justice Penchev.

³⁸ Bulgarian Helsinki Committee (2018). *Declaration by NGOs on the decision of the Constitutional Court of the Republic of Bulgaria regarding the constitutionality of the Council of Europe Convention on preventing and combating violence against women and domestic violence* (Декларация на неправителствени организации по повод решението на Конституционния съд на Република България относно конституционността на Конвенцията на Съвета на Европа за борба с насилието над жени и домашното насилие). Retrieved on 28 February 2020, from www.bghelsinki.org/bg/novini/press/single/20180727-statement-istanbul-convention/.

³⁹ Vassileva, R. (2018). *Bulgaria’s constitutional troubles with the Istanbul Convention*. Retrieved on 28 February 2020, from <https://verfassungsblog.de/bulgarias-constitutional-troubles-with-the-istanbul-convention/>.

⁴⁰ Lasting weakening of sight or hearing, lasting impairment of speech, movement of limbs, torso or neck, of the functions of sexual organs without causing loss of reproductive capabilities; breaking of a jaw or taking off teeth hindering chewing and speaking; disfigurement of face or other parts of the body; permanent impairment of health, which is not life threatening or impairment of health temporarily threatening life; injuries entering the skull, chest or stomach (Art. 129, para. 2 of the Criminal Code).

⁴¹ National Assembly of the Republic of Bulgaria (2019). *Law on Amendments and Supplements to the Criminal Code* (Закон за изменение и допълнение на Наказателния кодекс). Retrieved on 29 February 2020, from <http://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=134676>.

In the face of Bulgaria's hardening position on the Convention (see introduction), campaigns of similar argumentation ensued, regarding the government's Strategy for the Child⁴² and the new draft Law on Social Services.⁴³ Both documents have significant implications on the protection of victims of gender-based violence. The Strategy puts the prevention and countering of violence and guaranteeing a safe environment and access to justice for every child among its strategic aims and provides for support and protection of children in contact with the justice system. The social services law offers specific regulation on (urgently) placing victims of domestic violence and trafficking into social services.

However, a circle of organizations similar to the one having rejected the Istanbul Convention⁴⁴ and using similar argumentation, criticized the Strategy as limiting the rights of parents and providing for an "undemocratic" widening of the functions of the state towards children and family life. The Strategy was allegedly violating a number of fundamental rights regulated in the ECHR. The state was claimed to be able to take away and institutionalize children just because of the poverty of their families and the physical disciplining of children "with restraint for educational purposes", which the Strategy rejected, was claimed to be a legitimate method. Thus, the Strategy allegedly violated people's right to personal and family life, while no mechanisms existed for controlling officials' activity. As regards the Law on Social Services,⁴⁵ social service providers and NGOs ardently opposed the statements that the new law opened the door for "private entities" to provide social services in Bulgaria saying that they had been doing so for more than 10 years already. NGOs also denied that some "ill-meaning" organizations would enter the country and create problems for children and families.

As a result of the campaigns, the Strategy was subsequently withdrawn, while the law's entry into force was delayed by (initially) half a year.

One of the latest campaigns against de facto gender-based violence-oriented measures concerned a program for prevention of sexual assault against children.⁴⁶ The campaign potentially stifled the effort to introduce such programs on a regular and sustainable basis as part of the school curricula.

Clearly motivated by recent campaigns, the State Agency for Child Protection announced its decision to take away the national children's helpline from a long time NGO service provider and manage it itself, again through public procurement.⁴⁷

⁴² Council of Ministers of the Republic of Bulgaria (2019). *Draft National Strategy for the Child 2019-2030* (Проект на Национална стратегия за детето 2019-2030 г.). Retrieved on 29 February 2020, from www.strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=4012.

⁴³ Law on Social Services (*Закон за социалните услуги*) (2020). Retrieved on 29 February 2020, from <https://www.lex.bg/bg/laws/ldoc/2137191914>.

⁴⁴ See, for example, Freedom for Everyone (2019). *Opinion on the National Strategy for the Child 2019-2030* (Становище относно Национална стратегия за детето 2019-2030 г.). Retrieved on 29 February 2020, from <https://svobodazavseki.com/blog/item/327-stanovishte-sv-strategia-2019-2030.html>.

⁴⁵ See, for example, the Open Letter about the intentions of delaying the entry into force of the Law on Social Services (*ОТВОРЕНО ПИСМО относно: Намеренията за отлагането на влизането в сила на Закона за социалните услуги*) (2019). Retrieved on 29 February 2020, from <https://nmd.bg/wp-content/uploads/2019/12/otvoreno-pismo-ot-56-grajdanski-organizacii-1.pdf>.

⁴⁶ Marginalia bg (2020). *PULSE psychologists: We are subjected to an anti-legal and anti-human 'people's' policy* (Психолозите от П.У.Л.С – Подложени сме на антиправова и античужденна „народна“ политика). Retrieved on 28 February 2020, from <https://www.marginalia.bg/tag/programa-taralezhi/>.

⁴⁷ NGObg.info (2020). *The State Agency for Child Protection undertakes the management of the National Children's Helpline 116 111* (ДАЗД поема управлението на Националната телефонна линия за деца 116 111). Retrieved on 28 February 2020, from <https://www.ngobg.info/bg/news/119767->

4. Bulgaria's fight against gender-based violence – Current status

After clearly influencing the Constitutional Court decision for rejecting the Istanbul Convention as unconstitutional, campaigns against anti-violence legislation, strategies and social services continue in Bulgaria in an environment of systematic problems in countering gender-based violence in most of the areas the Convention covers.

Having until recently only a civil protection procedure, whose effectiveness is often debated,⁴⁸ Bulgaria, as seen in Section 3.4., criminalized domestic violence belatedly and in a highly criticized manner. Prominent organisations have submitted numerous statements, regarding legislative gaps and weaknesses the amendments attempted to address only partially. In particular, organisations have insisted⁴⁹ that all forms of domestic violence that led to bodily injury shall be prosecuted ex officio, in harmony with the Istanbul Convention and the CEDAW committee recommendations to Bulgaria of 2012,⁵⁰ which has still not become reality. The specific criminalisation of strangling and marital rape, as an aggravated case of rape, has also been proposed, and has still not been adopted. Experts have criticised recent Criminal Code amendments as only criminalising systematic violence (committed more than three times) and offering partial protection to victims of crimes between relatives by still not penalizing ex officio all such crimes.⁵¹ Furthermore, no clarity exists yet as to how civil law protection measures will combine with protection measures in the criminal process, if both types of proceedings are opened for acts of domestic violence.

A number of proceedings against Bulgaria before the Committee on the Elimination of Discrimination against Women (CEDAW) have also yielded recommendations towards the country's domestic violence protection system.⁵² The country has shown notorious defects in its

<https://www.pulsfoundation.org/images/biblio/Monitoringow-doklad.pdf>

⁴⁸ See, for example, PULSE Foundation (2016). *Monitoring report on challenges and good practices in implementing the Law on Protection against Domestic Violence in the South-West Region* (МОНИТОРИНГОВ ДОКЛАД Предизвикателства и добри практики в прилагането на Закона за защита от домашното насилие в Югозападен регион). Retrieved on 29 February 2020, from <https://www.pulsfoundation.org/images/biblio/Monitoringow-doklad.pdf>.

⁴⁹ Alliance for Protection against Gender-Based Violence (2014). *Proposals on the draft Criminal Code, related to sexual violence and gender-based violence* (Предложения по Проекта на Наказателния кодекс свързани със сексуалното насилие и насилието, основано на пола). Retrieved on 29 February 2020, from <http://www.alliancedv.org/articles/>.

⁵⁰ Committee on the Elimination of Discrimination against Women (2012). *Concluding observations of the Committee on the Elimination of Discrimination against Women, Bulgaria*. New York: Committee on the Elimination of Discrimination against Women.

⁵¹ See more in Berbec, S. et al. (2019). *Violence against women: Key findings and strategies to tackle unreported cases and to enforce the protection order*. Retrieved on 29 February 2020, from https://csd.bg/fileadmin/user_upload/publications_library/files/2019_04/Study_Report_EN_Justice_for_Women.pdf.

⁵² Committee on the Elimination of Discrimination against Women (2011). *Views Communication No. 20/2008* (Forty-ninth session 11-29 July 2011) CEDAW/C/49/D/20/2008; Committee on the Elimination of Discrimination against Women (2012). *Communication No. 32/2011 Views adopted by the Committee at its fifty-second session, 9-27 July 2012* (Fifty-second session 9-27 July 2012) CEDAW/C/52/D/32/2011.

system of investigation and prosecution of violence (against women), profoundly criticized before the European Court of Human Rights.⁵³

Apart from ad hoc project based activities⁵⁴ and studies,⁵⁵ there has been no consistent effort to prevent, counter, or tackle the consequences of preceding gender-based violence among asylum seeking and migrant populations. According to the reports of the National Anti-Trafficking Commission, no foreign victims of human trafficking, as an utmost form of gender-based violence, have been identified yet. Doubts would arise as to whether the existing services would be able to timely adapt to the specific needs of migrant populations, such as language barrier, cultural specifics, etc.

In terms of comprehensive and coordinated policies, as required by the Convention, Bulgaria has a co-ordination mechanism for helping and supporting victims of domestic violence,⁵⁶ but its adoption has been for a long time stalled due to various institutional hindrances, mainly on the part of the Ministry of Health. The National Programmes for Prevention and Protection against Domestic Violence⁵⁷ aim at a coordinated effort among institutions in fighting the phenomenon of domestic (and gender-based) violence, but rather contain a set of institutional measures some of which achieve no or just partial implementation and pass from program to program for many years. The Ministry of the Interior has a national coordinator on domestic violence, but no coordinating body exists for the policies at interinstitutional level.

Problems have persisted in the collection of data on acts of domestic violence. The de facto existence of two parallel, civil and criminal procedure protection, regimes against such acts is expected to deepen those problems. Underfinancing has for many years limited the abilities of victim service providers to ensure adequate protection and support for victims throughout the country. Measures to develop risk assessment and risk management mechanisms for police authorities in tackling cases of domestic violence have only started to be developed.

⁵³ See, for example, CASE OF Y v. BULGARIA (Application no. 41990/18). Retrieved on 29 February 2020, from <http://hudoc.echr.coe.int/eng?i=001-201350> and CASE OF S.Z. v. BULGARIA (Application no. 29263/12). Retrieved on 29 February 2020, from <http://hudoc.echr.coe.int/eng?i=001-152850>.

⁵⁴ IOM Bulgaria (2018). *PROTECT – Preventing sexual and gender-based violence against migrants and strengthening support to victims*. Retrieved on 29 February 2020, from <http://iom.bg/bg/content/%D0%BF%D1%80%D0%BE%D1%82%D0%B5%D0%BA%D1%82>.

⁵⁵ Tisheva, G., & Nikolova, A. (2015). *Monitoring report on sexual and gender-based violence (Мониторингов доклад за сексуално и свързано с пола насилие)*. Retrieved on 29 February 2020, from <http://bgrf.org/articles/%D0%BC%D0%BE%D0%BD%D0%B8%D1%82%D0%BE%D1%80%D0%B8%D0%BD%D0%B3%D0%BE%D0%B2-%D0%B4%D0%BE%D0%BA%D0%BB%D0%B0%D0%B4-%D0%B7%D0%B0-%D1%81%D0%B5%D0%BA%D1%81%D1%83%D0%B0%D0%BB%D0%BD%D0%BE-%D0%B8-%D1%81%D0%B2%D1%8A%D1%80%D0%B7%D0%B0%D0%BD%D0%BE-%D1%81-%D0%BF%D0%BE%D0%BB%D0%B0-%D0%BD%D0%B0%D1%81%D0%B8%D0%BB%D0%B8%D0%B5-495>.

⁵⁶ See Animus Association Foundation (2017). *Co-ordination mechanism on helping and supporting victims of domestic violence (Координационен механизъм за помощ и подкрепа на пострадали от домашно насилие)*. Retrieved on 29 February 2020, from <http://animusassociation.org/wp-content/uploads/2017/08/Koordinacionen-mehanizum-doma6no-nasilie.pdf>.

⁵⁷ Council of Ministers of the Republic of Bulgaria (2019). *National Programme for Prevention and Protection against Domestic Violence for 2019 (Национална програма за превенция и защита от домашно насилие за 2019 г.)*. Retrieved on 29 February 2020, from <http://www.strategy.bg/StrategicDocuments/View.aspx?lang=bg-BG&Id=1274>.

5. Campaign's potential consequences

Civil society and victim protection stakeholders still ponder on the harm caused by the propaganda campaign against the Istanbul Convention on the overall protection of victims of domestic and gender-based violence in Bulgaria. Although a direct link between the campaign and subsequent developments could hardly be claimed, and proven, in the view of the present article, the harmful consequences of the “anti-Convention movement” should be sought in several main directions. Those are important to be publicized at a European level to provide “lessons learned” for other countries in Europe and beyond struggling to provide better protection for populations victimized by gender-based violence.

The campaign has decisively *influenced the decision of the Constitutional Court*, which in turn has so far brought the strive to ratify the Convention to a definitive end. Although far from unknown in Europe and other continents,⁵⁸ the anti-gender movement in Bulgaria has been among the ones having impacted the functioning of a state on the highest level by influencing a decision of paramount importance. The Court almost uncritically, and with a discriminatory undertone against transgender populations and other vulnerable groups, concurred with the movement's arguments about the dangerous nature of the interplay between sex and gender. The notions of “gender ideology” and “third sex” easily found its way in the elaborations of Bulgaria's constitutional jurisdiction and no reliance was made on other institutions' detailed statements on the Convention's compliance with the Constitution, and indicative statistics on the spread of gender-based violence and gender stereotyping. The same goes for the recurring anti-gender argument that the document has legitimate aims, but also a “second layer” which does not actually prevent and protect women from violence. Moreover, vulnerable groups like transgender people, the “binary” nature of sex and relatively rigidly regulated concepts like marriage and parenthood were referred to in a manner practically discriminating anybody who would deviate from the “norm”. No practical reference was made to the pieces of Bulgarian legislation touching upon the notion of gender, or of the substantial gaps the country's legislation exhibits in countering the phenomenon of gender-based violence.

Secondly, by upholding “family values” and standing against “ill-meaning foreign influence” *the movement paved the way* for subsequent campaigns against documents of utmost importance for victims of crime, and in particular gender-based violence. The National Strategy for the Child and the Law on Social Services regulate critical aspects of victims' protection – the protection of the most vulnerable among the victims, children, and the support given to them by social services. Thus, the series of campaigns substantially undermined the holistic approach the Istanbul Convention advocates for in protecting and supporting victims of domestic and gender-based violence. Moreover, by directly attacking the work of NGOs and leading to, among others, re-assigning the management of crucial services like the national children's helpline, the campaigns almost stifled the activity of major actors in the ecosystem for protecting victims. As organizations, countering gender-based violence, including human trafficking, represent a substantial part of the victim support and service provider actors in Bulgaria, this movement has had negative consequences on the overall protection of all victims in the country and the traditional stance of Bulgaria not questioning “the universality of the rights of crime victims” and treating them as “an inherent part of human rights”.⁵⁹

⁵⁸ Corrêa, S., Paternotte, D., & Kuhar, R. (2018). *The globalization of anti-gender campaigns: Transnational anti-gender movements in Europe and Latin America create unlikely alliances*. Retrieved on 29 February 2020, from <https://www.ips-journal.eu/topics/human-rights/article/show/the-globalisation-of-anti-gender-campaigns-2761/>.

⁵⁹ Chankova, D., & Andonova, S. (2012). Contemporary policies and practices towards crime victims in Bulgaria: Are we still beyond time? *Postmodernism Problems*, 2(2), 71-86.

Thirdly, *the campaign against and subsequent refusal to ratify the Istanbul Convention* critically delayed and hindered the adoption of effective and adequate national legislation to practically implement the Convention's norms. Besides rather fragmented Criminal Code amendments (see Section 3.4.), as admitted at the earliest stages of ratification effort, the country needs urgent amendments in its legislation on domestic violence and victim support and protection within criminal and civil procedure. Amendments are claimed to be prepared by public authorities, but they are still not available in the public domain even in draft and the drastically lowered quality of public debate has not allowed to voice a strong public demand of such urgent changes in law.

Last but not least, by influencing the Constitutional Court decision and Bulgaria's subsequent negative positions on the Convention on EU level, the campaign does have the potential to substantially *delay and hinder the EU wide adoption and implementation of the document*. This may critically undermine the cooperation among states on Union and also on regional level in preventing and countering the phenomenon of gender-based violence and the EU wide protection victims should receive.

6. Conclusions and the road ahead

No apparent solutions have been publicized so far regarding the unconstitutionality ruling the Bulgarian Constitutional Court on the Istanbul Convention. The campaign against the document has not been renewed, but has continued with similar argumentation against various steps in the social and educational sphere, presented as undue foreign influence. Legislative drafting to further transpose Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA in Bulgarian legislation is allegedly underway, as well amendments in the civil legislation on domestic violence, but actual adoption of amendments has got no further than the Criminal Code amendments discussed in Section 3.4. Cases under the amended provisions are instituted, but prosecution and law enforcement experience significant difficulties, regarding proving the domestic violence and eliciting the testimony of victims.⁶⁰

Thus, apart from urgent legislative amendments, which should be demanded via political and civic channels, criminal justice authorities and victim service providers have small to none legislative leeway to work towards improving the processing of gender-violence cases. Instead, *practical improvements should be sought* – use of various means to prove (systematic) domestic violence in criminal cases, as well as better observance of civil protection orders. *The co-ordination mechanism* on victims of domestic violence, discussed in section 4, should ultimately be adopted and rigorously applied to ensure no case falls through the gaps of interinstitutional co-operation.

Finally, *avenues should be sought to influence domestic legislature* through the process of EU accession to the Convention. Other international channels should also be explored, such as the recent critical stance by the UN Special Rapporteur on violence against women, its causes and consequences, who demanded the reopening of the ratification process for the Convention.⁶¹ Even if no way out is found of the unconstitutionality pronouncement, decisive

⁶⁰ Center for the Study of Democracy (2019). *Protection of women victims of crime*. Retrieved on 29 February 2020, from <https://csd.bg/events/event/protection-of-women-victims-of-crime/>.

⁶¹ The Office of the High Commissioner for Human Rights (2019). *Bulgaria: UN expert concerned about pushbacks on women's rights and misinterpretation of the term "gender" that stopped the ratification of the Istanbul Convention*. Retrieved on 1 March 2020, from <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25178&LangID=E>.

legislative and practical steps should be taken for a *de facto* ratification of the document to ensure strong and consistent protection and support of victims of gender-based violence and, ultimately, all victims of violence through improved investigation, prosecution and service provision.

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Zambian Constitutional Normativity on Religion

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Abstract

The Republic of Zambia from scratch has consecrated the freedom of religion as a constitutional right. From 1996 and onwards, it has gradually consecrated Christianity in the 1991 Constitution. In a similar way, it attempts to amend its Constitution as far as inter alia religious matters are concerned. This amendment implicates the replacement of the word “multi-religious” by the word “Christian”, as for Zambia nation and State. In a similar way, the “morality and ethics” as one of the national values and principles are proposed to be transformed into “Christian morality and ethics”. These proposed changes are in opposition to the constitutional principle of pluralism (multi-culturalism) whilst both democracy and freedom of religion are limited by the Constitution, allowing no political parties founded on religious basis.

Keywords: religion, Zambia, human rights, flexible/rigid constitutions, national values and principles, constitutional normativity, multi-religious state.

1. Introduction: Zambia Christianizing its Constitution

The Republic of Zambia constitutes an important case of state in constitutional terms, which has gained the world interest from scratch. Indeed, in its brief Constitutional History, it started its post-independence period with a Constitution, adopted in 1964, which established a (presidential, non-parliamentary) Republic as a form of state. This development was not the common practice as for the colonies coming from the UK rule. Till then, with the unique exception of the Republic of Cyprus, which however is characterized as a sui generis case, all colonies of this colonial power had begun their independent life with the Queen as the head of State. More precisely, those territories of the UK had hitherto gone into independence with a monarchical form of government, and with the Queen represented by a Governor-General. This novelty of Zambia was not presented by the UK as an indication that the people in Northern Rhodesia had any antipathy to the connection with the Crown. Rather it should be seen as a realistic acceptance, right at the outset, of what many African countries had found, after only a brief period of independence, the medium best adapted to their political aspirations. The UK granted to Zambia a Constitution being related to the Zambia – Barotseland agreement of the same year, which was terminated in 1969 at the expense of Barotseland (Caplan, 1970). So, some specific privileges of the community of Barotseland should be respected, in a unitarian, democratic state, the Republic of Zambia. This institutionalization of an ad hoc regime was by nature problematic, as in a way it encouraged the centrifugal tendencies of a particular community, let alone a former “protectorate within the protectorate” of Northern Rhodesia, in a new state having no federal structure (Maniatis, 2019).

Christianism ...

- ... was not consecrated in the initial Constitutions of Zambia
- ... was introduced in the 1991 democratic Constitution in 1996.
- ... has constituted to date the identity of the Republic.

If Zambia has had since the beginning of its existence some relatively original features in its constitutional profile and also important problems, such as inter alia neo-patrimonialism (Soest, 2009), it would be interesting to examine its actual process of amendment of its Constitution, as far as religious matters are concerned. A research on this topic is by nature oriented to examine in a global way religious normativity, in the constitutional order of this Commonwealth member.

The most recent constitutional developments on religion consist in:

- The 2016 clause on the acknowledgment of the supremacy of God Almighty.
- The 2016 clause on the multi-religious character of the Republic of Zambia.
- The 2019 amendment process to delete the clause on multi-religious character.
- The 2019 amendment process to institutionalize Christian morality and ethics.

First of all, the current paper focuses on a classic human right, consisting in the freedom of religion that is consecrated in the Bill of Rights.

Afterwards, it examines the contradictory normativity on religion, in Zambian Constitution beyond the Bill of Rights.

Then, it highlights the convergence of constitutional regulations on religion and language, as components of Zambian nation.

Besides, it deals with modernization being influenced by neo-colonialism.

Furthermore, it localizes some cases of forced dynamic of the Republic of Zambia towards citizens.

Finally, it ends up to some critical remarks on the institutionalization of Christianity in the Constitution, in comparison with the phenomenon of constitutionalism.

2. The freedom of religion in the Bill of Rights

The freedom of religion has been consecrated in Part III of the 1991 Constitution of Zambia. This part entitled “Protection of the fundamental rights and freedoms of the individual”, constitutes an extended and detailed Bill of Rights, which is similar to the initial one, included in the 1964 Constitution, and has remained unchanged, to date. The two amendments of the current Constitution, namely of 1996 and 2016, did not change the content of the Bill.

The freedom of religion is incorporated in article 19 under the title “Protection of freedom of conscience” whilst article 14 (3)c refers to the labor that person is required by law to perform in place of military service, with no explicit use of the term “religion”.

In virtue of paragraph (1) of article 19, “Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of conscience, and for the purposes of this Article the said freedom includes freedom of thought and religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.”

Paragraph (2) consecrates the right of a person to abstain from religious instruction, ceremony and observance related to a religion other than his own.

Paragraph (3) previews the right of religious community or denomination to provide instruction for its persons as well as to establish and maintain instructions to provide social services for such persons. The second right of these guarantees is the unique substantial change between the 1991 Constitution and the 1964 one, as for the right to religion.

Paragraph (4) protects a person from taking oath being contrary to his religion or belief whilst paragraph (5) tolerates any reasonable law, required in the interests of defense, public safety, public order, public morality or public health or for the protection of the rights and freedoms of other persons. It is notable that there is a constitutional tradition of limitations on the recognition of civil rights. Already in the 1964 Constitution, the consecrated rights were subject to various detailed limitations.

3. Contradictory normativity on religion

There is a gradual tendency, during the Third Republic, namely from 1991 onwards, to recognize the Christian identity of the people of Zambia and particularly of the State.

Against the recommendation of the Mwanakatwe amendment process Commission and over the objections of many of the churches, the government inserted in the Preamble of the 1996 version of the Constitution a provision to declare “the Republic a Christian nation while upholding the right of every person to enjoy that person’s freedom of conscience or religion”. It rejected the Mwanakatwe report’s recommendation that there should be separation of Church and State (Ndulo & Kent, 1996). This institutional connection between Church and State is opposite to other constitutional provisions of many African constitutions, which explicitly prohibit the amendment of this separation. For instance, Article 236 of the Constitution of Angola enumerates a list of prohibited topics, such as “The secular nature of the state and the principle of separation of church and state” (Metou, 2019).

However, Mediterranean states of Africa have consecrated explicitly their Islamic character, in their Constitutions, which are not flexible. For instance, article 178 of the Algerian Constitution bans any constitutional revision *inter alia* on Islam, as the religion of the State. There are similar dispositions, prohibiting constitutional amendments of some topics, in almost all African constitutions (Metou, 2019). It is to underline that there is a constant tendency for African constitutions to be rigid, establishing much or less important conditions for their amendment and excluding any amendment in some subjects. In this context, religion not only is present but also the principle of separation of church and state in many Constitutions is explicitly consecrated and endowed with the “privilege” of ban on amendment.

This is not valid for Zambian Constitutions, which have not been very rigid and therefore are quite similar to the republican Constitution of Italy, which was put into force in 1948 and is classified among the less rigid constitutions (Papagrigoriou, 1995). For instance, with the exception of parts of the Constitution relating to fundamental rights, the 1964 Constitution just required a two-thirds majority of the members of Parliament.

The 2016 version of the Constitution did not interrupt the tradition of too detailed texts, coming from the colonial era (Ndulo & Kent, 1996). It makes the step forward with the delicate question of religious belief, as at the beginning of the Preamble it includes a new disposition, according to which the people of Zambia acknowledge the supremacy of God Almighty.

This stereotype expression of Christianity is completed by the afore-mentioned clause on the Christian character of the nation of the Republic, as this identity is counterbalanced by the

recognition of the freedom of religion. The formulation has been enriched, given that the Republic upholds a person's freedom not only of conscience or religion but also of belief.

Anyway, the identity of the Republic as a Christian nation is contradictory to the new mention of the Preamble, consisting in the multi-religious character of the nation. The lack of cohesion and particularly the defect of conceptual repetitions are obvious in the main text, in which the Republic is characterized as a multi-religious state. Paragraph (3) of article 4 consecrates, though not explicitly, the principle of pluralism, as follows: "The Republic is a unitary, indivisible, multi-ethnic, multi-racial, multi-religious, multi-cultural and multi-party democratic state".

Besides, it is to put the stress on the fact that potential and existent political parties are oppressed, as long as the Constitution prohibits any party ideologically identified as a religious one. More precisely, article 60 is demanding as for the operation of political parties, to such a pitch that imposes the principle of internal democracy. This rather maximalist approach is also obvious in another disposition of this article, which prohibits a political party to "be founded on a religious, linguistic, racial, ethnic, tribal, gender, sectorial or provincial basis or engage in propaganda based on any of these factors".

This regulation is unfamiliar to the Western model, which is compatible with religion-based parties. The mainstreaming example consists in Christian democracy, which was the most important party in the period of First Italian Republic and also in political terms marked that period so much that the doctrine characterizes that period as a one-party governance. Instead of proposing the repeal of the aforementioned antidemocratic regulation, the Constitution of Zambia (amendment) Bill, adopted in 2019, includes another proposal relevant to political parties.

The scope of this Bill is to amend the Constitution so as to revise the Preamble in order to reaffirm the Christian character of Zambia. It is about the 2016 novelty, already mentioned, on the multi-religious character of Zambian nation. As the term "multi-religious" is deleted and substituted by the word "Christian", this change could not be isolated, it is completed by the same substitution in the aforementioned paragraph (3) of article 4.

In addition to this labeling, article 8 of the Constitution is amended by the deletion of paragraph (a) and the substitution therefor of the following paragraph: "(a) *Christian morality and ethics*;" against the current mention of morality and ethics, among the national values and principles. It is about values and principles applying to the interpretation of the Constitution, enactment and interpretation of the law as well as development and implementation of State policy. So, there is an extension of the consecration of Christianity, from the nation (society) to the State, which is endowed with a national identity.

4. Convergence of regulations on religion and language as components of a nation

It is remarkable that classical components of the concept of nation, such as religion and language, have been an object of (separate) regulation in Zambian Constitution. This proves that there is a great concern of the constituent power to control social developments and foster a concrete identity of both the constitutional state and the citizens' society.

The convergence of regulations on religion and language seems to exemplify the general principle of pluralism, but religion cannot be fully equalized to language, as far as State policy is concerned. Article 258 of the Constitution, being specific on languages, ensures the dominance of the English language, which is consecrated as the (unique) official language of Zambia. However, the privilege of this language, related to British colonialism, has acquired significant counterbalances. First of all, paragraph (2) of this article previews that a "language, other than English, may be used as a medium of instruction in educational institutions or for

legislative, administrative or judicial purposes, as prescribed". Furthermore, paragraph (3) guarantees the diversity of the languages of the people of Zambia as a State duty.

The diversity of languages in Zambian society has been established as a "special obligation" of the State, in constitutional terms, whilst the State has to pay respect for religions and cannot interfere in the competition among religions, let alone among denominations within the same religion. It results that the freedom of religion remains a typical civil right, corresponding to a policy of tolerance, on behalf of political power. In this context, the multi-religious character of a state is a rather disorienting concept.

5. Modernization influenced by neo-colonialism

Colonialism formally collapsed in 1960s in Africa, but it had already produced some positive effects as for human rights of the indigenous population, like the prohibition of slavery child marriages and forced marriages (Sakala, 2013). If it was replaced by self-governance, it essentially remained, perhaps with the unique exception of the phase of authoritarian regimes, such as the socialist, one-party ones in various countries, like Tanzania and Zambia. The current era of African countries is not merely the post-cold war period of democratic Republic model. It is also more or less marked by the phenomenon of neo-colonialism, which therefore coexists with the typical, for this era, development of constitutionalism, being explicitly consecrated in aforementioned article 8 of Zambian Constitution, as one of the national values and principles. It is about the phase of neo-constitutionalism in various regions, such as Africa and Latin America. The neocolonial politics have continued to reframe religious beliefs and practices into ideological state apparatus to manipulate and control religious citizens to think and approach politics in ways that are beneficial to the interests of those in power (Kaunda, 2018).

The introduction of constitutional normativity, such as the existent or the proposed one in Zambia, is not simply useful for political targets of politicians and political parties in the internal life of the country, namely to gain votes from devout Christian voters. It may also be useful for the diplomatic mobility of the State, mainly towards its former colonialists and other powerful countries, whose overwhelming majority of the people are Christians. This convergence, being anyway attributed to the historical phenomenon of penetration of missionaries, companies and the State itself of the colonial power involved, is a quite impressive image towards powerful states and international organizations. It results essentially a kind of religious diplomacy, let alone with some of the most powerful factors of the international context.

In this chain of ideas, this image-making process through the adoption and interpretation of new rules in the Constitution is not merely something that could be proved to be useful for the diplomatic position of Zambia, being particularly interested for good international relations and investments made by foreign factors in the current era of globalization. It has also to do with a psychological need of feeling something particular, if not unique, in the wider geographical area; the prestige of a sovereign country being created through the fusion of two protectorates of the UK, such as Northern Rhodesia and Barotseland, is enhanced as long as a Western-type cultural element, like Christianity, is explicitly introduced in the Preamble of the Constitution. This profile is promoted further as long as this development takes place in the main body of this text.

In other words, the explicit attachment of mainstreaming Christian belief to the State is not uniquely open for interpretations upon Constitutional law but also interpretable from theological point of view. First of all, as already signaled, there are African constitutions consecrating Islam as the state religion, let alone protecting it from any amendment attempt. So, Zambian nation demonstrates its "religiously correct" orientation, against non-Christian

countries. Similar remarks are valid for the comparison of Zambia with other African states, which have consecrated their secular nature.

Besides, it would not be accurate to present Zambia as the unique country in the world that openly has consecrated its religious identity in the Constitution. For instance, the Greek nation during its Revolution against the Ottoman Empire founded a Ministry on Education and Religions. Article 3 of the current Greek Constitution keeps establishing the relation between Hellenic Republic and religion. First of all, it begins with the preliminary phrase “*In the name of the Holy and Consubstantial and Indivisible Trinity*”. To this phrase, having an autonomous position as there is no Preamble, is comparable the aforementioned clause of the Preamble of Zambian Constitution, relevant to the supremacy of God Almighty. Furthermore, paragraph 1 of article 3 of Greek Constitution previews that “*The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ*”.

As far as Zambian nation is concerned, it would not be “politically correct” to institutionalize the prevailing position of one Christian denomination against the rest ones, namely following the Greek case. The declaration on Christian nation implies the unity of Christianity, but Zambia is far away from Greece, whose overwhelming majority is Orthodox, let alone the fact that Greek Orthodox Church had a significant role in Greek Revolution. Indeed, Zambia is marked by a significant division within Christianity and, as a result, the declaration rather tends to obscure religious diversity (Kaunda, 2018). It is also remarkable that the 2019 amendment proposals on religion are clearly supported by Pentecostal-Charismatic Church (Lumina, 2019). In a similar way, the majority of stakeholders that made submissions on the amendment Bill overwhelmingly supported the retention of the Christian nation clause in the preamble by deletion of the term “multi-religious” (IDEA, 2019). However, this proposed change has been rejected by Roman Catholic one, which has the largest number of believers in Zambia (Lumina, 2019). Besides, it is notable that Catholic Church worldwide has adopted the “Social Doctrine of the Church”, which, designed to guide the behavior of private individuals, has been transformed into a systematic synthesis in 2004 (Maniatis, 2017). In the framework of this “codification” the Vatican includes the major principles of its social theory. It is about a tetrptych consisting in human dignity, common good, subsidiarity and solidarity.

6. A forced dynamic of the State towards citizens

The State in the territory which nowadays is Zambia has made use of institutionalized force or tends to make such a use towards the people, undermining more or less crucial human rights.

This oppressive approach, being in the margin of legality, if not clearly illegal, is exemplified by the following cases:

- Forced labor in the colonial era, as a substitute of the already abolished slavery;
- Quasi enforced participation to constitutional referendums, through the consecration of a turn-out quorum having led the 2016 constitutional referendum to failure;
- Forced participation of citizens invited in the National Dialogue Forum upon the Bill No. 6 of 2019, for the preparation inter alia of the new proposal for constitutional amendment.

Furthermore, another case could be added, this time relevant not to society itself but to citizens being a part of the powerful apparatus of the State. It is about the constitutional proposal to characterize the morality and ethics as Christian ones. If this tool is established, the way of Christianizing not only the internal structure and operation of the State but also the lifestyle of private individuals is open. This development would be ensured through the obligation of the

State staff, included the civil and military parts of Public Administration, to make direct and explicit use of Christian rules, which to date have not constituted an official source of law. As this obligation would be universal within the structure of the Republic, it would result in forced application, if not also promotion, of Christian rules by public servants. In other words, members of Parliament, the staff of Public Administration as well as the judiciary would be thoroughly subject to Christian morality just due to their profession, even though they do not share Christian belief.

In other words, Christianity is essentially imposed as a public service to all members of State power.

7. Conclusion: Christianity like constitutionalism

The current study ends up to the following final remarks:

(a) *Ambivalent character of the constitutional amendment process*

Constitutions of Zambia have been presented as flexible documents, as for the possibility to amend them. In reality, their character is ambivalent on the matter, as they may be amended by Parliament, but with the augmented majority of two-thirds, not to speak about dispositions on fundamental rights (Part III of the Constitution) and on the amendment procedure itself (Article 79), for which even a constitutional referendum is required. It is notable that due to this normativity, in combination with the aforementioned turn-out quorum for the referendum (which is not directly required by the Constitution itself), the Bill of Rights constitutes the unique Part of the 1991 Constitution which has been intact, from 1991 and on, in spite of various amendment processes. The amendment of this Part has been associated to the political demand for a people-driven constitution, a phenomenon that is not well understood and sometimes is misleading, as it is difficult to know which is a people-driven or not people-driven Constitution (Chungu).

Besides, given that this Constitution has repeated, as a general rule, the content of the 1964 one, in the delicate matter of protection of fundamental rights, the Bill of Rights is quite old, if not in some points rather anachronistic. For instance, the freedom of religion is one of the most important classical civil rights in comparative law, so it would deserve an emphatical consecration whilst it is not mentioned in a separate way against the freedom of conscience. However, in some other points it is modern, such as the protection from taking oath contrary to the religion or belief of the person involved. Anyway, the constitutional tradition of Zambia consists in absolutely flexible Constitutions, as for the possibility to amend any part of the Constitution, the dispositions on fundamental rights and the constitutional amendment process included. This approach, already existent in the 1964 Constitution, did not protect the Republic of Zambia from the above-mentioned authoritarian governance. It seems quite paradoxical that the Zambian people put an end to their authoritarian, one-party regime, but adopted the initial provision, of the 1964 Constitution, on the amendment process.

In the post-cold war period of Zambian constitutional history, this flexible nature of the 1991 Constitution, which has survived to date, makes the democratic Republic of Zambia a very rare minority among African states, whose overwhelming majority is endowed with Constitutions explicitly prohibiting any amendment of some concrete topics, well exemplified by religion. This flexibility seems to be rare not only in the African context but also worldwide as well as problematic. Furthermore, it is notable that many African states (whose overwhelming majority of citizens are Christian or Muslim) have consecrated the separation of state and church whilst Zambian Constitution has been amended towards the opposite ideological direction, consisting in the recognition of the Christian identity.

(b) *An ambivalent proposal for amendment on religion*

As already described, there is a gradual tendency, during the Third Republic, to recognize the Christian identity of the people of Zambia and particularly of the State. It is not about the recognition of empirical data, as the fact that the vast majority of the people are Christians, it is a matter of national identity for citizens, whose ancestors were not Christians but related to the indigenous tradition of animism. In this context, the 2019 proposals on religion are rather ambivalent, having caused mixed feelings, if not divergent views to Christian population. It is not clear which is the constitutional advantage of these changes, with the unique exception of the fact that the current version of the Constitution has an obviously contradictory content, with the coexistence of clauses on Christian nation and multi-religious character of the Republic. Perhaps, the multi-religious nature of the State seems anachronistic, due to the fact that the vast majority of people are Christians.

Constitutional principles and religious dogmas have historically served as ethical elements for unification of communities and societies (Marinho, 2014). Christianity has followed the way of Constitutionalism in Zambian Constitutional History (Maniatis, 2019). This religion, being typical of the Western world, has been incorporated initially in the culture of the people of Zambia, displacing a variety of religious and other similar traditional references of the indigenous people. On the one hand, it became a very powerful factor of convergence of Zambian nation but, on the other hand, it is marked by important diversity due to the coexistence of various Churches, such as mainly the Roman Catholic and Protestant denominations.

Christianism gained territory in the Constitution itself, in which constitutionalism has been so appreciated that it is explicitly consecrated among the national values and principles. In other words, irrespective of the issue of service of important political considerations in the internal political life of the country, the gradual penetration of Christianity in various points of the Constitution results from a sociocultural process of adoption of Western values, particularly of those of the colonial power involved. This “Europeanization” is interpreted by various political and ecclesiastical factors as a kind of significant progress, which makes Zambian nation (almost) unique in the international context (Kaunda, 2018) whilst a strong minority in the United Kingdom declares that it does not profess any religion.

Anyway, it is notable that Zambia has been a country with some particular features, which make it almost unique in comparative public law (Maniatis, 2019). If the most known feature on the matter has to do with the denial of any transitory form of state, being in connection with the UK crown, another feature has been highlighted in the framework of the current research. It consists in flexibility of Zambian constitutional texts, let alone their absolutely flexible character as for the question of amendable dispositions, in opposition to other Constitutions, particularly in Africa (Maniatis, 2019).

The penetration of Christianity into various points of the Constitution has proved to be gradual, it remains to be progressive, if Christianity finally is further established, with the pending amendment of the Constitution. Anyway, the clause on multi-cultural character of Zambian State, exemplifying the current African trend of multi-culturalism (Mwaebeme, 2019) and glocalization (Maniatis, 2019) in the framework of neo-constitutionalism that is not exempted from criticism (Senou, 2019), remains intact.

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Issues of Legitimacy for Children of Polygamous Marriage in US Immigration Practices

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Abstract

The government of the United States does not recognize the children of polygamous marriages abroad as legitimate, causing myriad issues for a significant number of immigrants seeking citizenship through derivation. The proposal put forth in this article suggests that the US government automatically recognize these children as legitimate and stop requiring them to provide further proof of their legitimacy. A review of case law in which questions of legitimacy have been answered by relying on a petitioner's country of origin will show that the US government already accepts other foreign practices concerning marriage and children. Additionally, further issues surrounding polygamy, legitimation, and US immigration practices will be addressed.

Keywords: immigration, polygamy, derivation of citizenship, legitimacy, US law.

1. Introduction

Immigration practices in the United States are ever evolving, much like in the rest of the world. While significant advances and reforms have passed that allow more individuals to benefit from various forms of immigration relief, there are still many reasons for comprehensive immigration reform. One such area is the US government's refusal to recognize the legitimacy of children born to polygamous marriages abroad. This means that a child born legitimately in one country might not be deemed as legitimate through immigration proceedings in the United States. It is true that there are ways for non-traditional families to find immigration relief, but they are mostly acquired by admitting that the family is not actually a family, that some marriages are not real, and that certain children are in fact illegitimate.

Recognizing polygamous marriages is not something that US immigration law is ready to do, but the children of such marriages should not suffer just because they are not the children of the first wife. Therefore, the current practice of not recognizing children of second, third, or even fourth wives needs comprehensive reform. Such children should receive the full rights and privileges as other children for immigration purposes. Doing so would make derivation of citizenship easier for millions of children, remove a significant amount of paperwork from the already inundated immigration system, and restore a sense of dignity to individuals seeking to derive citizenship from someone that they have always seen as their father.

While there are more politically correct ways to refer to the children in question, the proposal presented in this paper will use the term "illegitimate" for the sake of consistency as it is

the term used in US immigration law. In addition, the law is silent on whether a polygamous marriage affects the eligibility of the children of the first spouse, but the standard practice shows that it does not.

1.1 The definition of child

Before delving further into this quagmire, it is important to solidify the term “child” as it is used in US immigration practices. According to US law, we can define this term a few different ways, depending on the specific intention of the petition or act. The US Immigration and Naturalization Act (INA) defines it in two different ways, depending on the circumstances of the birth of the supposed “child”. INA § 101(b)(1) defines a child as “an unmarried person under twenty-one years of age who is...” either born in wedlock, a stepchild, adopted, or has been legitimated. This definition is what the government of the United States uses when it issues immigrant and nonimmigrant visas. However, for naturalization purposes and derivation of citizenship, there is a different definition. INA §101(c)(1) states:

“The term “child” means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile, whether in the United States or elsewhere...”

The definition continues by explaining how adopted children factor into this framework as well as legal custody. Though these definitions are very similar, their unique nuances can have a huge impact in determining whether a potential immigrant can receive the relief or benefits sought. The most important thing to know, when considering the second definition and the point of this proposal, is that the act clearly states that immigration courts must consider the laws of the child’s country of origin when handling issues of legitimacy.

1.2 Derivation of citizenship

Legitimacy issues primarily arise in US immigration proceeding when an applicant seeks to derive citizenship from their father. INA § 320 allows the child of a US citizen who was born outside the United States to derive citizenship from a parent who is a citizen. The parent in question may have been born a citizen or acquired their citizenship through naturalization. There are certain stipulations, including the age and location of this child in question, but one important caveat is that a child born outside of wedlock must prove that they received legitimation prior to their eighteenth birthday. Immigrant families can accomplish this in several ways, but many lack the funding and resources to do so. Thus, it becomes problematic when claims of illegitimacy arise.

2. Methodology

The following will review seminal cases concerning individuals seeking various forms of immigration relief. Each of these cases contains a petitioner whose legitimacy was brought into question during their immigration proceedings, and the determination of which ultimately affected the outcome of the case. Particular emphasis will be placed on the US court system’s recognition of external legitimacy practices and its willingness to accept children as legitimate when they do not immediately conform to US societal norms. There will also be some commentary on the state of polygamy in the world as well as recommendations for future legislation concerning children of polygamous marriages in immigration proceedings.

3. Discussion

There is practically no case law concerning children of second or third wives and naturalization. This is because legitimation can be proven through many different means and most petitioners will begrudgingly submit the proper documentation to prove that they obtained legitimation prior to their eighteenth birthday. When legitimation does arise in the courts, it is usually in a situation where parents were not married and fathers were not always present. However, an analysis of such cases does reveal a particularly interesting notion: the laws and customs of an immigrant's country of origin more often than not answer questions of legitimation. This is a rare occurrence in US jurisprudence, including immigration law.

It should be noted that these issues of legitimation almost only arise when a petitioner seeks to derive citizenship through a US-citizen father; for obvious reasons, legitimation issues do not commonly arise when the US-citizen parent is the petitioner's mother.

3.1 *Elimination of distinction*

One of the first cases to defer to another country's laws pertaining to legitimation was *Matter of Clahar* (1981) which concerned two individuals who sought immigration relief through their link as brother and sister. According to INA §101(b)(1), to derive immigration benefits as siblings, the two people must both be "children" of a common "parent", those words being read with their immigration definitions and not plain meaning. The individuals in *Clahar* had been born to different mothers, neither of whom the record indicates was married to their shared father. Jamaica has an interesting history concerning its stance on legitimation of children. In 1909, the government of Jamaica enacted what would become known as the Jamaican Status of Children Act, which confirmed legitimate status on many children who had been born out of wedlock. Even with the invocation of this act, the brother and sister in *Clahar* could not claim that they had been legitimated since none of their parents had even been married, even after their respective births. However, the Jamaican Status of Children Act basically eliminated the distinction between legitimate and illegitimate children (*Matter of Clahar*: 4). Individuals, whether they had been born legitimate, legitimated, or always illegitimate, could all be deemed "children" of their fathers in the same capacity. Therefore, while the government of Jamaica has enacted provisions that allow many more children to claim legitimacy, it has also removed any real potency from the distinction. As the Legitimation Act of Jamaica has yet to be repealed, this shows that being labeled as legitimate or illegitimate is still important to people even if it has no actual impact on their status or rights. Even as the world moves away from being concerned with legitimacy, people still find it personally important and it can have a significant effect on their identity.

There is a significant correlation between the acceptance that comes with being considered legitimate by society and one's self-esteem. Children, who have been deemed illegitimate, whether by society or a government agency, tend to exhibit low self-esteem (Maldonado, 2011) and can actually have stunted cognitive development (Silverstein & Auerbach, 1999). While this may not be surprising for children who have been told they are illegitimate their entire lives, the traumatic effect this can have on adults who have considered themselves legitimate until the US government says otherwise is practically unconscionable. Even after they have proved by some means that they obtained legitimation prior to their eighteenth birthday, requiring a petitioner to admit that they were at one time an illegitimate child still has the potential to damage their reputation and self-worth.

The brother and sister in *Clahar* were not able to claim legitimacy as their shared father had never married either of their mothers, but the Jamaican Status of Children Act could have allowed them to have a viable claim to siblinghood. However, this particular act was ill timed for the brother and sister in *Clahar*. To obtain the immigration relief that they sought, the court

found that “it must be demonstrated that both parties once qualified as the “child” of a common “parent”...” (*Matter of Clahar*: 5). When the Jamaican Status of Child Act came into effect, both the brother and sister in *Clahar* were above the age of eighteen (p. 6) and had no retroactive or *nunc pro tunc* effects. Therefore, even though the act allowed the siblings the ability to claim the same rights and privileges as legitimate or legitimated children in Jamaica, they had never been able to do so as minors and therefore could not claim to be the “children” of the same “parent” for US immigration purposes.

Numerous countries have sought to eliminate the distinction between legitimate and illegitimate children for various reasons. In some regards, it is because the international community has recognized that children should not be made to suffer or feel inferior because of the actions of their parents. Another reason may be that governments have realized that the elimination of such distinction and bias makes it easier for their citizens to emigrate to more affluent countries. The Guyanese Removal of Discrimination Act was one such attempt to put all children on a level playing field. It features prominently in *Matter of Goorahoo* (1994), another case of US immigration courts relying on laws of an immigrant’s country of origin to determine whether they can be claimed as a child for immigration purposes. In *Goorahoo*, a lawful permanent resident sought to bring his young son from Guyana to the United States; the child’s parents had never been married, but both parents’ names were on the child’s birth certificate and the father had contributed greatly to the child’s upbringing. In lieu of determining whether the child had been formally legitimated by his father before he left Guyana, the court considered the Removal of Discrimination Act and its effect on the child. The act had been in effect since before the child’s birth, so this situation differs from *Clahar* in that regard. The court ultimately found that “...when the country where the child was born eliminates all legal distinctions between legitimate and illegitimate children, all children are deemed to be the legitimate offspring of their natural parents from the time the country’s laws are changed” (*Matter of Goorahoo*: 784). Though legitimation probably could have been established through other means, it was not necessary because the laws of the country of origin made such a distinction irrelevant. The court considered the son in *Goorahoo* a “child” for immigration purposes and allowed him to join his father in the United States.

Both *Clahar* and *Goorahoo* show that the United States recognizes the elimination of the distinction between legitimate and illegitimate children abroad. The US government will accept this elimination instead of using its own tests to determine legitimacy. There are temporal considerations with the potential to yield unsatisfactory results on the part of the petitioner, but there is no evidence that the US government ever questions the authenticity or viability of such legislation. Yet, this government will not eliminate the distinction altogether in its own immigration system.

3.2 Assuming legitimacy

While the majority of the cases of an immigration court deferring to the legitimation standards of a foreign country concern immigrants from the Africa and Asia, there is also proof that Europe has begun to abolish the distinction. *Matter of Pavlovic* (1980) is one such case wherein a woman from Yugoslavia who had been born out of wedlock sought to immigrate. The parents in *Pavlovic* had never married, but the 1946 Yugoslav Constitution had eliminated all distinction between legitimate and illegitimate children (Chloros, 1970: 187). Since this was the standard at the time of Pavlovic’s birth, she was able to claim that she was the “child” of her father for immigration purposes and become a lawful permanent resident. In its opinion, the court found that the Yugoslav Constitution codified that “All [Yugoslav] children... are legitimate at birth” (*Matter of Pavlovic*: 409). The court again ignored US standards of legitimacy and followed the customs of the immigrant’s country of origin. Besides being one of the few legitimacy cases to

concern an individual from Europe, *Pavlovic* can also be distinguished by the age of the law referenced by the court. The first constitution of Yugoslavia came into effect not long after the end of WWII, and its provisions considering the legitimacy of children survived until the dissolution of the country in the early nineties. This is much earlier than many of the other legitimation acts that courts have used to determine if an applicant is eligible for immigration benefits that require the status of “child”. This shows that abolishing the distinction between children born in and out of wedlock is not a contemporary notion.

Not every nation has eliminated all distinctions between legitimate and illegitimate children, but these terms are becoming less and less concrete. Where children born out of wedlock were once considered impure and shameful, modern culture around the globe recognizes that they are no less human than those born to married parents are. Birth after marriage is not the only way that children avoid the moniker of illegitimate. Many countries have codified means of establishing legitimacy through either cultural or legal means. Some of these have existed for thousands of years, originating in tribal practices, while others are the product of twentieth-century legislation. US immigration courts recognize these forms of legitimation and again use them to determine if someone qualifies as a “child” for immigration purposes. The case of *Bonsu v. Holder* (2009) is the most notable case of an immigration court using another country’s legitimation standards to determine whether an individual could be considered a “child” for immigration purposes. A lower court had convicted Nana Osei Bonsu of sexual assault and unlawful restraint, which initiated removal proceedings. If Bonsu could establish that he had derived citizenship from his mother who was a naturalized citizen, the notion of removal would be moot. However, there was still the question of whether or not his father had ever legitimated him; If legitimation had occurred, Bonsu would not be able to derive citizenship from his mother (*Bonsu v. Holder*: 278). Ghana had not enacted legislation eliminating the distinction between legitimate and illegitimate children, the court was charged with determining whether the appellant had been legitimated by his father. In doing so, the court reasoned that it “must consider whether paternity has been established based on the law of the child’s native country” (p. 275). Ghana, where Bonsu had been born, had extensive methods for proving legitimacy. The US court considered all of these methods, which involved an extensive look at Ghanaian law and customs, and ultimately it found that Bonsu had never been completely legitimated by his father in Ghana. This actually worked in his favor, and Bonsu was able to derive citizenship through his mother. The analysis of Bonsu’s legitimation or lack thereof, shows the depth to which US immigration courts will probe in order to determine whether an individual is a child for immigration purposes and how much influence the system gives to the customs and practices of an immigrant’s country of origin.

Analyzing foreign legitimation practices can yield positive results when legitimation has been established as well. In *Matter of Kubicka* (1972), another of the rare European cases, a young Polish woman sought to prove that she had been legitimated by her father after it was determined that he did not have a valid marriage to her mother. In fact, her father was still married to his first wife and the time of his marriage to Kubicka’s mother, therefore nullifying the union. Polygamy is not, and has never been, legal in Poland. At the time of Kubicka’s birth, the constitution of Poland did state, “The birth of a child out of wedlock does not reduce its public rights” and there were enumerated means through which a child could be legitimated by his or her father (*Matter of Kubicka*: 303). Since Kubicka’s father had completed the process of legitimation, the court determined that she was a “child” for immigration purposes and had been when her father became a Lawful Permanent Resident. The court was not even concerned with the invalidity of Kubicka’s parents’ marriage because the government and laws of the country where she had been born considered her a legitimate child.

Illegitimate children face a significant number of hardships, both from societal stigma and legal discrimination. The majority of global inheritance laws focus on legitimacy and only

contain provisions for illegitimate children to inherit once they have proven that they are the issue of the decedent. Marriage laws in some countries restrict persons born out of wedlock from ever marrying, even to other such individuals. There are even regions of the world where the birth of an illegitimate child can lead to criminal sanctions for the parents. While such practices certainly need to be addressed, the US immigration system should not cause further strife by stripping someone of their claim to legitimation while petitioning for immigration relief.

The analysis of *Pavlovic*, *Bonsu*, and *Kubicka* reveal that the US government will accept another country's assumption of legitimacy in immigration proceedings. It will even use negative outcomes of this assumption to direct its rulings. However, the United States will not establish its own policy of assuming legitimacy of children born from legal foreign polygamous marriages.

3.3 Accepting polygamy

As was stated before, this proposal is not advocating for polygamy and not suggesting that it should be seen on equal footing with monogamous marriages for immigration purposes. The US government does need to recognize that polygamy is still widely practiced and polygamous unions create children who could eventually be able to derive citizenship. It is true that polygamy is on the decline throughout the world, but that does not mean that the practice will soon be abolished everywhere. Some nations are actually enacting legislation that protects their polygamous practices. In 2014, the President of Kenya introduced a bill, commonly referred to as the Kenya Polygamy Law. The bill actually addressed marriage as a whole, and included provisions about marriage age and divorce allowances. However, the main point of the bill was to protect polygamy and it actually allowed "men to take more wives without consulting existing spouses" (Wamwara, 2019: 96). Where women were once required to take part in the selection of a potential sister-wife, they now legally have no say whatsoever.

A significant number of countries recognize polygamous marriages but only within particular groups of people. This primarily concerns Muslims living in predominantly non-Muslim countries. In some of these, the government has decided to allow Muslims to practice polygamy. Such governments will recognize a second or third spouse in the same way as the first one (Wamwara, 2019: 111). This would not present itself as an issue should the US government recognize the children of legal polygamous marriages as legitimate; the government would simply need to require petitioners to provide marriage certificates along with proof that their country of origin permits polygamous marriage. The understanding that different populations within a country have different marriage rights should not be foreign to the US as its own Mormon population is allowed to practice polygamy.

The fact of the matter is that polygamous practices still occur in the contemporary world, and the wives and children of these marriages are suffering the most. Allowing the children of such marriages to at least be able to derive citizenship from their fathers should they choose to naturalize would be both just and humane, giving them some sense of dignity in their unfortunate situations. Many of these children believe that their births were legitimate, that their parents' marriage had been in good faith, and are offended by any other notion. Rather than chastise these individuals, the US immigration system should respect the culture in which they were raised and avoid casting doubt on their very legitimacy.

Just like the practice of polygamy, the practice of deferring to another country's legitimation laws has not disappeared. On more than one occasion, the US Board of Immigration Appeals has again utilized Jamaica's legitimation standards to determine whether an individual had derived citizenship, which would end removal proceedings. In *Matter of Cross* (2015), the respondent was another child who had been born out of wedlock in Jamaica. His father did take

the proper steps to have him legitimated, including having his name added to the child's birth certificate. However, by the time of Cross's birth, the Jamaican Status of Children Act "...had eliminated the legal distinction between legitimate and illegitimate children..." (*Matter of Cross*: 486) in Jamaica. Therefore, it did not matter that Cross's father had legitimated him. The court respected the Jamaican Status of Children Act, and held that "a person born abroad to unmarried parents can qualify as a legitimate "child" ... if he or she is born in a country or State that has eliminated all legal distinctions between children based on marital status of their parents" (p. 491). Once again, where the country of origin was ambivalent towards the legitimacy of a child, the court assumed that the individual in question was a "child" for immigration purposes.

Automatically recognizing illegitimate sons and daughters, whether they be born out of wedlock or from a polygamous union, would definitely have severe repercussions on the US immigration system and received unending criticism from conservative constituents. It would open up the floodgates with millions of people seeking to derive citizenship. This proposal merely suggests that children of marriages that have been deemed lawful by their country of birth be considered "children" for immigration purposes. It is true that should these children be allowed to immigrate, they can eventually petition for their mothers who may come to the United States and continue their polygamous union with the child's father. However, if the child's legitimation could be proved through some other means, there is nothing to stop them from doing so anyway. The rationale behind not letting children of polygamous marriages be recognized as "children" for immigration purposes is that polygamy goes against US norms and ideals. Doing so may make it seem like the United States both approves and supports polygamy. However, US laws show that the nation is not in favor of polygamy and other immigration standards do not suggest an acceptance of the practice at all. Recognizing the children of polygamous marriages would only be conferring upon them a right that they should already have; if a child is recognized as legitimate by his or her country of origin, the child should be considered a "child" for immigration purposes.

4. Conclusion

When there is a question of legitimation or legitimacy, immigration courts base their decision on the laws and practices of a potential immigrant's country of origin. The courts respect the customs of other countries in this regard, and give them more clout than US standards, insomuch as to completely disregard the situation of one's birth at times. Many children who would still be deemed illegitimate by US standards have been able to derive citizenship from parents who have immigrated before them. Yet many are still stuck in the mire of having to prove that they were legitimated, or in other cases not legitimated, before they can receive certain immigration benefits that should rightfully be theirs.

Legitimation standards vary across the globe, but one common theme is that it is becoming less and less necessary for people to rely on the circumstances of their birth to determine their lot in life. *Matter of Clahar* showed that the United States accepts foreign abolishment of the distinction between legitimate and illegitimate children, but it still considers time when determining if someone is a "child" for immigration purposes. *Matter of Goorahoo* reinforced this notion and showed that doing so can have positive immigration outcomes for the individuals involved. *Matter of Pavlovic* furthered that notion and showed the abolishment of the distinction between legitimate and illegitimate children has also occurred in Europe and has occurred since the early twentieth century. *Bonsu v. Holder* showed how proving a lack of legitimation can actually be helpful for an individual in some instances. *Matter of Kubicka*, another of the rare European cases of legitimation, again addressed the affirmative measures that a father can take to legitimize a child born out of wedlock. *Matter of Cross* reemphasizes the importance that immigration courts put on the legitimation and legitimacy standards of an immigrant's country of

origin. It also demonstrates that this practice is still used by the court today and still relevant for analysis of derivation of citizenship.

A reform in the way that US immigration courts address and recognize marriages to second and third wives, not as good faith marriages but as a means through which a legitimate child can be produced, would ease the process of derivation of citizenship and allow such children to maintain a sense of human dignity through the immigration process. Certainly, the United States is not ready to recognize all aspects of polygamous marriages abroad, although the question of whether or not immigration benefits should be extended to multiple spouses remains to be discussed. Allowing children of polygamous marriages to derive the same benefits as children of monogamous marriages is simply a way to award them equal rights and privileges in the immigration system of the United States.

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