



Center for Open Access in Science

Open Journal for
Legal Studies

2020 • Volume 3 • Number 2

<https://doi.org/10.32591/coas.ojls.0302>

ISSN (Online) 2620-0619

OPEN JOURNAL FOR LEGAL STUDIES (OJLS)

ISSN (Online) 2620-0619

www.centerprode.com/ojls.html * ojls@centerprode.com

Publisher:

Center for Open Access in Science (COAS), Belgrade - SERBIA

www.centerprode.com * office@centerprode.com

Editorial Board:

Sladana Aras Kramar (PhD)

University of Zagreb, Faculty of Law, CROATIA

Vigita Gebraite (PhD)

University of Vilnius, Faculty of Law, LITHUANIA

Iryna Izarova (PhD)

Taras Shevchenko National University of Kyiv, Faculty of Law, UKRAINE

Evgeny Vasilievich Afonasin (PhD)

Novosibirsk State University, Institute of Philosophy and Law, RUSSIAN FEDERATION

Elisabetta Silvestri (LL.M)

University of Pavia, Department of Law, ITALIA

Ovidiu Podaru (PhD)

Babeş-Bolyai University, Faculty of Law, Cluj-Napoca, ROMANIA

Laura Stănilă (PhD)

West University Timisoara, Faculty of Law, ROMANIA

Ioana Celina Pasca (PhD)

West University Timisoara, Faculty of Law, ROMANIA

Barbara Preložnjak (PhD)

University of Zagreb, Faculty of Law, CROATIA

Košjenka Dumančić (PhD)

University of Zagreb, Faculty of Economics and Business, CROATIA

Slavka Dimitrova-Simeonova (PhD)

Burgas Free University, Faculty of Law, BULGARIA

Jelena Trajkovska-Hristovska (PhD)

Ss. Cyril and Methodius University of Skopje, Faculty of Law "Iustinianus Primus", NORTH MACEDONIA

Miran Marelja (PhD)

University of Zagreb, Faculty of Law, CROATIA

Executive Editor:

Goran Pešić

Center for Open Access in Science, Belgrade

CONTENTS

- 87 The Voice of the Child: Are the Procedural Rights of the Child Better Protected in the New Brussels II Regulation?
Sladana Aras Kramar
- 98 Legal Aspects of the Principal of “Rule of Law” as an Element of Constitutionalism
Jelena Trajkovska-Hristovska
- 111 Construction of the Rehabilitation Model for Drug Abuse in Non-Penal Criminal Policy Perspective
Agah Sonjaya
- 124 The Relation of Gender and Feminism in Islamic Jurisprudence
Fokky Fuad Wasitaatmadja, Susianto & Suartini
- 133 Adopting Passing off Concept of Unfair Competition Into Indonesia’s Trademark Law
Ali Oksy Murbiantoro, Rachmad Safa’at, Yuliati & Sukarmi
- 143 Study of Omnibus Law on the Legal Politics of the Indonesian Government in Using Foreign Workers
B. Woeryono
- 153 The Urgency for the Implementation of Transition Norm “Lex Favor Reo” in the Imposition of Tax Sanction in Indonesia
Arifin Halim, Sudarsono, Tunggul Anshari Setia Negara & Heru Ratno Hadi
- 167 Traffic Policy towards the Current of Refugees and Subscribers Movement in Reforming State Sovereignty
Lisda Syamsumardian, Abdul Rachmad Budiono, Moh. Fadli & Dhiana Puspitawati



The Voice of the Child: Are the Procedural Rights of the Child Better Protected in the New Brussels II Regulation?

Sladana Aras Kramar

University of Zagreb, Faculty of Law, Zagreb, CROATIA

Received: 9 April 2020 ▪ Accepted: 9 July 2020 ▪ Published Online: 25 July 2020

Abstract

The procedural rights of children in civil court proceedings, and in particular the right of children to be heard in such proceedings, play a significant and growing role in international, European and national context. At the EU level, the growing relevance of the procedural rights of the child has shaped the Brussels II system, originally adopted in the Council Regulation (EC) No 1347/2000 of 29 May 2000, now in the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Recently, the Brussels II system has been the subject of a second recast aimed at better protection of the best interest of the child, including the right to be heard in these matters. The new Regulation II *ter* will start to apply from 1 August 2022. In this paper, the importance and role of the right of the child to be heard in the Brussels II *bis* Regulation will be analyzed and discussed, taking into account the jurisprudence of the Court of Justice of the EU. Following that, the impact of the right of the child to be heard on the second recast of the Brussels II System will be evaluated. Last but not least, the paper will try to answer the question of what we have achieved with the new Brussels II *ter* Regulation in proceedings on parental responsibility from a child rights-based approach.

Keywords: right to express an opinion, child, parental responsibility, Brussels II Regulation, recast, procedure.

1. Introduction

The procedural rights of children in civil court proceedings, and in particular the right of children to be heard in such proceedings, play a significant and growing role in international, European and national context. The right of the child to be heard is one of the key principles of the 1989 Convention of the Rights of the Child (hereinafter: CRC) (Art. 12 of the CRC; Kilkelly, 2011: 180-182; Committee on the Rights of the Child, 2009: 5, 17-21; Fortin, 2003: 37-38). Article 12 of the CRC addresses the participation of children in proceedings in a way that guaranties to the child who is capable of forming her or his own views, the right to express those views freely in all matters affecting the child, and the right to have her/his views accorded due weight in accordance with the age and maturity of the child. For this purpose, the Paragraph 2 states, in particular, that the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The UN Committee on the Rights of the Child has adopted the General Comment No. 12 on the Right of the Child to be Heard. The Committee has stressed that the articles of the CRC should be considered together, but it has itself elevated articles on the right to non-discrimination, the child's best interests, the right to life and development, and the right to be heard among the general principles of the CRC (Committee on the Rights of the Child, 2009: 5, 17; Committee on the Rights of the Child, 2013: 11). In addition, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) and the extensive jurisprudence of the European Court of Human Rights in Strasbourg are an increasingly valued source for the development of the procedural standards of participation of children in civil court proceedings (see more in: Stalford, 2012: 36-39; Fortin, 2003: 53 *et seq.*).

- The right of the child to be heard in court proceedings plays a significant and growing role in international, European and national context.
- At the EU level, the growing relevance of the rights of the child to express her or his views has shaped the Brussels II system.
- The Brussels II system has been the subject of a second recast aimed at better protection of the best interest of the child, including the right to be heard.
- The legal framework and practice of the EU Member States differ regarding the right of the child to express her or his views in court proceedings.
- In the operation of the new Brussels II *ter* Regulation, the key question will be what exactly is meant by a “genuine and effective” opportunity given to the child to express her or his views.

There have been extensive activities from the Council of Europe and its 1996 European Convention on the Exercise of Children's Rights (hereinafter: ECECR). The ECECR is much more a practical document which aims, in the best interests of children, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority, in particular in family proceedings involving the exercise of parental responsibilities (Art. 1, paras. 2 and 3 of the ECECR; see more in: Bainham, 2005: 577-579).

Furthermore, of a significant importance are also the Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice from 2010. Notwithstanding the absence of a legal binding nature, this instrument from the Council of Europe provides guidelines on the right to access to court, the right to be heard, the right to legal counsel and representation, the protection of private and family life, the role of holders of parental responsibilities, professionals and their training, as well as on the multidisciplinary approach (Council of Europe, 2010: 17-23, 26-31). The Guidelines state that child-friendly justice refers to justice systems which guarantee, *inter alia*, the respect and the effective implementation of all rights of children at the highest attainable level (Council of Europe, 2010: 17).

The right to be heard as a fundamental right of the child and the principle of child-friendly justice strongly influences the functioning of European private international law and procedure. Within the judicial area of the European Union (hereinafter: EU), the focus has shift into the rights of the child, in particular after the Lisbon Treaty (hereinafter: TFEU; Art. 3 of the TFEU) (see Stalford & Drywood, 2001: 205-206). Alongside with the Member States' international obligation derived from the CRC and the ECHR, it must be stressed the Article 24 of the European Charter of Fundamental Rights (hereinafter: ECFR) which has the same value as the fundamental Treaties (Art. 6, para. 1 of the TFEU). The ECFR grants children the opportunity to express their views freely and assurance that such views shall be taken into consideration on matters which concern them in accordance with their age and maturity, as well as the right to such protection and care as is necessary for their well-being (Art. 24, para. 1. of the ECFR).

At the EU level, the growing relevance of the procedural rights of the child has shaped the Brussels II system, originally adopted in the Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, now in the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter: Brussels II *bis* Regulation, BR II *bis*). The Brussels II *bis* Regulation, as a cornerstone in family matters in the EU Member States should be interpreted in accordance with the fundamental right of “participation” of children in justice system (see Franzina, 2019: 152; Distefano, 2019: 165; comp. Committee on the Rights of the Child, 2013: 4).

Recently, the Brussels II system has been the subject of a second recast. In 2016, the second recast of the Brussels II system started focusing on the matters of parental responsibility, and aimed at better protection of the best interest of the child, including the right to be heard in these matters (European Commission, 2014: 6 *et seq.*; European Commission, 2015: 46-56; European Commission, 2016a: 33 *et seq.*). This recast process ended in adopting the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (hereinafter: Brussels II *ter* Regulation, BR II *ter*) which will start to apply from 1 August 2022 (Art. 105 of the BR II *ter*).

In this paper, the importance and role of the right of the child to be heard in the Brussels II *bis* Regulation will be analysed and discussed, taking into account the jurisprudence of the Court of Justice of the European Union. Following that, the impact of the right of the child to be heard on the second recast of the Brussels II System will be evaluated. Last but not least, the paper will try to answer the question of what we have achieved with the Brussels II *ter* Regulation in proceedings on parental responsibility from a child rights-based approach.

2. The voice of the child in the Brussels II *bis* Regulation: Overview

The Brussels II *bis* Regulation sets out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding (Art. 1, paras. 1 and 2 of the BR II *bis*).

Notwithstanding of the commitment of the European legislator to respect for the fundamental rights derived from the ECFR (Rec. 33 of the Preamble of the BR II *bis*), the right of the child to be heard plays a limited role in the Brussels II system. An explicit requirement to hear the child, namely, is connected to child abduction cases in a way that enforcement of any decision to return the child to the country from which she/he has been abducted is not possible if a “capable” child was not given an opportunity to be heard (Arts. 11, para. 2 and 42, para. 2 (a) of the BR II *bis*). By “capable” child, it seems that the Brussels II *bis* Regulation acknowledges an assumption that every child is capable to express an opinion, unless this appears inappropriate having regard to her or his age or degree of maturity (*arg. ex*: Arts. 11, para. 2 and 42, para. 2 (a) of the BR II *bis*).

A failure to consult with a child may be a ground for non-recognition and enforcement of decision in matters of parental responsibility, as articulated in the Article 23 (b) of the BR II *bis*. Furthermore, the failure to hear the child plays a role in the process of the issuance of certificates pursuant to the Articles 41, para. 2 (c) and 42, para. 2 (a) of the BR II *bis*. The decisions on the access rights and those on the child’s return are the subject, namely, of the special regime of direct enforceability. For this purpose, the specific certificate must be issued, on which the court of origin

must declare that the child had an opportunity to be heard, unless a hearing was considered inappropriate having regard to her or his age or degree of maturity (see Arts. 41, para. 2 (c) and 42, para. 2 (a) of the BR II *bis*).

Except these provisions in the field of the child's return and the recognition and enforcement of decision in parental responsibility matters, the Brussels II *bis* Regulation does not provide for any guidelines and methods on how to hear the child by national courts. Of course, the limits of competences of the EU for harmonised measures in the field of procedural rules on the child participation in parental responsibility decisions could be questionable. Indeed, the hearing of the child has an important role in matters of parental responsibility in accordance with the Brussels II *bis* Regulation, although the Regulation is not intended to modify any national procedural rules applicable, as clearly articulated in the Recital 19 of the Preamble. This has been evidenced in the case of *Zarraga*, decided by the Court of Justice in December 2010 (C-491/10 PPU).

Mr Zarraga, a Spanish national, and Ms Pelz, a German national, were married in 1998 in Spain. They had a daughter who was born in 2000 whilst the family's habitual residence was in Spain. In 2007, the relationship of Ms Pelz and Mr Zarraga deteriorated and they issued divorce procedure before the Spanish court, with both parties seeking sole rights of custody in respect of the child of the marriage. In 2008, the first instance court in Spain provisionally awarded the right of custody to Mr Zarraga, while Ms Pelz was granted the right of access. Mr Zarraga, namely, was best placed to ensure that the family, school and social environment of the child was maintained, as was reasoned in the judgment. Following that judgment, Andrea went to her father's home (C-491/10 PPU: paras. 18, 19).

In 2008, Ms Pelz moved to Germany with her new partner. That summer of 2008, the daughter visited her but failed to return home to her father in Spain. The Spanish court issued a new judgment at the request of the father in the light of mother's breach of the custody and access decision. The court suspended until final judgment the right of access previously granted to Ms Pelz, as well as provisionally ordered the prohibition to the child from leaving Spanish territory in the company of her mother or any member of her mother's family or any person close to her mother (C-491/10 PPU: paras. 20, 21).

In July 2009, the proceedings in matters of custody in respect of the child were continued before the Spanish court who requested a fresh expert report and to hear the child personally. However, neither the child nor her mother attended the hearing on the requested dates. The Spanish court, namely, rejected the mother's application that she and her daughter be permitted to leave Spanish territory freely after the expert report and the hearing. It must be stressed, that the court did not agree to the mother's express request that the child be heard via video conference. In December 2009, the Spanish court awarded the sole right of custody to the father, Mr Zarraga. This decision was appealed by the mother, which included also the request that the child be heard (C-491/10 PPU: paras. 22, 23).

In Germany, there were initiated two sets of proceedings. The first concerned the father's application for the return of the child to Spain, brought on the basis of the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The decision for return was immediately appealed by the mother and set aside by the second instance court. The second instance court in Germany, namely, stated in particular that, when the child was heard by that Court, it had been shown that she was resolutely and categorically opposed to the return requested by her father to return to Spain (C-491/10 PPU: para. 28). Furthermore, the expert concluded following the hearing that the child's opinion should be taken into account in the light of both her age and her maturity (C-491/10 PPU: para. 28).

The second set of proceedings before the German courts was initiated by the issue of a certificate of the Spanish court on the basis of the decision from that Court related to the right of

custody in respect of the child from December 2009 (Art. 42 of the BR II *bis*). The mother, namely, objected to the enforcement of that certified judgment, requesting that it not be recognised. The German court upheld this mother's appeal and refused to enforce the certified judgment on the grounds that the Spanish court had not heard the child before issuing its judgment which, it concluded, constituted an infringement of the child's fundamental right to be heard, as stipulated in the Article 24, para. 1 of the ECFR (C-491/10 PPU: para. 32, 34-35).

The German court sought the opinion of the Court of Justice as whether the court of the Member State of enforcement exceptionally itself enjoy a power of review the substance of the case, pursuant to the Article 42 of the Brussels II *bis* Regulation and the ECFR, in particular the right of the child to be heard (Art. 24, para. 1 of the ECFR), in case where the judgment to be enforced issued in the Member State of origin contains a serious infringement of fundamental rights. Furthermore, whether the court of the Member State of enforcement is obliged to enforce the judgment of the court of the Member State of origin notwithstanding the fact that, according to the case-file, the certificate issued by the court of the Member State of origin in accordance with the Article 42 of the Brussels II *bis* Regulation contains a declaration which is manifestly inaccurate. The Spanish court confirmed, namely, in the certificate that the court had taken the opinion of the child before issuing the judgment on the right of custody (C-491/10 PPU: para. 37).

The Court of Justice observed that the clear division of jurisdiction between courts of the Member State of origin and those of the Member State of enforcement established by the provisions of the Brussels II *bis* Regulation lays down on the assumption that those courts respect the obligations which the Regulation imposes on them (C-491/10 PPU: para. 59). Whilst the Brussels II *bis* Regulation may not be contrary to the ECFR, the provisions of the Article 42 of the BR II *bis* which give effect to the child's right to be heard, must be interpreted in the light of the Article 24 of the ECFR (C-491/10 PPU: para. 60). In addition, the Court of Justice concluded that the assessment of whether there has been an infringement of fundamental rights is exclusively within the jurisdiction of the courts of the Member States of origin (in *Zaragga* case, Spanish courts) (C-491/10 PPU: paras. 73, 74). Further to that, a court of the Member State of origin can issue a certificate in accordance with the requirements of the Article 42 of the Brussels II *bis* Regulation, if the court ensures that proceedings and the judgement to be certified was made with due regard to "the child's right freely to express his or her views and that a genuine and effective opportunity to express those views was offered to the child, taking into account the procedural means of national law," as well as the instruments of international judicial cooperation, in particular the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (C-491/10 PPU: para. 68).

What we have learnt from the Court of Justice ruling in the *Zaragga* case? First, as the Court of Justice concluded, the Brussels II system operates on the principle of mutual trust between Member States in light that their national legal systems are "capable of providing an equivalent and effective protection of fundamental rights" (C-491/10 PPU: para. 70). Connected with first, the Brussels II system is based on the assumption that the legal systems of the Member States have the equal procedural standards regarding the exercise of the child's right to express an opinion. Even in the case when this assumption is not true and the serious infringement of human rights is obviously, the hands of the court of the Member States of enforcement are tied. Indeed, this is the case with decisions on the access rights and those on the child's return that are the subject of the special regime of direct enforceability. In other matters of parental responsibility, the failure to consult with a child may be a ground for non-recognition and enforcement of a decision issued in another Member State, as articulated in the Article 23 (b) of the BR II *bis*. Link to this issue is the fact that the Brussels II *bis* Regulation entirely refers to the national systems and measures of the Member States which give effect to the right of the child to be heard (*arg. ex*: Rec. 19 of the Preamble of the BR II *bis*). This approach, of course, can lead to a situation where a

Member State with stricter procedural rules and standards for the implementation of the right of the child to be heard than the Member State of origin of the decision refuses the recognition and *exequatur* of such decision on the ground that the hearing of the child does not meet its own standards and practice. Last but not least, when discussing on the right of the child to express her/his views and the ruling of the Court of Justice, it is obvious the conventional tendency of the proper functioning of the internal market, rather than the human right approach to this question (see C-491/10 PPU: para. 70).

3. Impact of the right of the child to express an opinion on the recast of the Brussels II System

At the normative level, the Brussels II *ter* Regulation has made a step forward in enhancing the exercise of the right of the child to express her or his views. The courts of the Member States exercising their jurisdiction in matters of parental responsibility have an obligation to provide the child who is capable of forming her or his own views with a genuine and effective opportunity to express her or his views, either directly, or through a representative or an appropriate body in accordance with national law and procedure (Art. 21, para. 1 of the BR II *ter*). For this purpose, the Paragraph 2 states where the court, in accordance with national law and procedure, gives a child an opportunity to express her or his views, the court shall give due weight to the views of the child in accordance with her or his age and maturity. The cited Article 21 of the Brussels II *ter* Regulation also applies in the procedure for the return of a child in the case of international child abduction (Art. 26 of the BR II *ter*).

This general rule and obligation of the Brussels II *ter* Regulation to give a child the opportunity to express an opinion, as well as to give due weight to the views of the child in accordance with her or his age and maturity, now applies in all matters of parental responsibility in the EU perspective. In this European instrument is noticeable the child-oriented tendency and the use of the term “right of the child to express his or her views” rather than the right of the child “to be heard”, as well as the acceptance of the normative expression and content of the Article 12 of the CRC.

Link to this general obligation of the Member States, the Brussels II *ter* Regulation continues to refer to the national legal systems and procedures of the Member States which give effect to the right of the child to be heard. However, following the Court of Justice ruling in the *Zaragga* case, the Brussels II *ter* Regulation stipulates that these national procedures of the Member States must guarantee the child “a genuine and effective” opportunity to express her or his views. Alongside to this general provision, there are no examples of methods and procedures that would be considered as “a genuine and effective” opportunity of the child to express her or his views in the context of the Brussels II *ter* Regulation. However, the Article 21 of the Brussels II *ter* Regulation should be interpreted in the light of the Article 24 of the ECFR and the Article 12 of the CRC as implemented by national law and procedure of the Member States (*arg. ex Rec. 39* of the Preamble of the BR II *ter*).

Notwithstanding of this commitment of the European legislator to respect for the fundamental rights of the child, the Brussels II *ter* Regulation leaves the question of methods and procedures of hearing the child to the Member States. In addition, it is expressly stipulated that the hearing of the child “cannot constitute an absolute obligation, but must be assessed taking into account the best interests of the child” (Rec. 39 of the Preamble of the BR II *ter*). While the Proposal for a recast of the Brussels II System contained a specific obligation of an authority of the Member State of origin to document its consideration regarding the exercise of the right of the child and the assessment of the child’s views in the decision (see Art. 20 of the Proposal), there is no such obligation in the adopted Brussels II *ter* Regulation (*arg. ex Art. 21* of the BR II *ter*).

Another important fact that must be emphasised is that the abolition of *exequatur* has been extended to all decisions of parental responsibility falling within the Regulation's scope of application (Rec. 58 of the Preamble of the BR II *ter*). Not only the decisions on the access rights and on the child's return, but those on the custody rights, child protection orders and placement orders are the subject, namely, of the regime of direct enforceability (*arg. ex* Art. 34 of the BR II *ter*). The issue of a certificate on which the court of the Member State of origin must declare that the child was capable of forming her/his own views and that was given a "genuine and effective" opportunity to express those views, has a growing role in this special regime of direct enforceability (see Art. 36 of the BR II *ter*; pts. 14 and 15 of the Annex III of the BR II *ter*). Notwithstanding of this obligation to issue a certificate for the purpose of the direct enforcement in another Member State, the court of the Member State of origin has a degree of discretion to decide whether will take an opinion of the child, which methods will be used, as well as how will assess the given opinion of the child (see Recs. 39 and 57 of the Preamble of the BR II *ter*). To conclude, not only the prescribed methods and procedures of the Member States which give effect to the right of the child to be heard, but also the used methods and the assessment ("due weight") of the views of the child are reserved for the authorities of the Member State of origin.

Nevertheless, in the new Brussels II System, there is a possibility of starting an action for non-recognition of a decision issued in another Member State, except for so-called privileged decisions on the right of access and the return of the child (see Art. 47 and Annexes V and VI of the BR II *ter*), on the ground that it was issued without the child who is capable of forming her or his own views having been given an opportunity to express her or his views (Art. 39, para. 2 in conjunction with the Art. 21 of the BR II *ter*). But there are significant restrictions to this control of the court of the Member State of enforcement of the decision. It should not be possible to refuse recognition and enforcement of a decision, namely, on the sole ground that the court of the Member State of origin used a different method to give the child an opportunity to express her or his views than a court in the Member State of recognition would use (Rec. 57 of the Preamble of the BR II *ter*). In addition, under the Articles 39 and 41 of the BR II *ter*, the court of the Member State where recognition and enforcement is invoked should not refuse recognition and enforcement of a decision on the sole ground that the child was not given the opportunity to express her or his views, taking into account her or his best interests, if the proceedings only concerned the property of the child and provided that giving such an opportunity was not required in light of the subject matter of the proceedings, or in the case of the existence of serious grounds taking into account, in particular, the urgency of the case. Of course, the term "serious grounds" is a legal standard whose meaning will be interpreted by the court of the Member State of enforcement of the decision. In the Recital 57 of the Preamble of the BR II *ter*, as an example of the "serious grounds" is described the case where there is an imminent danger for the child's physical and psychological integrity or life and any delay might bear the risk that this danger happens. Therefore, compared to the Brussels II *bis* Regulation, in the new Regulation the "control" of the Member State of enforcement of the parental responsibility decision should be rather limited.

4. What we have achieved with the Brussels II *ter* Regulation? A view from the child's perspective

As we have seen in the *Zaragga* case, the Brussels II system operates on the assumption that the legal systems of the Member States have the equal procedural standards regarding the exercise of the child's right to express an opinion. This assumption is even more enhanced in the new Brussels II *ter* Regulation. Not only the decisions on the access rights and on the child's return, but those on the custody rights, child protection orders and placement orders are the subject, namely, of the regime of direct enforceability. Link to this fact, in the new regime, the use of the prescribed methods and procedures which give a genuine and effective opportunity

to the child to express her or his views, as well as the views expressed by the child, are the subject of the assessment of the court of the Member State of origin. Therefore, in principle, there will be no longer a possibility for a Member State of enforcement to refuse recognition and enforcement of a decision on the sole ground that the hearing of the child does not meet its own standards and practice (of the Member State of enforcement), if it can be assumed that the concrete opportunity given to the child in the Member State of origin was “genuine and effective”.

Despite the UN General Comment No. 12 on the Right of the Child to be Heard and the commitment of the Committee on the Rights of the Child to develop the standards that must be met when children are heard in judicial proceedings, the normative framework and practice of the EU Member States differ on the questions how to hear the child and how to weight her or his views. Furthermore, it seems that the manner of hearing the child in judicial proceedings is much more in conformity with the legal tradition of the legal system in question (see Daly & Rap, 2019: 310).

The legal systems of the EU Member States, namely, have different standards required for exercising of the right of the child to express her or his views. In some Member States, the hearing of the child is made obligatory for the (family) court in certain judicial proceedings (see European Commission, 2015: 48; FRA, 2015: 40). For example, this is the case in Croatia and Slovenia when dealing with the matters of parental responsibility, separately or connected with the divorce procedure (see Kraljić, 2018: 484-486; Aras Kramar & Milas Klarić, 2017: 254-255). However, the hearing of the child will not take place when there are particularly justified reasons for not doing so that must be explained in the court’s decision (e.g. when the child does not want to talk) (see Aras Kramar & Milas Klarić, 2017: 254-255). In some Member States, the courts have a wide range of discretion in question of hearing the child that is in principle connected with the age and/or maturity of the child (for examples, see European Commission, 2015: 48; FRA, 2017: 40; FRA, 2015: 49-50).

In addition, in some legal systems of the Member States, the legal representative is essential for a genuine and effective participation of the child in judicial proceeding on parental responsibility (for so-called tandem model in common law systems, see FRA, 2017: 41-42; FRA, 2015: 48). On the other hand, in other systems, children are regularly interviewed direct by the judges (for example, Germany, the Netherlands, see Daly & Rap, 2019: 311-312; also see FRA, 2017: 39-40; FRA, 2015: 42-43 *et seq.*). Of course, there is also a mixture of both models, where in practice the (family) judge usually operates with a socio-economic report in which the views of the child are transmitted, instead of direct contact between the judges and the child (for example, Croatia, see FRA, 2017: 39-40; FRA, 2015: 42-43 *et seq.*).

Linked to the representatives of the child, there are controversies about the question of what exactly is being represented; the well-being of the child or the child’s wishes (for the discussion, see Daly & Rap, 2019: 312). There are also no clear guidelines on how to weight (“due weight”) the views of children. Daly and Rap (2019: 313) suggestion is to take, in general, the children’s autonomy principle when assessing the views of the child, respecting wishes of the child unless “significant harm would likely result”.

The recent studies on the children’s experience of justice system, conducted by the EU Fundamental Rights Agency, show all problems of the implementation of the right of the child to be heard in judicial proceedings (FRA, 2015, 2017). Despite the widely accepted Article 12 of the CRC, the fact is that the practices of the EU Member States differ on the question of exercising the right of the child to express views. The results of the conducted researches among the several EU Member States show that the judges hear children less often in civil (and family) court proceedings (compared to the criminal court proceedings) (FRA, 2015: 49). This is also the case with the participation of children in the international child abduction matters (com. Stalford, 2012: 116-117.). Nevertheless, it is important to emphasise how the children interviewed assess their

participation in judicial proceeding. Sixty-two per cent of the children interviewed, namely, assessed their participation as important (FRA, 2017: 11).

Furthermore, the conducted researches show some of existing deficiencies of the legal systems and practices of the EU Member States. Most children interviewed do not think they were given appropriate information before the hearing took place, in general to enable them to participate effectively in procedure (FRA, 2017: 11). In addition, children did not always feel sufficiently protected from the professionals. Indeed, they experienced the unfriendly behaviour by some professionals (lawyers, judges) (FRA, 2017: 11). In the Member States, different standards are developed and achieved in practice for the facilities where the child will be heard (see FRA, 2017: 29-33 *et seq.*; FRA, 2015: 46-47 *et seq.*), as well as for the person (professional) who will talk with the child (see FRA, 2017: 39-43 *et seq.*; FRA, 2015: 42-43 *et seq.*). In addition, there are different standards connected with the education and training of (family) judges and other professionals working with children (see FRA, 2017: 55 *et seq.*; FRA, 2015: 41 *et seq.*).

Therefore, in the operation of the Brussels II *ter* Regulation the key question will be – what exactly is meant by a “genuine and effective” opportunity given to the child to express her or his views? As it has been already elaborated in this paper, the legal framework and practice of the EU Member States differ regarding the right of the child to express her or his views in judicial proceedings. In addition, there is a general tendency of “non-hearing” the child in civil (and family) matters (compared to the criminal matters) (FRA, 2015: 49). *Pro futuro*, the EU activities on the development of minimum common guidelines for the implementation of the child’s procedural rights, in particular the right to express views in matters of parental responsibility should be considered and planned.

Further to that, in international child abduction cases, it can be questionable whether the Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, is sufficient EU instrument to enhance this kind of international judicial cooperation, or it is time to think about a special regulation in parental responsibility matters which will take into account the specific characteristics of cooperation in these matters, as well as the new technology.

5. Concluding remarks

The provisions of the CRC, in particular the Articles 12 (on the right to be heard) and 3 (on the best interest of the child), are the most implemented provisions into the legal systems around the world (see Liefgaard & Sloth-Nielsen, 2017: 1 *et seq.*). This general tendency is also seen in a European context (comp. Carpaneto, 2019: 267 *et seq.*; Stalford, 2012: 39-47 *et seq.*).

As we have seen in the *Zaragga* case, the European Brussels II system operates on the assumption that the legal systems of the Member States have the equal procedural standards regarding the exercise of the child’s right to express an opinion. This assumption is even more enhanced in the new Brussels II *ter* Regulation. Not only the decisions on the access rights and on the child’s return, but those on the custody rights, child protection orders and placement orders are the subject, namely, of the regime of direct enforceability. Link to this fact, in the new regime, the use of the prescribed methods and procedures which give a genuine and effective opportunity to the child to express her or his views, as well as the views expressed by children, are the subject of the assessment of the authorities of the Member State of origin. Therefore, in principle, there will be no longer a possibility for a Member State of enforcement to refuse recognition and enforcement of a decision on the sole ground that the hearing of the child does not meet its own standards and practice (of the Member State of enforcement), if it can be assumed that the concrete opportunity given to the child in the Member State of origin was “genuine and effective”.

Although the development in the EU judicial area, achieved with the Brussels II *ter* Regulation, is to be welcomed, it seems that a “genuine and effective” participation of children in proceedings of parental responsibility is much more in conformity with the procedural rules and practice adopted at the domestic level of the EU Member States. The Member States’ international obligation derived from the CRC (and the ECHR, as well as from the ECECR) have achieved some improvements at the domestic level in recent years. Nevertheless, the implementation of these standards for the genuine and effective participation of children in the practice of the justice systems of the EU Member States, in particular the family justice systems has not yet fully occurred. Further to that, the question of whether to hear the child and the manner of hearing the child in judicial proceedings is much more connected with the legal tradition of the Member State in question.

Therefore, in the operation of the Brussels II *ter* Regulation the key question will be – what exactly is meant by a “genuine and effective” opportunity given to the child to express her or his views? *Pro futuro*, the EU activities on the development of minimum common guidelines for the implementation of the child’s procedural rights, in particular the right to express views in matters of parental responsibility should be considered and planned. Of course, a practical guide to the implementation of the Brussels II *ter* Regulation could be a good start for these common guidelines. Last but not least, in international child abduction cases, it is time to think about a special regulation in the area of judicial cooperation in the taking of evidence which will take into account the specific characteristics of cooperation and hearing the child in these matters, as well as the new technology.

Acknowledgements

This research did not receive any specific grant from funding agencies in the public commercial, or not-for-profit sectors.

The author declares no competing interests.

References

- Aras Kramar, S., & Milas Klarić, I. (2017). The main challenges of implementing the procedural rights of the child in the family justice systems of some Southeast European countries. In T. Liefwaard & J. Sloth-Nielsen (Eds.), *The United Nations Convention on the Rights of the Child: Taking stock after 25 years and looking ahead* (pp. 247-271). Leiden/Boston: Brill/Nijhoff.
- Bainham, A. (2005). *Children – The modern law*, 3rd ed. Bristol: Family Law.
- Carpaneto, L. (2019). Impact of the best interests of the child on the Brussels II *ter* Regulation. In E. Bergamini & C. Ragni (Eds.), *Fundamental rights and best interests of the child in transnational families* (pp. 265-285). Cambridge/Antwerp/Chicago: Intersentia.
- Committee on the Rights of the Child (2009). *General Comment No. 12 (2009) on the Right of the Child to be Heard (CRC/C/GC/12)*. Geneva: Committee on the Rights of the Child. Retrieved 2 April 2020, from <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>.
- Committee on the Rights of the Child (2013). *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) (CRC/C/GC/14)*. Geneva: Committee on the Rights of the Child. Retrieved 2 April 2020, from https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf.

- Council of Europe (2010). *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*. Strasbourg: Council of Europe Publishing. Retrieved 7 April 2020, from <https://rm.coe.int/16804b2cf3>.
- Daly, A., & Rap, S. (2019). Children's participation in the justice system. In U. Kilkelly & T. Liefgaard (Eds.), *International human rights of children* (pp. 299-319). Singapore: Springer.
- Distefano, M. (2019). The best interests of the child principle at the intersection of private international law and human rights. In E. Bergamini & C. Ragni (Eds.), *Fundamental rights and best interests of the child in transnational families* (pp. 157-170). Cambridge/Antwerp/Chicago: Intersentia.
- European Commission (2014). *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*, COM(2014) 225 final. Brussels: European Commission. Retrieved 2 April 2020, from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2014:0225:FIN>.
- European Commission (2015). *Study on the assessment of the Regulation (EC) No 2201/2003 and the policy options for its amendment; Final report; Analytical Annexes*. Brussels: European Commission, Directorate-General for Justice and Consumers. Retrieved 2 April 2020, from <https://op.europa.eu/en/publication-detail/-/publication/924728ec-9148-11e8-8bc1-01aa75ed71a1>.
- European Commission (2016a). *Commission staff working document, Impact assessment, Accompanying the document – Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decision in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)*, SWD(2016) 207 final. Brussels: European Commission. Retrieved 2 April 2020, from <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SCo207&from=EN>.
- European Commission (2016b). *Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decision in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)*, COM(2016) 411 final. Brussels: European Commission. Retrieved 8 April 2020, from <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF>.
- Fortin, J. (2003). *Children's rights and the developing law*. London: LexisNexis.
- FRA – European Union Agency for Fundamental Rights (2015). *Child-friendly justice. Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States*. Luxembourg: Publications Office of the European Union.
- FRA – European Union Agency for Fundamental Rights (2017). *Child-friendly justice. Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States*. Luxembourg: Publications Office of the European Union.
- Franzina, P. (2019). The place of human rights in the private international law of the Union in family matters. In E. Bergamini & C. Ragni (Eds.), *Fundamental rights and best interests of the child in transnational families* (pp. 141-155). Cambridge/Antwerp/Chicago: Intersentia.
- Kilkelly, U. (2011). Using the Convention on the Rights of the Child in law and policy: Two ways to improve compliance. In A. Invernizzi & J. Williams (Eds.), *The human rights of children. From visions to implementation* (pp. 179-197). Farnham/Burlington: Ashgate.
- Kraljić, S. (2018). *Družinski zakonik s komentarjem in podrobnim pojasnili* [Family Code with commentary and detailed explanations]. Maribor: Poslovna založba MB, založništvo d.o.o.
- Liefgaard, T., & Sloth-Nielsen, J. (2017). 25 Years CRC: Reflecting on successes, failures and the future. In T. Liefgaard & J. Sloth-Nielsen (Eds.), *The United Nations Convention on the Rights of the Child: Taking stock after 25 years and looking ahead* (pp. 1-13). Leiden/Boston: Brill/Nijhoff.
- Stalford, H. (2012). *Children and the European Union. Rights, welfare and accountability*. Oxford/Portland: Hart Publishing.

Stalford, H., & Drywood, E. (2001). Using the CRC to inform EU Law and policy-making. In A. Invernizzi & J. Williams (Eds.), *The human rights of children. From visions to implementation* (pp. 199-218). Farnham/Burlington: Ashgate.

Council of Europe, (European) Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950. Retrieved 7 April 2020, from <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=>.

Council of Europe, European Convention on the Exercise of Children's Rights, 25 January 1996, ETS No. 160. Retrieved 7 April 2020, from <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/160>.

European Union, Charter of Fundamental Rights of the European Union, Official Journal of the EU 2012, C 326, pp. 391-407. Retrieved 8 April 2020, from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>.

European Union, Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the EU 2012, C 326, pp. 47-199. Retrieved 8 April 2020, from <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN>.

European Union, Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, Official Journal of the EC 2001, L 174, pp. 1-24. Retrieved 8 April 2020, from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1206&from=EN>.

European Union, Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, Official Journal of the EC 2000, L 160, pp. 19-36. Retrieved 8 April 2020, from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000R1347&from=EN>.

European Union, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, Official Journal of the EU 2003, L 338, pp. 1-29. Retrieved 8 April 2020, from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R2201&from=EN>.

European Union, Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, Official Journal of the EU 2019, L 178, pp. 1-115. Retrieved 8 April 2020, from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1111&from=EN>.

Hague Conference on Private International Law, Convention on the Civil Aspects of International Child Abduction, 25 October 1980. Retrieved 8 April 2020, from <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>.

UN General Assembly, UN Convention on the Rights of the Child, 20 November 1989, 44/25. Retrieved 2 April 2020, from <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

Court of Justice of the EU, C-491/10 PPU, *Aguirre Zarraga v Simone Pelz*. Retrieved 8 April 2020, from <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-491/10>.



Legal Aspects of the Principal of “Rule of Law” as an Element of Constitutionalism

Jelena Trajkovska-Hristovska

“Ss. Cyril and Methodius” University in Skopje, NORTH MACEDONIA
Faculty of Law “Iustinianus Primus”

Received: 2 June 2020 ▪ Accepted: 17 August 2020 ▪ Published Online: 24 August 2020

Abstract

The paper analyzes the relation between the principle of “rule of law” and the concept of constitutionalism. In this context, the paper elaborates the concept of rule of law and its varieties of definitions. The author emphasizes that although there are different approaches in defining the concept of constitutionalism, they all include the principle of rule of law. The paper also brings up the issue of some legal aspects of the principal of rule of law – hierarchy of acts in the legal system (Kelzen-Merkel Stoffentheorie), and the limits and boundaries of the powers of the norm makers, in the process of materialization of the law. The paper analyzes the problem of (pan)juridisation and polyferation as deviation / hybridization of the legal system in practice.

Keywords: constitutionalism, rule of law, constitutionality, legality, materiae constitutionis, materia legis, materiae sublegalis, paniuridistion, polyferation.

1. The rule of law as an element of constitutionalism

The rule of law is neither a rule, nor a law. It is more a political or moral principle. The rule of law is probably one of the most challenging concepts of constitution and one that may be interpreted in different ways. It is not the concept with one accepted meaning.

The rule of law is generally understood as a doctrine which concentrates on the role of law in securing the correct balance in rights and powers between individuals and the state. The rule of law may be interpreted as a philosophy which lays down fundamental requirements for the law or a procedural device by which those with power rule under law. Generally, two aspects are emphasized for the principle of rule of law. The first one refers to the substance of the relationship between citizens and government. The second, deals with the processes through which that relationship is conducted. Or, phrased more simply as Ian Loveland pointed out, “the rule of law is concerned with what the government can do-and how government can do it.”¹

¹ Loveland, Ian. *Constitutional law, administrative law and human rights*. Oxford University Press. London, 2006, p. 56.

In connection with the above mentioned, procedurally oriented version of the concept of rule of law by Joseph Raz, is in relation with 8 specific postulates:

- (a) The law should be general, prospective, open and clear,
- (b) The law should be relatively stable (not subject to frequent and unnecessary changes),
- (c) The law should identify the jurisdictional limits to the exercise of delegated legislative powers,
- (d) The independence of the judiciary should be guaranteed,
- (e) The application of the law should accord with the rules of natural justice,
- (f) The courts should have a power of review over law-making and administrative action,
- (g) The courts should be easily accessible,
- (h) Crime preventing agencies should not be able to choose which law to enforce and when.²

For Raz, the rule of law is a political ideal which a legal system may lack or possess and by which it can be judged. It is a virtue of the legal system, but it must not be confused with the constitutionalism, democracy, justice or equality. It does not necessarily mean that the legal system that respects the above mentioned postulates is necessarily “morally good”. That is why his doctrine is morally neutral.³ Raz draws an analogy between the principle of rule of law and a knife. One quality of a good knife is a sharpness. However, the quality of sharpness says nothing as to the use to which the knife might be put: murder or beneficial surgery⁴. The same is with the rule of law. That is why this principle must be put in the greater perspective or it might be misused.

Other interpretations of the doctrine go beyond the procedural and formal requirements and face certain values that this principle should protect. Alex Carroll emphasizes that the purpose of all law should be to respect “for the supreme value of human personality” and that the observance of the rule of law should entail:

- (a) The existence of representative government,
- (b) Respect of the human rights and freedoms,
- (c) Absence of retrospective penal laws,
- (d) The right to bring proceedings against the state,
- (e) The right to a fair trial,
- (f) An independent judiciary,
- (g) Adequate control of delegated legislation.⁵

According to Berman, the rule of law means that the respective heads of each body would be bound by the law which they themselves had enacted, they could change it lawfully, but until they did, so they must obey it—they must rule under law.⁶

² Raz, Joseph. *The rule of law and its virtue*. In A. Carroll (Ed.), *Constitutional and administrative law*. Pearson Longman. London, 2007, p. 46.

³ Barnett, Hilaire. *Constitutional and administrative law*. Routledge Cavendish, 2006, p. 77.

⁴ *Ibid.*, p. 78.

⁵ Carroll Alex. *Constitutional and administrative law*. Pearson Longman. London, 2007, p. 47.

⁶ Berman, H. J. *Law and revolution: The formation of the Western legal tradition*. Cambridge Mass. Harvard University Press. 1983, 292. In Whittington, K. E., Kelemen R. D., Caldeira G. A. *The Oxford Handbook of law and politics*. Oxford University Press, 2008, p. 64.

Although the concept of the rule of law is a comprehensive and broad concept that can be analyzed from several different aspects, this paper will address several legal aspects that enable the rule of law in a state and constitutionalism.

2. Some legal aspects of the principal of “rule of law”

2.1 *Hierarchy of legal acts in the legal system*

Each legal system is constructed from a number of legal acts. These acts are passed by different organs, occur in different forms and have their own content. All of these regulations are part of one system and represent a set of legally binding rules of conduct. The main feature of the legal system and *conditio sine qua non* for its functioning is its monolithicity and consistency of the legal acts that make it up. Thus, every legal act, *per se*, must be an authentic part of that whole.

2.1.1

The trichotomy of established political systems, on the other hand, entails the trichotomy of the general legal acts adopted by these bodies. The constitutional government enacts the constitution, the legislature enacts the laws, and the executive enacts the bylaws. Kelsen's theoretical views and the theory of degrees in law start from a basic premise that in the system of state bodies, there is an appropriate hierarchy in which two basic organs stand out – the parliament and the executive. Namely, the theory of the legal nature of state functions and the degree and hierarchical structure of legal regulations (Stuffentheorie) is developed in the direction that state, functions (legislation and execution) are not two coordinated state functions, but two degrees in the process of creating law, which are in a hierarchical relationship. The process of creating the legal acts neither begins nor ends the process of creating the law. It develops upwards (towards the constitution) and downwards (towards the bylaws). In such a degree and hierarchy, the lower act is always the application of the higher, and the higher, always the act of creation and foundation. This process is a constant concretization of the law. Finally, in order for this to be realized, special legal and technical guarantees are needed for the legality of the bylaws and the constitutionality of the laws. Given that the guarantees of the constitution are in fact “*guarantees for the protection of the legal framework under the constitution*”, superimposed on these guarantees is the “*guarantee of the constitutionality of laws*”.

Jovičić's theoretical views are almost on the same line as the aforementioned Stuffentheorie. He points out that “in accordance with the democratic tradition, parliament as a direct expression of the will of the citizens is a hierarchically higher body, while the government as a body arising from parliament and suited to it, is a hierarchically lower body.”⁷ Consequently, this arrangement is reflected in the acts adopted by these bodies. Hence, the determination of the legal force of the legal acts, of the body that adopts them, as well as their mutual placement in the legal system, is understandable.

These legal acts, analyzed not only from a formal but also a material point of view, differ in terms of the content and the material they regulate. Based on this criterion, there are legal acts that regulate *materia constitutionis*, *materia legis* and *materia sublegalis*, following the line of generality and principle, as *differentia specifica* of constitutional provisions, to the precise regulation of certain social relations, which is characteristic of bylaws.

⁷ Jovičić, M. *Ustav i ustavnost*. Beograd, 2006, p. 333.

2.1.2

The existence of a hierarchy of legal acts determines the position of the legal act in the system, the degree of its legal force, the relationship of this act with the other acts and the priority in the application for regulation of certain social relations.

The hierarchy of legal acts is a reflection of the hierarchy of state bodies and other entities that create the law, and finally a reflection of the social forces behind them. “It is a reflection, and at the same time a means of strengthening the schedule of social forces and an expression and a means of social organization and order.”⁸

The essence of the principle of hierarchy of legal acts indicates that:

- Determining the hierarchy of legal acts within a given legal system is a necessary condition for the establishment and functioning of the system itself and for the implementation of constitutionalism, or more precise implementation of the principles of rule of law and the principle of constitutionality and legality, wrapped in the veil of constitutionalism in its broadest meaning.
- The hierarchy of legal acts is primarily conditioned by two formal criteria, organic (related to the entity that adopts the legal act) and procedural (related to the procedure for adoption and its revision). These two formal criteria would be meaningful only if the material criterion is satisfied, i.e. the meaning and character of the social relations regulated by the legal act.
- Finally, the essence of the hierarchy of legal acts consists in the existence of greater legal force of one at the expense of other legal acts which implies that, in case of conflict of two legal regulations, preference and legal obligation will be provided to the legal regulation with greater legal force.

Merkel-Kelzen’s theory of degrees (Stufentheorie) emphasizes that the legal order is not a system of coordinated norms, but a degree order of various types of norms through which the concretization of law is realized. The process of exercising the law starts from the constitution as (*lex superior*), the law (acts), the decree (and other bylaws), court decisions and administrative acts to the acts of execution. Each of these degrees represents the creation and application of law.

The classical theory of law, on the other hand, insists on a legal order that presupposes internal harmony and integration. The hierarchy of legal acts is important for the functioning of law on the one hand, and the organization of social life with the help of law, on the other. Through this principle, all acts represent a logical and indisputable whole and enable the harmonious action of the entire legal order. The hierarchization of legal acts requires that, the lower ones be harmonized with the higher ones, because only in that way can the legal order be seen as a “monolithic bloc in which all legal acts must be in mutual harmony.”⁹

2.2 *Materialization of the law – Limits of the powers of the norm maker*

The state has a monopoly on the adoption of legal acts and the legal regulation of social relations. State bodies do so on its behalf. The pre-determined position of the state bodies in the system of the organization of the government, and the predetermined competencies of these bodies, determine the limits within which they can act and create the right. Namely, the legal effect

⁸ Radomir D. Lukić. *Teorija države i prava*. Beograd, 1958, p. 147.

⁹ Jovičić, M. Hijerarhija pravnih propisa. In *Ustav i ustavnost*. Beograd, Službeni glasnik, 2006, str. 331.

of the acts, as well as their legal force, depend on a very important constant and formal criterion – which body adopts the legal act.

In theory, it seems that in parallel with the analysis of the process of materialization of law, the question of the limitations of norm-makers in that materialization of law, is additionally raised.

Therefore, following the line of concretization of the law and the general legal rules, it is expected that the boundaries of the norm-maker will be developed by analyzing the individual degrees in the process of materialization and creation of the law.

2.2.1 *Boundaries of the constitution-maker*

R. Kay emphasizes that “the special virtue of constitutionalism lies not merely in reducing the power of the state, but in effecting that reduction may the advance imposition of rules”.¹⁰ In modern conditions, constitutionalism, understood as a state of mind for effectively limited state power, is unthinkable without a constitution.

“It was in the late 18th century that the word constitution first came to be identified with a single document, mainly as a result of American and French Revolutions.”¹¹ The Constitution as a *lex superior*, an act with the greatest legal force in the legal system, an act that determines the legal force of all other regulations in the system, an act that imposes a necessity for compliance of all legal acts with its provisions, is the first stage of the materialization process of the law.

Around the written constitution will evolve a wide variety of customary rules and practices which adjust the operation of the constitution to changing conditions.¹² However, the constitution as an act is subject to revision. It is not a once and for all adopted document. The mentioned customary rules and practices ensure the flexibility of the constitution and its adaptation to the changing constellation of social relations. In addition, the longevity of the constitution is ensured by the interpretation of the constitutional provisions by those who directly apply them, especially by the constitutional courts. However, the basic specificity of the constitution as *lex superior* is the difficult, complex, multi-stage, procedure for amending the constitutional text. This is especially so, because the core of the constitution is maintained by norms that are usually standard constitutional matter (*constitutional materiae*). Which issues will be covered and regulated by the constitutional norms, and thus will represent *materia constitutionis*, depends on the constitutional maker (“founding fathers”).

The constitutional maker is the original government and the only one responsible for passing and changing the constitution. It is the highest, superior and legally unlimited in the procedure of creating and adopting the constitution. Constitutional legal theory advocates that, given that the constitution is the highest act in the hierarchical pyramid of acts in the legal system, the constitutional creator is not in a position to reconcile the constitutional text with any other legal act. Therefore, the constitution as a creation, in its form and content, can be conceived in a way most appropriate to the will, expertise, experience and creativity of the constitutional creator. “He can conceive of his work as he wants.”¹³ “*Quod principi placuit legis habet vigorem.*”

¹⁰ Alexander, L. *Constitutionalism Philosophical Foundations*, 1998, p. 16.

¹¹ A. W. Bradley and K. D. Ewing. *Constitutional and Administrative Law*, 2007, p. 5.

¹² *Ibid.*

¹³ Jovičić, M. *Ustav i ustavnost*, 2006, p. 396.

The mentioned principled theoretical position is the subject of analysis and debate, because it raises the question of whether the creator of the constitution in the process of creating constitutional norms, is still bound by certain values or meta-legal rules that deserve to enjoy special constitutional protection. On the other hand, although legally unlimited, the constitutional process in the process of creating the constitutional text is bound by certain factual restrictions, which can be of various natures: political, historical, international, economic, legal, etc.

Thus, the proponents of Jus naturalism insist on the necessity of certain values on which a society is based and this values must be subject to constitutional and legal protection. Considering that these are values that are rooted in the DNA material of society, the constitution must ensure their protection. Namely, human rights, justice, fairness, freedom, equality and some other eternal, meta-legal values and principles limit the absolute freedom of the constitutional creator. The German Constitution of 1946 points to “the existence of inviolable and inalienable rights as the basis of every community, peace and justice in the world.”

Another example of restricting the freedom of the constitution-maker in the constitutional review process is the ban on changing the form of government. Encouraged by a number of political, legal and historical factors, there are examples when the constitutional government, in an attempt to limit the next constitutional creator, envisions an explicit prohibition in the constitutional text to change the form of government. The French Constitution of 1958 determines a ban on changing the republican form of government. A reflection on how legally binding the constitutional norm is for a ban on changing the established form of government, is the legal principle “*lex posterior derogat priori*” as well as the example of the Greek Constitution of 1968 which provided that the provisions of the constitution which regulate the form of government as a monarchical democracy can never be subject to change.

A special type of restrictions for the creator of the constitution are the prohibitions for constitutional revision in conditions of occurrence of special circumstances, such as military or state of emergency. Namely, in the comparative constitutional law, there are different solutions for when the constitutional revision should not be approached, i.e. what are the circumstances when *lege artis* could not consistently implement the procedure for changing the constitution. Thus, the 1946 Constitution of Brazil provides for a ban on its replacement in military conditions. De Gaulle's 1958 constitution stipulates the impossibility of implementing the procedure for changing the Constitution “at a time when the territorial integrity of the country is at stake.”¹⁴ A similar constitutional solution is envisaged in the Constitutions of Spain¹⁵ and Portugal,¹⁶ which provide for the impossibility of changing the constitution in conditions of martial law, state of emergency or a state of siege of the country.

The factual limitations of the absolute legal freedom of the constitutional creator in creating or changing the constitutional norms also exist for the established form of state organization. Namely, the creator of the federal constitution, in the offered solutions for constitutional revision, is limited to the issue of organizing the federation and the relations between the union and the federal units.

Finally, Rajko Kuzmanović points out that the so called fetishism of legal, especially constitutional norms, should be understood *cum grano salis*, because it is true that the

¹⁴ Constitution of France, 1958, art. 89/4.

¹⁵ Constitution of Spain, 1978, art. 169.

¹⁶ Constitution of Portuguese Republic, 1976, art. 289.

constitution as an act cannot be changed by whoever feels like changing it, but it is still an act that does not is intangible and must be changed when incomplete or historically exceeded.¹⁷

Jovičić points out that, “not ignoring the importance of the actual restrictions of the constitutional creator in the process of constitutional revision, it must be emphasized that the constitutional creator, however, is not subject to legal restrictions.”¹⁸ All of the above is a premise from which the conclusion is drawn, that the prohibitions on absolute changing the constitution as a basic legal construction, and the absolute restrictions on the creator of the constitution, cannot have a binding character, but only political significance and political value.¹⁹

2.2.2 Boundaries of the legislature

The legislator in the role of a norm-maker is bound by the Constitution. The Constitution is a higher legal act than the Acts, in the Kelzen hierarchy of legal acts, and thus it is an act of creation and a basis for its adoption. The Constitution is the first stage from which the materialization of law begins. The law, although an act with legal effect *erga omnes*, is a concretization of the constitutional provisions in an attempt to regulate social relations.

On the other hand, the powers of the legislature are fixed, clear and precisely provided for in the constitution. The legislator must not exceed them, nor must he violate them in the implementation of the procedure for passing the laws. Namely, the legislator must respect the constitutional provisions by which concrete action or non-compliance is envisaged for mandatory or prohibited.

Thus, from a theoretical point of view, the limitations of the legislator in the process of materialization of the law are related to the procedure of creation of the law. In the context of this issue, the theory seems to emphasize the clash of two dominant concepts, the Laband-Yelneck-Anschitz theory and Henel’s theory. The first, which gives priority to the form of the law, but not the essence, and the second, which is based on the thesis that “the law has a form, because of the content that is necessary for it.”²⁰ However, Kelzen points out that, “according to the constitutional principle, the form of the law is what emphasizes its basic features: a decision of the parliament (expression of will), sanction, promotion and publication.” Namely, for him, what the state “wants” as the legal behavior of the “subjects of Laband” is important, but it seems that in terms of imperative theory, not the law in a formal sense, but the form of the law and more importantly the body of adoption, are the key moments that determine the law as an act.

In the context of the constitutional norms that stipulate what the legislator must and must not do, he has no absolute freedom of action and is obliged to act in accordance with the stated constitutional provision. However, the constitutional legal literature represents the view, that if the legislator does not respect the constitutional norm that requires legal regulation of a certain matter, those social relations will remain unregulated, but no legal consequence will be realized on the legislator. This is especially because the essence of the existence of the legislature is the adoption of laws and accordingly, it independently determines which relations, when and in what way should regulate them by law. On the other hand, in the constitutional literature there is

¹⁷ R. Kuzmanović. *Značaj prava i pojave koje narušavaju pravni sistem*. https://www.anurs.org/sajt/doc/File/govori_besjede/2011-05-31_znacaj_prava_predsjednik_spanija.pdf. p. 10.

¹⁸ Jovičić M. *Ustav i ustavnost*. Beograd, 2006, p. 399.

¹⁹ S. Klimovski, R. Deskoska i T. Karakamiseva. *Ustavno pravo*. Skopje, 2009, p. 103.

²⁰ Kelzen, H. *Glavni problemi teorije državnog prava*. Beograd, 2001.

an English phrase that implies that, the legislature can regulate everything except turning a man into a woman and vice versa. Nowadays, that can be regulated too.

The constitutional provisions allow for broad powers of parliament in the exercise of normative powers. The only restriction is that it be done from both a formal and a material aspect in accordance with the constitution. Hence, the first and basic limitation of the legislature in the normative regulation of the so-called *materia legis* is that it be done in accordance with the constitution.

Other types of restrictions for the legislator regarding the exercise of legislative competence are the need to comply with certain principles such as the ban on retroactive effect of laws, the ban on changing final court decisions by law, the ban on restricting already acquired rights, the ban on introduction of provisions that violate the provisions of international agreements, etc.

Countries with a complex form of government have an additional factor that affects the legislator's restrictions on the exercise of normative powers – the established relationship between the union and the federal units and the degree of autonomy they enjoy. Therefore, the tendency of the federal constitution to determine and regulate in detail the issue of the legislative competence of the parliaments of the federal units is obvious. Probably the most appropriate examples of the extremely different approach to regulating this issue are the US Constitution of 1787 and the 1988 Constitution of Brazil with the 2010 constitutional amendments.

Finally, in the context of the issue of legal obligation of the legislator with the constitution, in the realization of the legislative (normative) competence, the issue of the legal consequence of the violation of the constitutional norms is added. Hence, countries with an established system of institutionalized assessment of the constitutionality of legal norms provide for a sanction for violation of constitutional powers. In case the legal norms adopted by the legislator violate of the constitutional provisions and are in collision with them, the decision of the competent body (constitutional courts) may declare that legal norm unconstitutional and remove it from the legal system. Such action in the institutionalized systems of controlling the constitutionality of legal norms is extremely important because of its dual effect. On the one hand, it disables the legal effect of unconstitutional legal norms and the occurrence of harmful consequences, but on the other hand, no less important, it keeps the legislator in the pre-determined restrictions provided by the constitution.

2.2.3 *Limits of the ordinance maker*

The third stage in the Kelzen hierarchical arrangement of the general legal acts, which materializes the law, is the ordinance and other bylaws. The process of creation of the law and the more detailed regulation of the social relations is possible only if the editor in his action is completely bound by the law and indirectly bound by the constitutional provisions. Therefore, the basis for the enactment of bylaws is always the law as a degree superior to them, and the constitution as a second higher degree. Hence, the freedom of action of the ordinance-maker is far more limited than that of the legislature.

In principle, in the process of creating the law, the ordinance-maker concretizes the law, and therefore always moves within the act that is the basis for their adoption. However, a deviation from this classical conception of the realization of the normative activity of the state exists when the authorization for enactment of the by-laws (the regulation) arises directly from the constitution. Consequently, the limitations of the ordinance-maker are quite different if his powers arise *ex constitutionem or ex lege*. In the first case, the powers of the ordinance-maker are similar to those of the legislature, as the legal regulation of relations seems to be original, primary and principled. In the latter case, the theory insists on the direct connection of the legislature with

the law and of course the constitution, but insists on initially limiting the legislature to the law which is primarily the basis for the enactment of the bylaw. This means that the freedom of his action is limited exclusively to the concretization and more detailed elaboration of the legal norm.

3. Deviation / hybridization of the legal system in practice

The antithesis of the concept of constitutionality is unconstitutionality, and the antithesis of the concept of legality is illegality. Illegality is an unacceptable phenomenon for the legal system. It implies non-compliance of the lower legal regulations with the law. Stable legal systems seek to suppress and eliminate them because they undermine their monolithic nature.

The two dominant forms of the occurrence of illegality are the (pan)juridisation and the polyferation of the legal system. Both phenomena are a consequence of the modernization of the legal system and are characteristic of modern social development. However, they are undesirable, because behind the scenes, they hide the danger of legal uncertainty of the citizens.

1. (Pan)juridisation is a phenomenon of expanding the domain of legal regulation. Classical legal theory points out that the desire for any relationship to be legally regulated and gradually develops the awareness that only what has a legal form is legally obligatory. (Pan)juridisation is undesirable because it hides the dependence on the transformation of the principle of the rule of law into tyranny of law. Giving too much importance to the written legal norm and the necessity of each relationship to be regulated with it leads to over-regulation. However, even though the law is a living and dynamic category, social relations are still more dynamic, so it cannot be expected that only those relations that are legally regulated would be recognized. The beginnings of (pan)juridisation in the 1970s, when Đorđević warned that “it is better for some relations to remain unregulated than wrongly, prematurely and irrationally regulated”, seem to be gaining momentum in the period of the 90s in transition countries, which abandon existing political systems and establish new ones. The development of technological and digital systems on the other hand seems to impose an additional need to regulate the new forms of relations faced by social, legal, political and economic systems. These phenomena obscure the danger posed by Gordana Gasmi, according to which panjuridization leads to “bulky, expensive and inefficient state apparatus and slow traffic of legal entities.”²¹ Probably the most vivid appearance of (pan)juridisation is portrayed by Jovicic, for whom, “the lawmakers are like a huge spider knitting their web, continuously cover a wider range of issues, both important and unimportant, and eligible and ineligible for legal regulation.”²²

Modern legal systems appear to be facing the challenge of overcoming the emergence of (pan)juridisation of law, on the path to its harmonization with EU law, too.

2. Reflection of the (pan)juridisation is the appearance of polyferation. It seems that the panjuridization and polyferation of law are occurrences which disrupt the established legal system and which per se cause the emergence of legal insecurity. Polyferation is the overproduction or multiplication of legal regulations. It can appear in the form when every higher legal regulation creates space and is the basis for creating a whole group – family of legal regulations or when in an attempt to regulate in detail the changing social relations, the legal acts, especially laws, are changed very often, thoughtlessly and unsystematically.

The law does not benefit from a frenetic atmosphere, nor in such atmosphere should the legal regulations be amended. Probably the most appropriate representation of this is the change of laws that have not yet begun to be applied or to produce any legal effect in the system.

²¹ Gasmi, G. *Pravo i osnovi prava Evropske Unije*. Beograd, 2010, p. 75.

²² M. Jovičić. *Ustav i ustavnost*. Beograd, 2006, p. 436.

This phenomenon is absolutely undesirable, because there is no possibility, nor a certain time interval has passed in which the effects of the application of the law, its advantages and disadvantages, would be perceived.

The polyferation of law is particularly undesirable if it is essentially a hyper creation of rules that cannot be applied or should be applied *pro futuro*. Gasmi points out that “excessive mobility and variability of the law are also serious forms of illegality.”²³

The law must change. Its change has been imposed as a need to regulate and regulate the altered social phenomena and relationships. However, that change of the law, expressed through amendments to the laws, must be thought out and moderate. Otherwise, it leads to vague norms, ambiguous rules, inappropriate constructions and phrases and inadequate language, and all this ultimately results in the inapplicability of the law and the creation of legal insecurity.

Finally, if (pan)iuridisation is tied to social relations and the attempt to make absolutely every relation legally regulated, polyferation is tied to hyper production of regulations. Both phenomena are undesirable for the legal system and represent forms of illegality. They pose challenges for modern legal systems in striving to modernize and adapt to changing constellation of social relations.

It seems that maintaining a balance in the necessity for the existence of the law and the norm and the actual materialization-creation of the law, is an art. Maintaining such a balance is a prerequisite for the existence of a monolithic harmonized legal system without norms that would be in mutual collision. Namely, the request for the existence of such a system is also a request for the constitutionalism.

4. Conclusion

The Constitutionalism is an idea, ideology, and state of mind of the need of a limited, limited, and controlled government by legal means. There is no single definition of the term constitutionalism in constitutional literature. Its most appropriate explanation is possible only by analyzing its basic elements. One of these elements is the rule of law.

The constitutionalism and the rule of law are not synonymous, and there should be no equalization between them. The principle of the rule of law is embedded in the idea of constitutionalism as a broader term. Therefore, it would seem that without the rule of law, constitutionalism in one state would be impossible. Namely, it is one of those basic legal mechanisms, instruments and means that enable the restriction of state power.

The principle of the rule of law is included in the so-called “chameleon” concepts, as well as the concept of constitutionalism and democracy. This further complicates its definition. Although this concept covers so many things, it is important to emphasize some of its legal aspects, which seem to have been forgotten. Lowland points out that the rule of law is concerned with what the government can do, but of no less importance is the question – how the government can do it.²⁴ Hence, the analysis of some forgotten issues such as the hierarchy of legal acts, the boundaries of the norm-maker in the creation of the law, the concept of illegality and the danger of the emergence of (pan)iuridisation and polyferation, seem a good reminder.

²³ Gasmi, G. *Pravo i osnovi prava Evropske Unije*. Beograd. 2010, p. 75.

²⁴ Loveland, Ian. *Constitutional law, administrative law and human rights*. London, Oxford University Press, 2006, p. 56.

Acknowledgements

This research did not receive any specific grant from funding agencies in the public commercial, or not-for-profit sectors.

The author declares no competing interests.

References

- Andrews, W. G. (1963). *Constitutions and constitutionalism*. London.
- Bradly, A. W., & Ewing, K. D. (2007). *Constitutional and administrative law*. London.
- Bacić, A. (2009). Ustavne promjene i dileme konstitucionalizma [Constitutional changes and dilemmas of constitutionalism]. *Zbornik radova Pravnog fakulteta u Splitu*, 46(4).
- Barnett, H. (2006). *Constitutional and administrative law*. Routledge Cavendish.
- Berman H. J. (1983). *Law and revolution: The formation of the Western legal tradition*. Cambridge Mass. Harvard University Press.
- Caroll, A. (2007). *Constitutional and administrative law*. London: Pearson Longman.
- Deskoska, R. (n.d.). *Constitutionalism and Transition: Case study of the Republic of Macedonia*. www.juridicas.unam.mx/wccl/ponencias/16/283.pdf.
- Gasmi, G. (2010). *Pravo i osnovi prava Evropske Unije* [Law and fundamentals of European Union law]. Beograd.
- Graglia, L. A. (1996). *It's not constitutionalism, its judicial activism*. *Harvard Journal of Law and Public Policy*, 19(2).
- Henkin, L., & Rosenthal, A. J. (1990). *Constitutionalism and rights. The influence of the United States Constitution abroad*. New York: Columbia University Press.
- Kelzen, H. (1951). *Opšta teorija države i prava* [General theory of state and law]. Beograd.
- Kelzen, H. (2001). *Glavni problemi teorije državnog prava* [The main problems of the theory of state law]. Beograd.
- Kuzmanović, R. (2011). *Značaj prava i pojave koje narušavaju pravni sistem* [Significance of rights and phenomena that violate the legal system]. https://www.anurs.org/sajt/doc/File/govori_besjede/2011-05-31_znacaj_prava_predsjednik_spanija.pdf.
- Loveland, I. (2006). *Constitutional law, administrative law and human rights*. London: Oxford University Press.
- O'Connell, R. (2000). *Legal theory in the crucible of constitutional justice: A study of judges and political morality in Canada, Ireland and Italy*. Ashgate.
- Post, R., & Siegel, R. (2004). *Popular constitutionalism, departmentalism and judicial supremacy*. Yale Law School Faculty Scholarship. Paper no. 178, vol. 92.
- Raz, J. (2007). The rule of law and its virtue. In A. Carroll (Ed.), *Constitutional and administrative law*. Pearson Longma. London.
- Klimovski, S., Deskoska, R., i Karakamiseva, T. (2009). *Ustavno pravo* [Constitutional law]. Skopje.
- Treneska Deskoska, R. (2015). *Constitutionalism*. Skopje.

Treneska Deskoska, R. (2012). The rule of law and protection of human rights in Macedonia. In *Summer Academy Rule of Law, Human Rights and European Union – Book of Proceedings*. Centre for SEELS.

Treneska, R. (2006). *Constitutionalism and human rights*. Skopje.

Whittington, K. E., Kelemen, R. D., & Caldeira, G. A. (2008). *The Oxford Handbook of law and politics*. Oxford University Press.

Jovičić, M. (2006). *Ustav i ustavnost* [Constitution and constitutionality]. Beograd: Službeni glasnik.

Lukić, R. D. (1958). *Teorija države i prava* [Theory of state and law]. Beograd.



Construction of the Rehabilitation Model for Drug Abuse in Non-Penal Criminal Policy Perspective

Agah Sonjaya

Pasundan University, Bandung, INDONESIA

Received: 21 July 2020 ▪ Accepted: 18 September 2020 ▪ Published Online: 2 October 2020

Abstract

As mandated by the Law for drug addicts/abusers, rehabilitation is carried out. Meanwhile, the rules for drug addicts and psychotropic drugs or similar drugs that cause dependence and have a serious impact are not regulated normatively. So that in the law enforcement process, both Narcotics, Psychotropics and Drugs, Law No. 35 of 2009 concerning narcotics. In a practical level or reality in the field, the implementation of rehabilitation is very monotonous and the road is in place. Both the Narcotics Law, Seja, Sema and Perber all require that before waiting for the decision of the panel of judges concerned as a category of addicts must be placed in a rehabilitation institution. Of course, this is very worrying, how much will the rehabilitation process cost? Economically, this law enforcement model is ineffective, so the implementation of enforcement is in place.

Keywords: drug rehabilitation, rehabilitation model construction, non-penal policy.

1. Introduction

The era of globalization which is marked by the emergence of the Industrial Revolution 4.0, to be precise in 2020-2030,¹ is predicted to have the opportunity to receive a demographic bonus where the structure of Indonesia's population will be dominated by the productive age. It is hoped that this will have an impact on increasing community productivity and spurring economic growth and optimizing development significantly. However, these great opportunities can turn into disasters when we fail to manage these opportunities, for example, we fail to protect the "productive age" from the threat of drug abuse. It is worth watching out, data from the survey results of the National Narcotics Agency (BNN) in collaboration with the University of Indonesia (UI) Health Research Center in 2017 shows that the prevalence of drug abusers reaches 3,376,115 people or 1.77% of the total population of productive age (10-59 years).² The large number of abusers or prevalence figures will be a big threat to the demographic bonus, lest the demographic bonus that should be a bonus will turn into a disaster if we fail to suppress the rate of increasing the number of abusers.

As the leading sector for the implementation of the Prevention and Eradication of Narcotics Abuse and Illicit Narcotics (P4GN) program, the National Narcotics Agency (BNN) has

¹ Klaus Schwab, *The Fourth Industrial Revolution*, World Economic Forum, 2016.

² <https://bnn.go.id/puncak-peringatan-hari-anti-narkotika-internasional-hani-2018/>.

prepared various policy instruments and carried out various activities to reduce the rate of increase in the number of abusers (prevalence) and together with POLRI (Republic Police of Indonesia) reveals the narcotics syndicate network to stop drug supplies from producing countries from entering Indonesia.

Based on quantitative data, estimates and projections of the number of drug users tend to be stable from 2017 to 2022. This happens because efforts to reduce the number of drug abuse have entered a stage that is increasingly difficult to reduce absolutely (hard rock), which is around 3.3 million people per year. Extra strategies for programs and activities that are more innovative and sustainable are needed so that they can significantly reduce both the prevention and law enforcement side, by setting targets for achievement that are much higher than today.³

As an applicable effort in preventing and supplying narcotics for the sake of treatment and health services, one of the efforts of the government is to legally regulate the distribution, import, export, cultivation, use of narcotics in a controlled manner and strict supervision.⁴ So to prevent and eradicate abuse⁵ and the illicit trafficking of narcotics which has harmed and endangered the lives of the people, In this case the Indonesian government itself on September 14, 2009 has succeeded in compiling and ratifying the new Narcotics Law, namely Law Number 35 of 2009 concerning Narcotics.⁶

Efforts that can be realized are the enforcement of positive laws, namely Law No. 35 of 2009 concerning Narcotics, one of these efforts is to reform and strengthen the regulatory sector. Before Indonesia issued Law No. 35 of 2009, Indonesia has ratified the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances through Law No. 7 of 1997 concerning the Ratification of the United Nations Convention on the Eradication of Illicit Narcotics and Psychotropics (1998).

Efforts to solve drug problems have been carried out in a cross-sectorial manner both from the “preventive” and “repressive” aspects through the existence of laws and regulations relating to narcotics. In particular, preventive efforts have been made, for example by officials with an interest, especially from the National Narcotics Agency (BNN), the Indonesian National Police and Civil Servant Officials (PPNS) as well as through active community participation, namely by the emergence of institutions established by the community including the campus

³ Badan Narkotika Nasional, *Laporan Akhir Survei Nasional Perkembangan Penyalahgunaan Narkotika Tahun Anggaran 2017, 2017*.

⁴ The circulation of narcotics must be closely monitored on the basis of the consideration that currently their use is mostly for negative things. In addition, through the development of information and communication technology, and the spread of narcotics which have also reached almost all regions of Indonesia. Areas that have never been touched by narcotics trafficking have gradually become the centers of narcotics trafficking. Likewise, children who are initially unfamiliar with this haram have turned into addicts who are difficult to let go of their dependence.

⁵ Mardani, *Penyalahgunaan Narkotika (dalam Perspektif Hukum Islam dan Hukum Pidana Nasional)*, PT Raja Grafindo Persada: Jakarta, 2008, hlm: 1-2. In this book it is stated that: “Narcotics abuse is the use of drugs outside of medical indications without a doctor's instructions or prescription and its use is pathological (causes abnormalities) and causes obstacles in activities at home, school, campus, work place and social environment.”

⁶ Law No. 35/2009 is a refinement of Law No. 22/1997 which is deemed less likely to provide a deterrent effect and reduces the level of prevention both quantitatively and qualitatively on the distribution and use of narcotics. The existence of this new law also regulates the regulation of medical and social rehabilitation and the use of narcotics for medicinal and health purposes. Therefore, Law Number 35 of 2009 concerning Narcotics is the basis for law enforcement in order to ensure the availability of drugs for the benefit of science, technology, health and to prevent the abuse and illicit trafficking of narcotics. Siswanto S, *Politik Hukum Dalam Undang – Undang Narkotik*, Rineka Cipta: Jakarta, 2012, hlm: 83.

community – campus that cares about the dangers of drugs. “Repressive” efforts have been carried out ranging from arrest to legal proceedings in court. However, until now the number of drug abusers has not decreased and it tends to increase. Drugs are also rife in prisons and even drug production has been found in prisons several times.⁷

Narcotics / drug addicts / the like are basically victims of the abuse of narcotics crimes that violate state laws, and they are all Indonesian citizens who are expected to be able to build this country from a downturn in almost all fields. In connection with the problem of narcotics abuse, a criminal law policy is needed that positions narcotics addicts as victims, not criminals.

Narcotics addicts are “*self-victimizing victims*”, because narcotics addicts suffer from a “dependency syndrome” as a result of their own narcotics / drug abuse.⁸ It is interesting in law No. 35 of 2009 regarding narcotics, it is the judge’s authority to issue a sentence for someone who is proven to be a narcotics addict for rehabilitation. Implicitly, this authority recognizes that narcotics addicts, apart from being the perpetrators of criminal acts, are also victims of the crime itself, which in terms of victimization is often referred to as self-victimization or victimless crime. The description in the article focuses on the judge’s power in deciding narcotics cases. Unfortunately the formula is ineffective in reality. Trials of drug / drug addicts mostly end in imprisonment and not rehabilitation verdicts as stipulated in the law.

The approach used so far as a solution to reduce drug abuse rates can be seen from 2 (two) different points of view, the first is that prioritizes law enforcement efforts (“penal”) by imposing criminal sanctions on drug abusers in order to get a deterrent effect, while on the side others use rehabilitation (“non-penal”) measures to reduce the black market, which is assumed to have an effect on reducing the “demand” for drugs. Both “penal” and “non-penal” approaches, efforts to tackle the problem of narcotics addiction require appropriate policy steps and formulations so that the high rate of narcotics abuse in Indonesia can be suppressed. In accordance with the efforts to prevent, curb the abuse and illicit trafficking of narcotics that have been proclaimed by the National Narcotics Agency (BNN).

The sanctions provided for in Law No. 35 of 2009 concerning narcotics adopts a “double track system”, namely in the form of criminal sanctions and action sanctions, rehabilitation is a form of sanctions.⁹ However, based on empirical facts in the field, it shows that law enforcers often do not give narcotics users the right to carry out rehabilitation, even though

⁷ Dani Krisnawati, *Pelaksanaan Rehabilitasi Bagi Pecandu Narkotika Tahap Penyidikan Pasca Berlakunya Peraturan Bersama 7 (Tujuh) Lembaga Negara Republik Indonesia*, Laporan Hasil Penelitian: Universitas Gajah Mada: Yogyakarta, 2014, hlm: 1-3.

⁸ The thing that must be kept in mind is that a narcotic addict will not heal itself from his dependence, so this will keep the perpetrator committing the act.

⁹ The nature of the sanctions in Law No. 35 of 2009 double track system, because based on the victimology review that narcotics addicts are self-victimizing victims, namely victims as perpetrators, victimology still determines narcotics abuse as victims, even though victims of criminal acts / crimes they commit themselves. Therefore, narcotics addicts who are also victims deserve protection. However, because narcotics addicts are also perpetrators of a crime, they must also be punished, because of this it is said that the double track system in the formulation of sanctions against criminal acts of narcotics abuse is the most appropriate. The double track system in the formulation of sanctions against narcotics abuse is a criminal law policy in the formulation of provisions governing the sanctions given to narcotics abuse offenders, namely in the form of criminal sanctions and sanctions considering the perpetrators of narcotics abuse have a slightly different position from other criminal offenders. On the one hand, he is a perpetrator of a criminal act who must be punished, but on the other hand he is a victim of the crime he has committed himself, so it is necessary to carry out an action in the form of rehabilitation. Determination of sanctions against narcotics addicts, whether to apply criminal sanctions or action sanctions, the determination rests with the judge. See in: Putri Hikmawati, *Analisis Terhadap Sanksi Pidana Bagi Pengguna Narkotika*, Dalam: Jurnal Negara Hukum: Vol. 2, No. 2, November 2011, hlm: 335.

in Law No. 35 of 2009 concerning narcotics, there is guaranteed rehabilitation for narcotics addicts. In addition, due to the limited number of assistants or counsellors, the number of narcotics addicts who are reached by the rehabilitation program is limited.¹⁰

Rehabilitation is a form of punishment for addicts or drug users, for the norm itself, as stated in Article 103 of Law No. 35 of 2009 concerning Narcotics, has no problem with the interpretation of norms or legal interpretations, because it is clear that in every narcotics case, law enforcers and decision-makers are required to comply with the same rules, namely Law No. 35 of 2009 on narcotics. The law is a “special” regulation that deviates from the criminal system that has been in effect in Indonesia. It is said to be “special” because the Narcotics Law adopts a “double track system” for self-punishment of abusers with an obligation for all courts in Indonesia to punish rehabilitation.

The application of criminal law in the form of imprisonment for victims of narcotics abusers has been proven to have failed because every year the number of victims of abusers who go to prison increases. Through the Supreme Court Circular (SEMA) No. 3 of 2011 concerning the Placement of narcotics abuse victims in Medical Rehabilitation and Social Rehabilitation Institutions. This SEMA strengthens Articles 54-59 of Law No. 35 of 2009 concerning narcotics, Articles 13-14 of Government Regulation no. 25 of 2011, which in essence is that Narcotics abusers who are faced with the law are placed in medical and social rehabilitation places during the judicial process. The Attorney General also responded to a similar prospect by issuing SEJA No. SE002 / A / JA / 02/2013 concerning the Placement of Victims of Narcotics Abuse to the Medical Rehabilitation and Social Rehabilitation Institutions and the technical rules in implementing SEJA are contained in SEJA No. SE002 / A / JA / 02/2013 concerning the Placement of Narcotics Abuse Victims to Medical Rehabilitation and Social Rehabilitation Institutions.

Then the Joint Decree of the Chairman of the Supreme Court of the Republic of Indonesia, Minister of Law and Human Rights of the Republic of Indonesia, Minister of Health of the Republic of Indonesia, Minister of Social Affairs of the Republic of Indonesia, Attorney General of the Republic of Indonesia, Chief of the National Police of the Republic of Indonesia, and Head of the National Narcotics Agency of the Republic of Indonesia Number. 01 / PB / MA / III / 2014 - 03 Year 2014 - 11 / Year 2014 - PER005 / A / JA / 03/2014 - 1 Year 2014 PERBER / 01 / III / 2014 / BNN (National Narcotics Agency) About the Handling of Narcotics Addicts and Victims of Narcotics Abuse in Rehabilitation Institutions with the aim of realizing optimal coordination and cooperation in solving narcotics problems in order to reduce the number of narcotics addicts and victims of narcotics abuse through treatment, treatment and recovery programs in the handling of narcotics addicts and victims of narcotics abuse as suspects, defendants or prisoners, while still carrying out the eradication of illicit narcotics trafficking. This means that drug addicts no longer end up with imprisonment penalties but end up in rehabilitation, because sanctions for addicts are agreed in the form of rehabilitation.¹¹

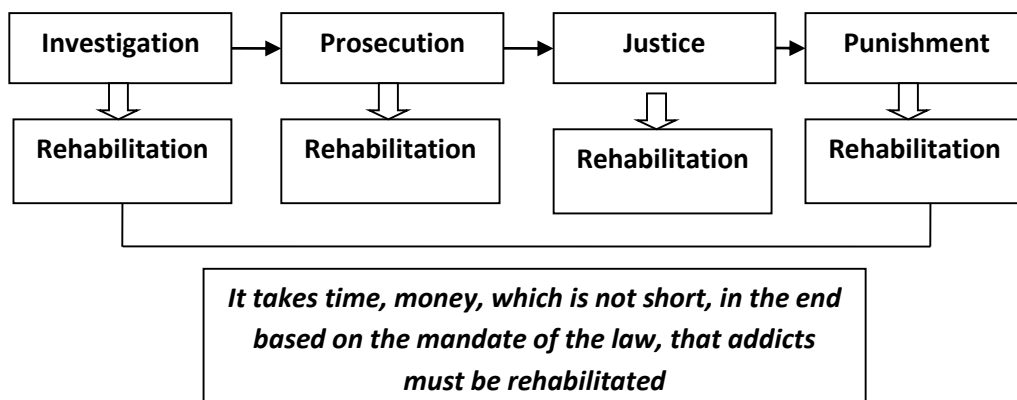
¹⁰ Chairman of the Indonesian Addiction Counselor Certification Board, Benny Ardjil, said that out of a total of around 3.6 million drug addicts, only 10% are covered by the therapy and rehabilitation program. See: Benny Ardjil, Improvement of Rehabilitation Facilities, SINAR BNN Magazine, Edition 3, 2010, pages: 24-25, then stated that: Whenever police officers find someone or a group of people using drugs, the mind quickly concludes that the person is a drug addict. Even though this is not always the case, addicts do use drugs. Meanwhile, those who use drugs are not always addicts. Because if he uses it for the first time, has just tried, he is called a trial drug user or experimental user.

¹¹ The establishment of this Joint Regulation is aimed at providing technical guidelines in the handling of narcotics addicts as suspects, defendants or prisoners in undergoing medical rehabilitation and/or social rehabilitation. Apart from that, it also aims to ensure that the medical rehabilitation and social rehabilitation processes at the investigation, prosecution and trial levels can be carried out in a synergistic and integrated manner. After the enactment of this Joint Regulation, the implementation of this Joint Regulation itself will

On the basis of the formation of the Joint Regulation, an Integrated Assessment Team (TAT) was established at the central, provincial, district / city levels consisting of a team of doctors and a legal team tasked with carrying out an analysis of the role of suspects arrested at the request of investigators related to illicit trafficking. Drugs especially for addicts. The team then carries out legal analysis, medical analysis and psychosocial analysis and develops a rehabilitation plan that outlines how long the rehabilitation will take. The results of the assessment are used as a complete case file, which functions as information such as *visum et repertum*. The results of the analysis will sort out the role of the suspect as an abuser, an abuser as well as a dealer. The assessment team's analysis of abusers will produce levels of addicts ranging from heavy, medium and light addicts where each level of addicts requires different rehabilitation.

An addict and a victim of narcotics abuse is a victim of narcotics so he deserves to be called a sick person. As a result, an addict and a victim of narcotics abuse must undergo treatment by placing him in a medical rehabilitation and/or social rehabilitation institution. The placement of addicts and victims of narcotics abuse into these rehabilitation institutions is in accordance with the objectives of the Law as mandated in Article 4 letter d of Law No. 35 of 2009 concerning Narcotics.

A problem that is quite crucial and has caught the attention of many circles is that the rehabilitation process itself is very convoluted and time-consuming and costs a lot of money, starting from the process of investigation, prosecution, trial to conviction. The problem in question can be illustrated by the demonstration below;



The author as a Police investigator who often handles drug cases is very difficult to carry out the mandate of Article 54 of Law No. 35 of 2009 concerning Narcotics and Regulation of the Head of the National Narcotics Agency No. 11 of 2014 concerning Procedures for Handling Suspects and/or Defendants of Narcotics Addicts and Victims of Narcotics Abuse into Rehabilitation Institutions, namely implementing the Integrated Assessment Team (TAT) mechanism in terms of time, distance and geographic location of our country, costs, and readiness the integrated assessment team officers themselves.

In addition, the existence of the Integrated Assessment team is not evenly distributed throughout the Province or Regency / city, thus it is so difficult just to carry out an assessment of an addict, even though it is not uncommon for investigators to be able to secure large numbers of

be carried out in stages. As an initial stage, the pilot project was carried out in 16 cities and districts namely Batam City, East Jakarta City, South Jakarta City, Bogor Regency, South Tangerang City, Semarang City, Surabaya City, Makassar City, Maros Regency, Samarinda City, Balikpapan City, City Padang, Sleman Regency, Pontianak City, Banjar Baru City, and Mataram City. The selection of cities and regencies is based on the readiness of infrastructure such as rehabilitation centers. It can be opened the website address: <http://www.renewalvoice.com/home/>.

drug addicts every day, because of this difficulty investigators can only take two steps, namely carrying out a fingerprint process and detaining suspected drug abusers / addicts, then proceeding to the next process by heeding article 54 of Law 35 of 2009 on Narcotics or the second step of the National Police Investigator with confidence and judgment in the investigation or investigation stage that they believe that a person the suspect is a drug user who needs immediate treatment or rehabilitation to carry out an assessment of the Report Obligatory Recipient Institution (IPWL) or a Rehabilitation institution in the jurisdiction of each investigator working and the results of the medical assessment are immediately admitting the suspect to a government or non-government rehabilitation institution, however, this is done by the investigator not in accordance with existing regulations and the investigator realizes that there is no protection and legal certainty for the investigator, but on the other hand the investigator provides direct legal protection for drug users and the actions taken by the Police investigators in this second step were very effective and efficient.

Why put more emphasis on the rehabilitation process? This is necessary in order to operationalize Article 54 of Law no. 35 of 2009 concerning Narcotics in which narcotics addicts are required to undergo medical rehabilitation and social rehabilitation. Then when this legal process is running, the verdict that will apply in accordance with the mandate of the law is the rehabilitation verdict. The problem is, why do you have to go through a legal process if in the end it is rehabilitation, how much is the cost for something like this? The costs incurred to carry out rehabilitation are money from the State, if at every stage in the legal process to take a rehabilitation sentence, you can imagine how much it costs for one addict if the process of investigation, prosecution, trial and punishment is carried out and ultimately rehabilitation too, this is very unlikely. very effective so that the value of legal efficiency is lost, even though on the other hand this process is to avoid the value of legal uncertainty, however this should be resolved with a future criminal law perspective as contained in the Draft Criminal Procedure Code, namely the role of preliminary examining judges at the investigation stage and/or prosecution of a criminal act.

Rehabilitation of addicts is also a form of reducing the over capacity of prisons or detention centers which tends to trigger new problems that are no less significant. Many cases have occurred in prisons, including riots, crimes in prisons, and other serious problems. So far, drug cases are the biggest contributor to prisons or remand centers in Indonesia. Seeing this situation, it takes extra hard work from various parties so that this problem of overcapacity can be overcome or at least overcome.

2. Literature review

The paradigm that the writer adapts from Sellin and Wolfgang, the victim of narcotics abuse is “mutual victimization”, where the perpetrator who becomes the victim is the perpetrator himself, as well as prostitution and adultery. Based on the opinions of legal experts regarding the typology of victims from a victimological perspective, it can be stated that a drug addict is a “self-victimizing victim”, that is, someone who becomes a victim because of his own actions. However, there are also those who classify it as “victimless crime” because these crimes usually do not target victims, all parties are involved.

In addition, it can also be categorized as “crime without victim”. The definition of a victimless crime means that this crime does not cause victims at all but the perpetrator as the victim. Meanwhile, in the category of crime, an evil act must cause a victim and the victim is someone else. This means that if you are the only victim yourself, it cannot be said to be a crime. In terms of the position of victims of Narcotics abuse in the judicial system, their position is still underestimated, even though they can be categorized as “sick people” who are the joint responsibility of the government, the community component with the rehabilitation program.

Legal Protection for Drug Abuse Victims is based on Law No. 35 of 2009 concerning Narcotics, when viewed from “*strafsoot*” (type of sanction) is included in the “double track system”, which provides criminal sanctions and sanctions for action. Criminal sanctions are in the form of death penalty, imprisonment, imprisonment, fines and sanctions for action, in the form of rehabilitation. In Law Number 35 of 2009 concerning Narcotics, it is stated in Article 54, that; Narcotics addicts and victims of Narcotics abuse are required to undergo medical rehabilitation and social rehabilitation. Addicts and victims of Narcotics abusers must be rehabilitated, Judges can decide and assign a Narcotics addict to undergo treatment and/or treatment, the period of undergoing treatment and/or treatment for Narcotics addicts, is counted as a period of serving a sentence.

Regulations regarding Rehabilitation are regulated in Law No. 35 of 2009 Article 54 - Article 59. With the regulation regarding Rehabilitation in the Narcotics Law, the victims of narcotics abuse are categorized as “sick people” who are entitled to receive treatment (in this case through Rehabilitation). In Article 127 paragraph 3 concerning penalties for Narcotics Abusers, the regulations stipulate that:

In the case of an abuser as referred to in paragraph 1, who can be proven or proven to be a Victim of Narcotics abuse, then the abuser is obliged to undergo medical rehabilitation and social rehabilitation.

Article 127 in Law No. 35 of 2009 applies 2 (two) sanctions, namely imprisonment and action sanctions. On the one hand, Narcotics abusers are subject to criminal sanctions, but if proven to be a Victim of Narcotics abuse, they are entitled to receive treatment in the form of medical rehabilitation and social rehabilitation. The purpose of law itself is in conventional view¹² is in order to realize justice (“*rechtsgerechtigheid*”), benefit (“*rechtsutiliteit*”) and legal certainty (“*rechtszekerheid*”). Thus, the arguments against the purpose of this law are as follows:

*The law protects a person's interests by allocating a power to him to act in his interests. This allocation of power is carried out in a measured manner, in a sense, its breadth and depth are determined. Such power is called right. But not every power in society can be called a right, but only certain powers which become the reason for the attachment of that right to someone.*¹³

Legal protection is an act or an effort to protect people from arbitrary actions by a ruler who is not in accordance with the rule of law, to create order and tranquility so as to enable humans to enjoy their dignity as humans.¹⁴ So it can be said that what is called legal protection is:¹⁵

Activities to protect individuals by harmonizing the relationship of values or rules that are incarnated in attitudes and actions in creating order in the interaction of life among humans.

The character of “preventive” legal protection as stipulated in Law No. 35 of 2009 concerning Narcotics, has the same meaning as criminal law which is “*ultimum remedium*”.¹⁶

¹² Achmad Ali, *Menguak Tabir Hukum (Suatu Kajian Filosofis dan Sosiologis)*, PT. Gunung Agung Tbk: Jakarta, 2002, hlm: 85.

¹³ Satjipto Rahardjo, *Ilmu hukum*, Citra Aditya Bakti : Bandung, Cetakan ke - V 2000, hlm: 53.

¹⁴ Setiono, *Rule of Law (Supremasi Hukum)*, Magister Ilmu Hukum Program Pascasarjana Universitas Sebelas Maret : Surakarta, 2004, hlm: 3.

¹⁵ Muchsin, *Perlindungan dan Kepastian Hukum bagi Investor di Indonesia*, Magister Ilmu Hukum Program Pascasarjana Universitas Sebelas Maret : Surakarta, 2003, hlm: 14-15.

¹⁶ In Jeremy Bentham's view, Criminal Law should not be imposed / used if it is *groundless, needless, unprofitable or inefficacious*. Likewise, Packer once reminded that the use of criminal sanctions indiscriminately and coercively will cause said criminal means to become a “prime threatener”. Due to the limitations of penalties, two policies should be used in the prevention of crime (criminal politics), namely

Suffering of a special nature in criminal law is very different from suffering in civil law, because in criminal law there is an institution of deprivation of liberty or an institution for limiting freedom that can be imposed by judges against people who have violated the norms regulated in the law. In criminal law, even in it, people also recognize the institution of deprivation of life in the form of the death penalty, which in fact is not known to people in other laws generally.

With regard to special sufferings in the form of (criminal) penalties, criminal law has a separate place among other laws, which according to criminal law scholars should be seen as an “ultimum remedium” or as a last resort to improve human behavior. Then, in its application, criminal law must be accompanied by the strictest possible restrictions. The term “ultimum remedium” is used by the Dutch minister of justice to answer a question by a member of parliament named McKay in the context of the discussion of the Criminal Code, which said that he had failed to find a legal basis regarding the need for a sentence for someone who had committed an offense.

Regarding the statement from McKay, the Dutch Minister of Justice Modderman said, among others, the following:¹⁷

“I believe that this principle is not only perpetuated between the lines, but is expressed repeatedly, perhaps in a different form. The principle is this: that all may be punished that which is in the first place unjust. This is a *conditio sine qua non*. In the second place, there is an additional demand that it be an unjust one, which experience has taught that it cannot be properly controlled by any other means. The punishment remains an ultimate remedy. Of course, there are objections to any criminal threat. Any sensible person can understand this without explanation. That does not mean that one should omit punishment, but that one must always weigh against each other the advantages and disadvantages of the punishment, and agree that the rigid does not become a cure worse than the disease ...”

Related to rehabilitation in the provisions of Law no. 35 of 2009 concerning narcotics, in terms of the Pancasila philosophy, the principle of “*ultimum remedium*” contains moral messages and humanity is not merely law as a means or tool but law as a value. In addition to this, the legal function of “*ultimum remedium*” also contains benefits, not necessarily being interpreted as repressive (“*corrective justice*”) / “*deterren*”, but also “*rehabilitative*” and “*responsive*”.¹⁸ The implied meaning in rehabilitation based on Pancasila and the Preamble to the 1945 Constitution is that if a case can be resolved through other channels (kinship, negotiation, mediation, civil or administrative law), that route should be followed first. In this case, the nature of criminal sanctions as the ultimate weapon or “*ultimum remedium*” when compared to civil or administrative sanctions has harsh sanctions. One thing that distinguishes criminal law from other laws, both public law and private law, is the matter of sanctions. Criminal sanctions can be in the form of imprisonment and imprisonment which makes the convict must be isolated and separated from his family and society. The cruelest penalty is the death penalty to separate the convict from his life.

When talking about the value of “*efficiency*” and “*rationality*” in law, it cannot be separated from the thought of law as a value. In the development of scientific thought and legal theory, a framework of thought called Integrative Legal Theory, was developed, which was put

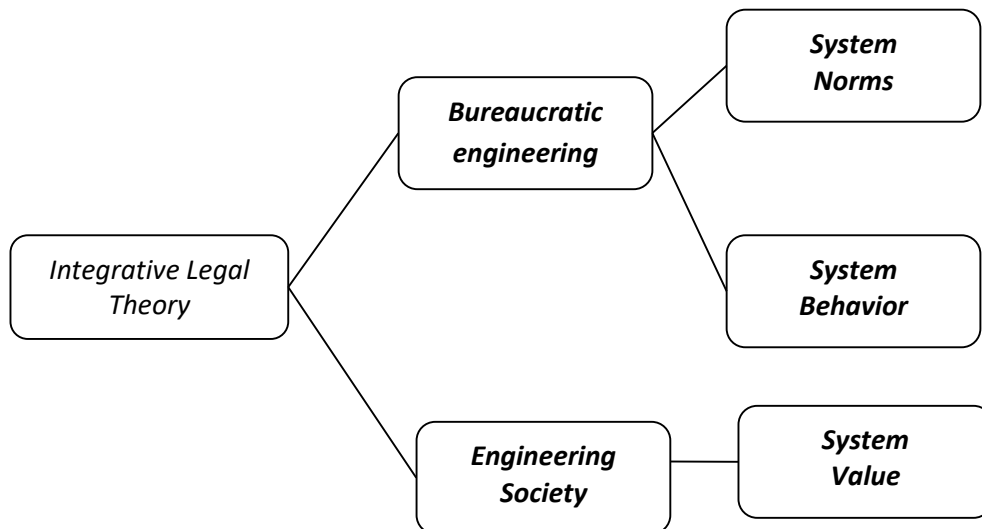
penalties using criminal sanctions (including criminal law politics) and non-penal policies (including using administrative sanctions, civil sanctions and others).

¹⁷ PAF Lamintang, *Dasar – Dasar Hukum Pidana Indonesia*, PT. Citra Aditya Bakti: Bandung, 2011, hlm: 17.

¹⁸ Romli Atmasasmita, *Moral Pancasila, Hukum & Kekuasaan*, PT. Refika Aditama: Bandung, 2020, hlm: 21.

forward by Romli Atmasasmita¹⁹ that law can be interpreted as *a system of norms* and law as “*a system of behavior*”, and law as “*a value system*”.

The following is a chart of the integrative law theory proposed by Romli Atmasasmita;



What was stated by Romli Atmasasmita in the context of the life of the Indonesian people must be seen as a unit of thought that is suitable in facing and anticipating the worst possibility of the current century of globalization by not breaking away from the traditional nature of Indonesian society which still prioritizes moral values and social values. The three legal natures are outlined in one container called tripartite character of the Indonesian legal theory of Social and Bureaucratic Engineering (BSE).²⁰

Romli Atmasasmita’s way of thinking, which adds a value system to a rule of law and the formation of laws that are made must be adapted to the development of the dynamics of society and pay attention to aspects of justice²¹ and can provide protection to create legal order, this is where law functions as a rule. This is in accordance with the foundation of Roscoe Pound’s²² sociological journalism theory which emphasizes that law is a tool for building society. “*Law as a tool of social engineering*”, in line with Roscoe Pound’s thinking, Eugen Erlich proposes a conception of a living law with a legal meaning that is not found in formal legal materials but in society.²³

Mochtar Kusumaatmadja proposed a conception of law as a means of reforming society in development based on his following thoughts:²⁴

¹⁹ Romli Atmasasmita, *Teori Hukum Integratif: Rekonstruksi Terhadap Teori Hukum Pembangunan dan Teori Hukum Progresif*, Genta Publishing : Yogyakarta, 2012, hlm. 96.

²⁰ Romli Atmasasmita, *Teori Hukum Integratif: Rekonstruksi Terhadap Teori Hukum Pembangunan dan Teori Hukum Progresif*. Ibid, hlm: 96.

²¹ John Rawls, *Teori Keadilan: Dasar-Dasar Filsafat Politik Hukum Mewujudkan Kesejahteraan Sosial Dalam Negara*. Terjemahan: Uzair Fauzan dan Heru Prasetyo. Yogyakarta: Pustaka Pelajar, 2001, hlm. 3.

²² Yesmil Anwar & Adang, *Pengantar Sosiologi Hukum*, PT. Gramedia Widiasarana.

²³ Lili Rasjidi dan I. B. Wyasa Putra, *Hukum Sebagai Suatu Sistem*, Mandar Maju: Bandung, 2003, hlm. 79.

²⁴ Mochtar Kusumaatmadja, *Fungsi Hukum dan Perkembangan Hukum Dalam Pembangunan Nasional*. Bandung: Bina Cipta, 1976, hlm. 9.

(1) That there is regularity or order in the development or renewal effort which is something that is wanted or even deemed (absolutely) necessary;

(2) Whereas law in the sense of a rule or legal regulation can indeed function as a tool (regulator) or a means of development in the sense of channeling human activities in the direction desired by development or renewal.

The meaning of law as a manifestation of political policy is regulation, or what is often referred to as positive law (*currently applicable law*). Therefore, the regulation is strongly influenced by the ruler's view of the law. According to Mochtar Kusumaatmadja, legal reforms are:

*Legal reform efforts should begin with the conception that law is a means of reforming society. Law must be a tool for reform in society (social engineering), which means that the law can create conditions that lead people to a harmonious state in improving their lives.*²⁵

In line with Mochtar Kusumaatmadja's opinion above, Sunaryati Hartono²⁶ argues that the meaning of legal development will include the following: Making things better (making things better); change for the better; doing something that didn't exist before; or negating something that was in the old system, because it is not needed and is not compatible with the new system.

As the mandate of the 1945 Constitution that the administration of public welfare, the formation of various laws and regulations is very important. To reform Indonesian criminal law in order to achieve the goal of a country, namely a country that is prosperous as well as just and prosperous, it is necessary to have a conducive atmosphere in all aspects including legal aspects. One of the policies to provide social protection ("social defense policy") is the prevention and control of actual or potential crimes or crimes. All efforts to prevent and overcome this crime / crime are included in the area of criminal policy ("criminal policy").²⁷

3. Findings and discussion

Rehabilitation is a form of punishment for addicts or drug users, for the norm itself, as stated in Article 103 of Law No. 35 of 2009 concerning Narcotics, has no problem with the interpretation of norms or legal interpretations, because it is clear that in every narcotics case, law enforcers and decision-makers are required to comply with the same rules, namely Law No. 35 of 2009 on Narcotics. This law is a "special" regulation that deviates from the criminal system that has been in effect in Indonesia so far. It is said to be "special" because this law adheres to a "*double track system*",²⁸ the punishment of self-abuse for abusers with an obligation for all judicial institutions in Indonesia to punish rehabilitation.

²⁵ Mochtar Kusumaatmadja, *Hukum, Masyarakat dan Pembinaan Hukum Nasional*, Bina Cipta: Bandung, 2006, hlm. 8-9.

²⁶ Sunaryati Hartono, *Hukum Ekonomi Pembagunan Indonesia*, BPHN: Jakarta, 1999.

²⁷ To accommodate the needs and aspirations of its people, the Indonesian state has determined a social policy in the form of a policy to realize social welfare (social welfare policy) and a policy to provide social protection (social defense policy). See, Barda Nawawi Arief. *Masalah Penegakan... Op. cit.*, hlm. 73.

²⁸ In this case, there is a two-track system regarding sanctions in criminal law. Although the existing literature has never found an explicit affirmation of the basic idea of a double track system, from the background of its emergence, it can be concluded that the basic idea of the system is the equality of criminal sanctions and sanctions for action. This idea of equality can be traced through developments in the criminal law sanction system from the classical to the modern and the neo-classical. Likewise with rehabilitation and prevention (as the goal of the mother from the type of action sanction / treatment). Although this method has special features in terms of the perpetrator's resocialization process so that it is expected to be able to

The legality of the arrangement for the rehabilitation of victims of drug abuse must first be referred to the rules of a general nature (*“lex specialis”*). This means that drug abuse is a criminal act, thus it must be seen in general regulations, namely the Criminal Code (KUHP) and the Criminal Procedure Code (KUHAP). In these two regulations the rehabilitation arrangement is contained in Article 1 number 23 KUHAP and Article 97 KUHAP.

KUHAP and Law No. 35 of 2009 on Narcotics both require drug addicts to be rehabilitated rather than imprisoned and treated as criminals. It is clear and normal that the implementation of rehabilitation according to the Criminal Procedure Code does not at all pertain to the results of the actions of a criminal offender, but rehabilitation is nothing but a means (media) and an effort to restore the good name, position and dignity of a person who has undergone enforcement action law in the form of arrest, detention, prosecution or examination in court proceedings.²⁹

As a way out in terms of rehabilitation of victims of drug abuse is to make a special regulation without a legal process, so when the integrated legal and medical assessment team (TAT) states that the person concerned is a drug addict, the rehabilitation process can be carried out without a continuous legal process, in order to cure the health condition of addicts, this is an effective and efficient step to reduce the imposition of state costs to overcome addicts. Efforts to enact laws that live in society (the living law) are indeed a development of the principle that the current criminal law wants to shift from “retributive justice” to “ultimum remedium” and “restorative” justice. The shift from “retributive justice” to “ultimum remedium” and “restorative” justice, so that the principle of justice and expediency becomes one of the main objectives other than creating a humanist criminal law and recognizing human rights. This is also a development of criminal law theory and criminology in the world which aims to provide nuances of “peace keeping” or the creation of a sense of peace in society by reducing things that are inappropriate or degrading human dignity.

So with the application of the principle of “ultimum remedium”, in practice it is hoped that no one will be punished twice for his actions as has been the case, namely criminal punishment and rehabilitation, especially for minor offenses or mistakes, namely as a drug abuser. This effort aims to create a balance in the life of Indonesian society which is still thick based on the principles of deliberation and Pancasila.

The ideas and ideas above to be able to realize special rules regarding drug rehabilitation are the implementation of a criminal law policy in essence an attempt to realize criminal legislation to suit the circumstances at a certain time (*“ius constitutum”*) and the future (*“ius constituendum”*). The logical consequence is that criminal law policy is identical to “penal reform” in a narrow sense. Because, as a system, criminal law consists of culture (*“cultural”*), structure (*“structural”*), and substance (*“substantive”*).³⁰

Assessed from the perspective of legal politics, criminal law politics seeks to make and formulate good criminal legislation. According to Marc Ancel, a *“penal policy”* is both a science

restore a person’s social and moral quality so that he can reintegrate into society, it is proven to be less effective in repairing a criminal because it is considered too spoiling him. Precisely as said by C.S. Lewis, that the rehabilitation approach through treatment has invited individual tyranny and denial of human rights. Look inside: Sholehuddin, *Sistem Sanksi Dalam Hukum Pidana Ide Dasar Double Track System dan Implementasinya*, Raja Grafindo Persada: Jakarta, 2003, hlm: 50.

²⁹ J. C. T. Simorangkir (et al.), *Kamus Hukum*, Aksara Baru: Jakarta, 1980, hlm: 147, bahwa “rehabilitasi adalah pemulihan, pengembalian kepada keadaan semula”.

³⁰ Regarding the notion of a legal system consisting of cultural, structural and substantive, it can be seen in the writings of Lawrence M. Friedman in *Legal culture and social development*, p. 1002-1010 and *Law and society: An introduction*, New Jersey: Prentice Hall Inc, 1977, p. 6-7.

and an art that aims to enable better formulated positive legal rules. Positive legal regulations are here defined as laws and regulations on criminal law. Therefore, the term “*penal policy*” according to March Ancel is the same as the term “policy or criminal law politics”. The implementation in terms of rehabilitation for drug addicts / abusers, that the criminal law should not be imposed / used if it is “*groundless*”, “*needless*”, “*unprofitable or inefficacious*”.³¹ Likewise Herbert L. Packer once reminded that the use of criminal sanctions indiscriminately / generalizing and being used coercively (“*coercively*”) will cause the criminal means to become a “*prime threatener*”.

Due to the limitations of “*penal*”, two policies should be used in overcoming crime (*criminal politics*), namely the “*penal*” policy using criminal sanctions (including the field of criminal law politics) and “*non-penal*” policies (including using administrative sanctions, civil sanctions and others). The two policies are carried out through an integrated approach (“*integrated approach*”) between politics, crime and society and integration (“*integrity*”) between efforts to combat crime with penal and “*non-penal*” means.

4. Conclusion

One part of this social policy is the law enforcement policy, including the legislative policy. Meanwhile, the “*criminal policy*” itself is part of the law enforcement policy. So, in essence, the policy used to tackle drug crimes is a policy of using criminal law (a “*penal policy*”). This rehabilitation policy is very thick with the nuances of “*decriminalizing*” drug abusers. The form of legal protection for drug abusers or addicts is very clear, namely following the legal rules in Law No. 35 of 2009 concerning Narcotics, namely with rehabilitation and then reinforced back through the Supreme Court Circular (SEMA) No. 4 of 2010 and renewed by the Supreme Court Circular (SEMA) No. 03 of 2011, that drug addicts must be placed in a rehabilitation institution while waiting for the trial process and when the judge ruled that these addicts also receive protection by being rehabilitated without imprisonment or criminal punishment.

The criminal law must be placed in the position of “*ultimum remedium*”, that the use of punishment and imprisonment must be ruled out or as a last resort. The future rehabilitation institute is at least equivalent to Singapore, namely providing rehabilitation without imprisonment. That is, the addict is completely recovered, both mentally and physically, from drug addiction. Rehabilitation institutions must be able to provide justice both legally and socially. The concept of “*ultimum remedium*” is equivalent to the concept of “*Restorative Justice*”, in both psychological and physical recovery from victims of drug abuse.

Acknowledgements

This research did not receive any specific grant from funding agencies in the public commercial, or not-for-profit sectors.

The author declares no competing interests.

³¹ Barda Nawawi Arief, *Bunga Rampai Kebijakan Pidana*, PT. Citra Aditya Bakti, Bandung, 1996, hlm. 2.

References

- Alam, A. S. (2010). *Pengantar Kriminologi* [Introduction to criminology]. Makassar: Refleksi Books.
- Ali, A. (2005) *Keterpurukan Hukum di Indonesia: Penyebab dan Solusinya* [Downsides of law in Indonesia: Causes and solutions]. Cetakan Kedua, Bogor: Ghalia Indonesia.
- Ancel, M. (1965). *Social defense: A modern approach to criminal problems*. London: Rotledge & Kegal Paul.
- Andersson, et al. (2014). *Alcohol and drug use among European 17–18 year old students*. Data from the ESPAD Project.
- Anwar, Y., & Adang (2008). *Pengantar Sosiologi Hukum* [Introduction to sociology of law]. Jakarta: PT. Gramedia Widiasarana Indonesia.
- Arief Mansur, D. M., & Gultom, E. (2007). *Urgensi Perlindungan Korban Kejahatan* [The urgency for the protection of victims of crime]. Jakarta: PT. Raja Grafindo Persada.
- Ata Ujan, A. (2009). *Filsafat Hukum, Membangun Hukum Membela Hukum* [Philosophy of law, Building the law defending the law]. Yogyakarta: Kanisius.
- Atmasasmita, R. (2012). *Teori Hukum Integratif: Rekonstruksi Terhadap Hukum Pembangunan dan Teori Hukum Progresif* [Integrative legal theory: Reconstruction of development law and progressive legal theory]. Yogyakarta: Genta Publishing.
- BNN (2014). *Laporan Akhir Survei Nasional Perkembangan Penyalahgunaan Narkoba Tahun Anggaran 2014* [Final Report of the 2014 National Survey on the Development of Drug Abusers].
- Chazawi, A. (2002). *Pelajaran Hukum Pidana Bagian I (Stelsel Tindak Pidana, Teori-Teori Pidana, dan Batas Berlakunya Hukum Pidana)* [Criminal law lessons Part I (Criminal action system, criminal theory, and the limits of applicability of criminal law)]. Jakarta: RajaGrafindo Persada.
- Cooter, R., & Ullen, Th. (2008). *Law and economic*. 5th edition. London: Pearson Addison Wesley.
- Fuller et al. (2007). *National report 2007*. UK.
- Hamzah, A. (1991). *Politik Hukum Pidana* [Criminal law politics]. Jakarta: RajaGrafindo Persada.
- Kaplow, L., & Shavell, S. (1999). *Economic analysis of law*. Cambridge: National Bureau of Economic Research.
- Kirchheimer, O. (1961). *Political justice: The use of legal procedure for political ends*. Princeton University Press.
- Kusumaatmadja, M. (1976). *Fungsi Hukum dan Perkembangan Hukum Dalam Pembangunan Nasional* [Legal functions and legal development in national development]. Bandung: Bina Cipta.
- Mardani (2008). *Penyalahgunaan Narkoba (dalam Perspektif Hukum Islam dan Hukum Pidana Nasional)* [Drug abuse (in the perspective of islamic law and national criminal law)]. Jakarta: PT. Raja Grafindo Persada.
- Martono, L. H., & Joewana, S. (2005). *Modul Latihan Pemulihan Pecandu Narkoba Berbasis Masyarakat Untuk Pembimbing Dan Pecandu Narkoba* [Community-based drug addict restoration exercise module for advisors and drug addicts]. Jakarta: Balai Pustaka.
- Nawawi Arief, B. (2010). *Bunga Rampai Kebijakan Hukum Pidana* [Interest of criminal law policies]. PT. Citra Aditya Bakti: Bandung.
- (2007). *Pedoman Pencegahan Penyalahgunaan Narkoba Bagi Pemuda (Stop Narkoba Atau Mati Sia – Si)* [Guidelines for the prevention of drug abuse for youth (Stop Drugs or Die - Si)]. Jakarta: Badan Narkotika Nasional Republik Indonesia.

- Poernomo, B. (1982). *Hukum Pidana Kumpulan karangan Ilmiah* [Criminal law collection of scientific essays]. Bina Aksara: Jakarta.
- Rawls, J. (2001). *Teori Keadilan: Dasar – Dasar Filsafat Politik Hukum Mewujudkan Kesejahteraan Sosial Dalam Negara* [Theory of Justice: Basis of legal political philosophy of creating social welfare in the State]. Terjemahan: Uzair Fauzan dan Heru Prasetyo. Yogyakarta: Pustaka Pelajar.
- Samekto, A. (2005). *Studi Hukum Kritis – Kritis Terhadap Hukum Modern* [Critical legal studies - Critics to modern law]. Bandung: Citra Aditya Bakti.
- Susanto, A. F. (2011). *Penelitian Hukum Transformatif-Partisipatoris, Fondasi Penelitian Kolaboratif dan Aplikasi Mix Method Dalam Penelitian Hukum* [Transformative-participatory legal research, collaborative research foundations and mix method applications in legal research]. Bandung: LoGoZ Publishing.





The Relation of Gender and Feminism in Islamic Jurisprudence

Fokky Fuad Wasitaatmadja

Al Azhar Indonesia University, Faculty of Law, South Jakarta, INDONESIA

Susianto

Merdeka Malang University, Faculty of Law, East Java, INDONESIA

Suartini

Al Azhar Indonesia University, Faculty of Law, South Jakarta, INDONESIA

Received: 21 August 2020 ▪ Accepted: 1 October 2020 ▪ Published Online: 10 October 2020

Abstract

Research on the relation of gender in Islamic Jurisprudence field always sparks the interest to study because of several things: the idea of power relations which has been touted as a thought that subordinates the role of women in their dynamic movements. Second, the role of the text of the Holy Qur'an in seeing and explaining gender relations in Islam, specifically when influencing or influenced by local culture. The main research question to be revealed is: how does the concept developed in Islamic Jurisprudence schools interpret the relations of men and women? The theoretical framework developed in this study is based on the thought which built in the Islamic Jurisprudence Schools. Sachiko Murata sees that there is a relationship between cultural understanding and the understanding of God in the relationship of men and women. The research method applied in this research is prescriptive normative legal method with conceptual approach. The conclusion in this study states that in the narrative approach to the Holy Qur'an, there is no significant power relation that degrades, dominates, or subordinates the role of women in Islam. Spatial structure of culture becomes a matter of concern when there is submission in the role of women in their socio-cultural environment. The narrative text of the Holy Qur'an explains the high appreciation of domestic and public roles for women. Feminism itself can be traced in various narrative texts in the Holy Qur'an that place women in a place of honor.

Keywords: feminism, gender, Islamic Jurisprudence.

1. Introduction

The idea of feminism in epistemological discourse is an interesting topic to explore. Research on the role of women in the sphere of socio-culture and religion becomes interesting to discuss due to several things: First, that in human civilization, there are power relation in relations to the role of women. Indeed, the religious messages in the texts of the Holy Book provide a space of togetherness, as well as equality for anyone regardless of one's gender. On the other hand, appears power relation that is a relationship between certain social groups, where one group dominates another group. The group that dominates can force its will, even oppressing and not giving room for freedom of expression in any existing social arena.

Second, that the relationship between men and women is a relationship between humans with all the values of civilization in it. The narrative text of the Holy Book will be thought according to what humans think about themselves and their environment, as well as their history. The narrative of the Holy Book, which seen as God's narration, is translated into civilized human behavior. In the structure of culture, there will be various meanings to the narratives of God's Holy Book in accordance with the cultural environment that shapes the natural world of thinking. In relation to feminism, obviously it will be seen as rules in the relationship between men and women in the religious and cultural domains.

Based on those two issues, then the research question going to be explored here is how does the concept of Islamic Jurisprudence see the relation between men and women? The objective of this study is to find how the construction of relation between men and women in the approach of Islamic Jurisprudence School.

2. Methods

The research method applied in in this study is doctrinal normative legal research, or the normative prescriptive. A research that use doctrinal normative like this was conducted by analyzing several legal sources, both in the narrative of the Holy Qur'an as the supreme source of law in Islamic Jurisprudence, various notes and sources of feminism thought in Islamic Jurisprudence as the main research source. Research by conducting a study on the understanding of Feminism in Islamic Jurisprudence using conceptual approach. The purpose of this method is to see how the concept of philosophical thought that is built in the Islamic Jurisprudence School of the originality of feminine thought contained in the school.

Theoretical framework that employed in this research was using the analysis of Feminist Legal Theory. It is a theory developed by Sachiko Murata by analyzing the narrative text of the Holy Qur'an that contains various supermen ideas in the context of relationship between men and women. Not only in the relation between humans, but also in theological relation that covers the form of feminism. There is a match to the understanding on the concept of yin-yang which understood in the culture of Chinese society on the relation of gender in Islam. In a more practical level, we can think further, the relation of gender in Islamic Jurisprudence which influenced by existing idea about gender in the idea of culture, and vice versa as taken from the core of Islam itself.

3. Results and discussion

Feminism implies an awareness to the existence of oppression or subordination of women due to gender differences, and this is followed by an effort to eliminate oppression and subordination as well as an effort to support gender equality between men and women. The relationship between men and women should more emphasize on their role in life. Not based on physical perception, but looking at the social roles of men and women (Nurmila, 2011: 34).

The patriarchal perception binds so strongly in relations between men and women. The role of men as leaders for women gives the meaning of a process of submission to oppression in certain areas. Power relations place a person in a certain position in a social relationship, as well as in the interactions created in that relationship (Susanto, 2019: 85). The relations between leader and subordinate show a strong hierarchical relationship. Leaders can control, regulate, and dominate the interactions with his/her subordinates. Subordinates will follow the leader's will because of the dominance of power over him. Apparently, what created in such interaction is not an equal relation, but rather hierarchical and dominant. In the world of patriarchy, there is a predominance of men that controls women groups.

In different interpretation, power relations can also be interpreted positively. Foucault sees that power relations become a system of control over behavior in an effort to create an order. Control over behavior can be carried out towards everyone by anyone. Power relations should not be interpreted as an effort to control through dictatorship, but rather be carried out through various implemented regulations and norms (Priyanto, 2017: 181). Control over humans, even though through norms will display submission even if it is disguised. It does not subjugate through the process of dictatorship but through various norms of laws which constructed according to the wishes of the patriarch.

The Holy Book tries to explain feminine-masculine relations in a balance view. Both share a balanced role in their socio-cultural role. Allah states that anyone who does good deeds both men and women in a state of faith, then Allah will bestow the reward better than what they have done (Qs. An-Nahl [16]: 97). In another verse, Allah affirms that Allah does not dissipate the good deeds done by both men and women, some of you are descendants of others (Qs. Ali Imraan [3]: 195). From the two narratives from the text of the Holy Book, it is evident that good deeds done by both men and women will be judged the same before Allah. Therein lies Allah's justice, He accepts good deeds done by both men and women. God looks at the good deeds done by human without discriminating the gender. The position of women is the same as men in carrying out their social activities.

There is a religious space for humans in the idea of feminism. It is not secularly separated from theological spiritualism. In essence, feminism is ontologically always placed on the idea of obedience to God. Therefore, the use of headscarves and all clothing that covers women's body, which often objected by sharp criticism, is not a form of anti-feminism. In this situation we can see the role of women in a position to contribute in the making of changes in the mindset of society. Headscarves and clothing are not interpreted as a form of exploitation of women, but rather are understood as a form of choice for women to follow the spirit of spiritualism. Women will be seen in the process of socio-cultural movements and not in what they wear. Women in dynamic sociocultural environments and arenas demand an active role. The freedom to decide whether to wear or not to wear hijab is more a choice of free will, and should not be interpreted as a form of oppression to women's position.

In the context of European thinking, the subordinating process on women's role in social arena makes women lost their competence rights. Patriarchy put a role of tyranny and total control on women rights. It fully recognizes that the relation is constructed on masculine paradigm whose character is conquering. Some legal norms were created based on men's volition, such as man's position as leader in various social, cultural, and religious levels. The law is constructed according to the patriarchal will, because the world is created as he wishes.

The process of cultural reinterpretation towards the meanings of God's scriptures will turn differently from the implementation. Issues and problems relating the role of women will be deeply affected by the local conditions. The problem of polygamy in Indonesia, the issue of political role of women in Afghanistan, and many other locality problems raise quite attention in gender study. In Indonesia, the issue of polygamy is a form of Indonesian men's efforts to show off their hegemony and masculinity in his social environment (Ghosh, 2009: 3). On the other side, the efforts to support women rights in educational sector in Indonesia are also high. Higher education becomes the medium in educating Indonesian Muslim women. The establishment of Pusat Studi Wanita (PSW)/ Women Studies Center in many Islamic universities and colleges shows the great attention given by higher education institution towards women's role (Kull, 2009: 30).

In the relation between men and women, it also needs to see the historiographical context socio-cultural condition in pre-Islamic era. The Holy Qur'an explains as well as informs how the real interaction between men and women is. The history of civilization in pre-Islamic period showed a picture of domination by men's world towards women's rights. During the

jahiliyah period in Arab, a father would kill a daughter born in his family. In Europe, the condition of women was also concerning, where a husband could sell his wife to other man. A man also could give his wife for some time to other man in exchange of an amount of wages (Hanapi, 2015: 15). So dreadful the condition of women in the dark ages, that Allah tells in the Qur'an how angry and furious a father could be upon hearing his wife giving birth a daughter (Qs. An-Nahl [16]: 58).

The domination subjugation and submission historically shows a patriarchal force that tends to characterize oppression towards women's rights in their social sphere. The narrative text of the Qur'an revealed by God has a mission to unravel the conditions of cultural oppression to women that were happening at that time. Relationships of men in a marriage are not presented in the form of hegemony and submission by a group of human to other human. It is presented in a love, even protection. God explained that a man becomes clothes for his wife and vice versa (Qs. Al-Baqarah [2]: 187). Clothes are symbolic form for the obligation to cover each other's weakness. The husband will cover his wife's weakness, and vice versa. The presence of God's narrative is to show how to act towards their partners. The process of domination of submission, even structural oppression, is changed into the concept of mutual support and protection. Clothes have the ability to protect, so each party will carry out the process of protection to his/her partner. There is a will to protect each other between humans.

The process of protecting is also given to women, so she expands the meaning of protective clothes by applying it to her wider social group. Women can protect their social environment through their active roles and movements. The process of becoming a protector for themselves and their environment has been carried out by many women since the arrival of the Holy Qur'an narrative. The presence of Admiral Malahati in the Sultanate of Aceh, the Leadership of Tjut Nya' Dien in Aceh War, Dewi Sartika, Rasuna Said, Nyi Ageng Serang, and many others are actually forms of Muslim women taking an active role as clothes in the process of protecting themselves and their social environment. Before the law, they are equal legal subject to men, especially in marriage institutions (Irawaty & Darajat, 2019: 61).

Awareness on the importance of self-protection, including their social environment, women basically become an entity who carries out her social role. Education to women is an initial milestone in how women interpret God's will in socio-religious relations. Women as figures who able to utilize the ability of their minds to position themselves as an agent of social change. Thinking, logic, and knowledge become weapons for her, with which she becomes perfect. Awareness to maximizing their logic to explain the ideas of the Holy Qur'an for human, especially women, must be directed to foster collective awareness (Bashori, 2020:65).

An awareness is being expected to be a driving force for reducing the understanding of domination, which is far from the teaching in Qur'an itself. The process of domination by men in social arenas seems to be more shaped by cultural ideas. Domination might be born from cultural structure space, while the religious teaching teaches about equal relationship based on deeds. It is one strategic role that can be played by both men and women in various social arenas. Cultural meanings which interpret various religious texts need to be understood. Culture essentially places a person in order and discipline. Behavioral patterns are regulated and determined by their normative standards for each activity carried out by a group, family, clan, nation, or class (Dewey, 1998: 15).

Culture will control every social group in an arena, where each group is involved in various relationships. Order in relationships is controlled, arranged to create an order and social order. The patriarchal cultural paradigm places men as controllers of this social order. He manages to control, subdue until he tries to manipulate. Then culture is not a static and empty space. It will be influenced by various values that enter the social arena so that culture can slowly change. Culture formed by a dynamic human mind concept is also able to transform itself to accept all changes. In this context, Islamic feminism movement emerged as an effort to change some

cultural settings which considered unfair. Re-actualization of the teachings contained in the Holy Qur'an also helped to sow renewal in this cultural paradigm. Justice and freedom of action are carried out to try to put a fairer idea on the position of women who sometimes marginalized.

A freedom of action for women is a manifestation to the meaning of God's justice for humans. The narrative of Holy Qur'an shows a principle of justice which must be upheld by every human being. Justice is a necessity which is an objective law, and does not depend on personal desires and cannot be changed (Madjid, 2010: 183). Religious dimension opens the discourse of understanding on the creation of a transformation of changes value in the culture of a group of people. Cultural understanding in the past once considered women unfit for higher education, but now millions of women in Indonesia and elsewhere are starting to be able to enjoy higher education. In the past, the role of women was subordinated to domestic roles, whereas now the public sphere has accommodated many roles for women in it. This is a transformation of values that continues to run, and provides a space of change for the meaning of women in law.

Basically, this transformation of cultural values is not a form of efforts to show a protest to God (Djuned, 2011: 166). Yet, it is essentially a form of complaint towards cultural structure that doesn't give enough room to what has been instructed by God towards women. The narrative of the Holy Qur'an doesn't subjugate or dominate women, even respect women and any other human being in general according to their capacity (Muhibbin, 2011: 110).

Allah is the only entity of God Almighty (tauhid), and those besides Him, namely the living beings, are created in pair. Other than Him, all of the realities are created in pair, such as the creation of morning and afternoon, the moon and the sun, land and sea, joy and sadness, as well as rational reasoning with masculine character and soul intuition with feminine character, all of which shows the realities of pairs. Likewise, humans are created in the form of pairs between men and women. Men are symbolized as strength and power, and on the other side there are women who get the symbol of tenderness and affection. Woman was created from the rib of man and makes women a place to lean for weary men. Ribs are a component of God's creation that serves to support heavy burden of a tired body to lean down. Without ribs, a tired body cannot lean. So God created women to be a peaceful place (Qs.ar-Rum [30]: 21), because in them tired body can rest.

This paired reality in the construction of the duality of beings distinguishes that Allah is the one and only Singular Reality. Thus, a marriage that connects men and women is not interpreted as a submission and subjugation of women. Men have been paired with women by God in the form of a marriage, thus marriage is an institution that manifest the reality of paired beings to complement each other. Woman are created from man's rib, therefore woman have two qualities that go with their character. The first trait is the trait in their root as man, and the second trait is the nature of woman as how they created (Murata, 1996: 248).

From the symbols and the nature of women who bear those two qualities that is the characteristic obtained from their roots from man's rib and the nature of the creation as woman, women are ontologically able to do the general things that usually done by men. Women often able to carry out duties in men's fields, because they came from man's rib. They also able to perform patriarchal works as well as they perform women's duties as their creational nature. Women can work as good as men in doing their works, and they can also get education, same as men. The power of women to be able to act and do like men is actually a form of God's desire for beings. In masculine and feminine relations, the power relation model should be questioned. The process of submission, subjugation, control, and also domination needs to be rethought deeply.

The narrative of the Holy Qur'an which gives breadth and even liberates women is not also stated as a liberal theology. In its capacity as a space that provides and presents rights for women, the narrative of the Holy Qur'an returns the role and function of women as the initial form desired by Him. Women with all their rights do not free themselves from the existence of an

objective narrative of God's laws for themselves. Women by nature are not to be dominated in power relations. They became a component in the series, and even the bonds of life of men. This is where the narrative of the Holy Qur'an glorifies women as men's accident, not putting it in a subordinate concept.

In the realm of historical historiography of Islamic civilization, it appears that the Prophet Muhammad saw a process of social transformation for the Arab's jahiliyah community. The pressure of oppression, until the murder of female infants as a tradition of pre-Islamic jahiliyah was fundamentally changed by the Prophet Muhammad. He not only explained in the narrative, but further carried out in concrete action (Latif, 2018: 293). The concept of subjugation in gender relations in the pre-Islamic Arabic tradition was changed into a complementary and covert affection relationship (Qs. Al-Baqarah [2]: 187). The fundamental right of equality appears as an equal being before God (Qs. An-Nahl [16]: 97). This equality before God principle taught by the Prophet Muhammad erased the jahiliyah culture in pre-Islamic period. The new dimension of relations presented in the narrative of the Holy Qur'an brought a profound change in tradition, especially in the jahiliyah community, until now. The religious foundations that reorganized the relations of women and men have been embedded in the socio-cultural dimension of Arab society, and now they are creeping in every tradition of Islamic society.

The strategic role of women in the midst of their socio-cultural environment, both within their family and as part of a nation/country, can be seen in three ways: First, women as a wife who play role as partner, motivator, and advisor to their husbands. A wife's role is to provide advice needed for her husband in every problem faced by the family. A wife provides solutions to solve the problems faced by her husband in managing the household. Second, women as mothers will act as educators in the midst of family institutions. Women in the middle of the family will become educators who teach moral values as well as intellectuality for their children. Mother is the closest parent figure in the environment of her children, where children get the very first education precisely from their mother. Third, women in their social environment will become a solid pillar of the country. The glory and the collapse of a nation is determined by the quality of women in the middle of the nation. The education they give to their children will be carried over time and have a profound influence on the socio-cultural environment. Nations formed from family community units will form themselves based on values implanted in family units (Rasyidah, 2019).

Feminism in the teachings of Islam takes the core of the heart of Islam itself, rather than understanding incorporating the value of European feminism into the body of Islamic thought. Islamic feminism can refer to its basic foundation, which is the narrative of the text of the Holy Qur'an itself. The narrative of the Holy Qur'an, in several verses, explains God's laws in giving the highest regard for the position of women. Lester and Spoerri (1997) revealed that an experience of an event that detrimental to humans was part of the process of maturity. A historical event of submission and domination of women in their socio-cultural environment has been able to mature women. They have been able to become figures who able to play an active role in determining the course of human civilization.

4. Conclusions

The conclusion obtained from this research is that in the narrative approach of the Holy Qur'an, there was no significant power relation that subjugates, dominates, or gives a subordinate role to women in Islam. Spatial structure of a culture becomes a matter of concern when there is a submission on the role of women in their socio-cultural environment. The narrative text of the Holy Qur'an explains the high appreciation of domestic and public roles for women. Feminism itself can be traced in various narrative texts of the Holy Qur'an that place women in a place of honor. It is seen that the position of a balanced gender relation gets its

strength in Islam through the narrative text of the Holy Qur'an. This balanced relationship between men and women is drawn from the heart of Islam itself.

In theoretical approach to gender relations developed by Sachiko Murata, there is a conclusion that gender relations are associated with strong Islamic spiritualism ideas. It is not merely produced by rational reason, but also by spiritualism contained in the narrative text of the Holy Qur'an. Gender relations show the difference between the concept of the duality of beings and the singular reality of God Almighty. Single reality is at the top of the hierarchy of power that controls the universe as a macro-cosmos, and human as a micro-cosmos.

Acknowledgements

This research did not receive any specific grant from funding agencies in the public commercial, or not-for-profit sectors.

The authors declare no competing interests.

References

- Bashori, A. (2020). *Filsafat Hukum Islam, Paradigma Filosofis, Mengais Kebeningan Hukum Tuhan* [Islamic law philosophy, philosophical paradigm: Scavenging the transparency of God's Law]. Jakarta, Penerbit Prenadamedia Group.
- Dewey, J. (1998). *Budaya dan Kebebasan, Ketegangan antara Kebebasan Individu dan Aksi Kolektif* [Culture and freedom: Tensions between individual freedom and collective action]. Jakarta, Yayasan Obor Indonesia.
- Djuned, D. (2011). *Antropologi Al-Qur'an* [Anthropology of Qur'an]. Jakarta, Penerbit Erlangga.
- Ghosh, H. A. (2009). Introduction: Gender and Islam in Asia, *Journal of International Woman's Studies, Bridgewater State University*, 11(1), 1-4. Available at <https://vc.bridgew.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1144&context=jiws>
- Hanapi, A. (2015). Peran Perempuan dalam Islam [The role of women in Islam]. *Jurnal ar-Raniry*, 1(1), 15-26. <http://dx.doi.org/10.22373/equality.v1i1.620>
- Irawaty & Darajat, Z. (2019). Kedudukan dan Peran Perempuan dalam Perspektif Islam dan Adat Minangkabau [The position and role of women in the Islamic perspective and Minangkabau customs]. *Indonesia Journal of Multidisciplinary Islamic Studies*, 3(1), 59-76. <https://doi.org/10.21009/003.1.04>
- Kull, A. (2009). At the forefront of a post patriarchal Islamic education: Female teachers in Indonesia. *Journal of International Woman's Studies, Bridgewater State University*, 11(1), 25-39. Available at <https://vc.bridgew.edu/jiws/vol11/iss1/3>.
- Latif, M. (2018). Islam and feminism theology. *Journal of Islamic Civilization in Southeast Asia*, 7(2), 288-313. <https://doi.org/10.24252/jicsa.v7i2.7338>
- Lester, J., & Spoerri, P. (1997). *Menemukan Kembali Kebebasan* [Rediscovering freedom]. Jakarta: Penerbit Grafiti.
- Madjid, N. (2010). *Islam Agama Kemanusiaan, Membangun Tradisi dan Visi Baru Islam Indonesia* [Islam, religion of humanity: Building a new tradition and vision of Indonesian Islam]. Jakarta: Paramadina.

- Muhibbin, Z. (2011). Wanita dalam Islam [Women in Islam]. *Jurnal Sosial Humaniora*, 4(2), 109-120. DOI: <http://dx.doi.org/10.12962/j24433527.v4i2.627>
- Murata, S. (1996). *The Tao of Islam, Kitab Rujukan tentang Relasi Gender dalam Kosmologi dan Teologi Islam* [The Tao of Islam: Book of reference on gender relations in Islamic cosmology and theology]. Bandung: Penerbit Mizan.
- Nurmila, N. (2011). The influence of global Muslim feminism on Indonesia Muslims feminist discourse. *Al-Jami'ah Journal of Islamic Studies, UIN Sunan Kalijaga*, 49(1), 33-64. <https://doi.org/10.14421/ajis.2011.491.33-64>
- Priyanto, J. (2017). Wacana, Kuasa dan Agama, dalam Kontestasi Pilgub Jakarta, Tinjauan Relasi Kuasa dan Pengetahuan Foucolt [Discourse, power and religion in the contestation of the Jakarta Pilgub: Review of the relationship of power and knowledge of Foucolt]. *Jurnal Thaqaifiyyat*, 18(1), 186-200. Availabe at <http://ejournal.uin-suka.ac.id/adab/thaqaifiyyat/article/view/1316/797>
- Rasyidah, K. (2019). Glory of women in family (Islamic feminism perspectives). *Jurnal Pemikiran dan Pendidikan Islam Studi Religia*, 3(1), 1-9. <http://dx.doi.org/10.30651/sr.v3i1.2938>
- Susanto, A. F. (2019). *Filsafat & Teori Hukum* [Philosophy and legal theory]. Jakarta: Penerbit Prenadamedia Kencana.



Adopting Passing off Concept of Unfair Competition Into Indonesia's Trademark Law

Ali Oksy Murbiantoro, Rachmad Safa'at, Yuliati & Sukarmi
Brawijaya University, Faculty of Law, Malang, INDONESIA

Received: 19 June 2020 ▪ Accepted: 30 September 2020 ▪ Published Online: 8 November 2020

Abstract

The application of the concepts of unfair competition in Indonesia's Trademark Law is one of the reasons as a proper solution in providing justification and argumentation basis, in terms of to answer the issue of impersonation of trademarks on different kinds goods, particularly for impersonation of domestic well known mark obtains sufficient legal basis due to the existence of protection and legal certainty for the trademark owner which is impersonated thereof. The current Indonesia trademark law basically only provide trademark lawsuit in terms of cancellation for registered mark; legal damages claim. Both lawsuits related to using unauthorized registered mark based on overall or basic similarities in the same kind of goods, although unauthorized use in different kind of good is possible to be sued but it is restricted for international well-known mark only. In addition there is such trademark lawsuit in connection with deletion registered mark means this proceeding enforce when the registered mark does not use for three years as of the mark registered. Considering that actually the concept of unfair competition basically reflect to the understanding of unlawful act (tort) which stating in the article 1365 Indonesia's Civil Code. However, this understanding is not covered in Indonesia's Trademark law instead of it is enforced in Indonesia's civil law and civil procedure. Hence, if there is a trademark impersonation dispute in the different kinds of goods, the resolution of the dispute will refer to unlawful act and that lawsuit will be trialed by regular district court, even though based on trademark law for trademark lawsuit should be trialed by commercial court. Therefore, it is lead to uncertainty in terms of the authorize court which is examined and handled the said case. To include the concept of unfair competition as a part of trademark violation into Indonesia's trademark law hopefully enable to anticipate in reducing any kind of types trademark violation occurred including in the form of violation such impersonation of domestic well-known mark in different kind of goods. This research is normative legal research with a legislation, concept, and comparative approach. The legal material with technical analysis is done by the method of interpretation. Comparing to the concept of unfair competition, passing off within Indonesia's trademark law; International Trademark Convention will answers whether the understanding of unfair competition applied in the trademark violation in Indonesia particularly in connection with the issues of impersonation towards registered of well-known mark domestically is already proper either for domestic or worldwide perspective.

Keywords: impersonation, different kinds of goods, unfair competition, well-known mark, domestically well-known mark, Article 21 Paragraph 3 of Indonesia's Trademark Law, Article 16 Paragraph 3 of TRIPs, Article 6 of the Paris Convention.

1. Introduction

The issue of impersonation of trademarks on different kinds goods, particularly for impersonation of domestic well-known mark no sufficient legal basis for the trademark owner which is impersonated to sue and to obtain remedy from the infringer considering that there is unclear provision stating in the trademark law. In practice, alternatively this case is proceeded refer to unlawful act (tort) as civil lawsuit, meanwhile in fact the case can be classified as trademark matters. Based on Indonesia's trademark law for trademark infringement becomes commercial court authority to examine and to trial the case. Hence, it leads to confuse which courts that having authorization in properly. This situation will impact to trademark owner in obtaining their legal protection.

According to Paris Convention (1967), which the convention deals with trademark subject matters, and Indonesia as one of member of the convention in article 10 basically govern that:

(a) Countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(b) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(c) The following in particular shall be prohibited:

(1) All acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;

(2) False allegations in the course of the trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;

(3) Indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or quantity, of the goods.

Then, Article 1 (iii) of WIPO define unfair competition s as follows:

“Act of unfair competition means any act of competition contrary to honest business practices in industrial or commercial matters as defined in Article 10 of the Paris Convention for the protection of industrial property, signed in Paris on 20 March 1883, as revised and amended” (Charles, 2014: 6), mentioning that “unfair competition”, but in a number of early cases involving attempts by one merchant to palm off inferior goods as those of another more reputable merchant by making deceptive use of the other merchant's trademark.

The issue of unfair competition as above mentioned different from countries (United States, Singapore, United Kingdom) which recognize unfair competition as passing off which is included in the part of trademark law. Basically by including this concept as a part of the trademark law which regulates with legal certainty in terms of providing legal basis for trademark violation that is not restricted directly to connect a common issue of overall and/or basic similarities in similar goods either for the proceeding of cancellation or legal damages (compensation). However, under passing off is also cover a trademark violation deals with impersonation of mark in the different kinds of goods.

Mary La France (La France, 2012) said that in the United States the meaning of unfair competition is identical or as a synonym for “passing off” (in the United States, however, “unfair competition” is typically used as a synonym for “passing off”).

The concept of passing off from a philosophical point of view is the rules of trademark law which grow from the values of recognition and respect for identity rights which are then crystallized into norms of protection. At this point, written law is not yet intensively developed, and in line with common law culture, legal norms are formed from a series of judges' decisions on relevant cases that have been decided by the court. It must be recognized that the concept of

passing off action also underlies and becomes the pillars of trademark law. This conception establishes norms that separate right or wrong behavior in the eyes of justice and legal rationality. Any behavior that is misleading to the public and is incorrectly categorized, is clarified as an act of passing off. Margreth Barrett gives the meaning of passing off namely: "Passing off occurs when the defendant makes one form the false representation that tends to cause consumers to believe that the defendant's goods or services come from the plaintiff."

Hillary E. Pearson and Clifford G. Miller provide the following understanding of passing off: "Passing off occurs where a trader confuses or deceives the public about the identity of his or her business, products or services. Where the public is led to believe that the business, products or services are those of another trader or are connected with another trader, and that other trader's business or trading goodwill is likely to be damaged". Copinger, as quoted by Muhammad Djumhana and R. Djubaedillah, gives the meaning of passing off as follows: "The action for passing off lies where the defendant has represented to the public that his goods or business are the goods or business of the plaintiff. A defendant may make himself liable to this action by publishing a work under the same title as the plaintiff's or by publishing a work where 'get-up' so resemble that of the plaintiff's work as to deceive the public into the belief that it is the plaintiff's work, or is associated or connected with the plaintiff." The three basic elements of passing off commonly called classic trinity are: (1) Goodwill / reputation related to the consumer's desire to buy goods that are related or part (related) to a particular brand; (2) wrong in assuming the origin of the goods; and (3) allows for goodwill to arise.

The case of passing off for instance related to a producer/ a maker of vodka in bringing such a claim against the manufacturer of Vodkat, an alcoholic beverage that did not meet the legal requirements to be marketed as Vodka under European law. The term Vodkat did not resemble the trademark used on any particular brand of vodka and thus could not be challenged under a traditional passing off theory. Nonetheless, it was actionable under the broader theory because it implicitly misrepresented the nature of product. The Vodkat case is particularly notable because it was the first to hold that extended from passing off is not limited to prestige or luxury product. Even a generic term such vodka, in the court's view, has a reputation sufficient to give rise to goodwill.

In civil law countries passing off is defined as unfair competition such as unfair competition remedies for unauthorized merchandising have been especially strong in Austria. When emblem of an English football club was used on merchandise without the club's consent, the Austrian Supreme Court held the defendant liable for parasitic exploitation of the emblem was attractive to consumers was because it signified the club's achievements, which were the result of the club's efforts and effort/expense/achievement rationale in later cases involving noncompeting goods and services. Even though there is exception even in the civil law country for instance in the case the mark of Opel. In 2011 Germany's highest court refused to find either a likelihood or the taking of unfair advantage where Defendant sold remote controlled scale model replicas of the Astra that featured the Opel logo (a registered trademark) affixed to the grille. Even though Opel had registered this mark both for motor vehicles and toys the Bundesgerichtshof (BGH, Federal Court of Justice) considered the fact that the replica car market in Germany had existed since the late nineteenth century, presence of the mark simply as one of the details necessary to making an accurate replica of the Opel Astra. A European commentator notes, however, that in other civil law jurisdictions the same fact might lead to different conclusion, taking into account local customs and views relating to (toy) cars (La France, 2012: 1112-1113).

The concept of unfair competition and passing off in Indonesia similar with unlawful act (tort) as stating in the Article 1365 of Indonesia's Civil Code. Unfortunately, the provision of the Article 1365 of the Civil Code is not as part of Indonesia's Trademark Law. Based on this article Prof. Mariam Darus stating that unlawful act including the criteria namely:

- (1) Occurs both positively and negatively;
- (2) Actions must be against the law;
- (3) There are losses;
- (4) There is a causal relationship between breaking the law and loss;
- (5) There is an error.

Rachmat Setiawan in terms of unlawful act stating that who opposed the law consisting of 4 petitions namely:

- (1) Violate the rights of others;
- (2) Contrary to the challenges of lawmakers;
- (3) Contrary to good morality; or
- (4) Contradicts the propriety in society of oneself or other people's property.

Unlawful act has been interpreted more broadly in the Netherlands since 1919, which is to choose one of the following actions:

- (1) Acts that is contrary to the rights of others;
- (2) Acts that is contrary to their own legal requirements;
- (3) Acts that oppose morality; and
- (4) Actions that is contrary to prudence or conflict in good community relations.

Some decisions that can be submitted because of actions against the law are:

- (1) Compensation for damages in the form of money for losses incurred;
- (2) Compensation for damages in kind or returned in original condition;
- (3) Statements, actions taken against the law; and
- (4) Prohibit certain actions.

2. Research methods

In connection with this, in this study using normative legal research methods, namely legal research conducted by examining materials derived from various laws and regulations, namely TRIPs, Paris Convention, WIPO Rules, Indonesia's Trademark Law, Law No. 20 of 2016 concerning marks and geographical indication and other materials from various literatures. In other words, this research examines literature or secondary data. The study of legal normative here is due to the ambiguity of norms, namely that there is a lack of clarity about the norms in determining the terms and criteria for well-known brands contained in the Indonesia's Trademark Law related to the provisions of the international convention of TRIPs, Paris Convention. Besides that, it is also related to the possibility of legal protection for registered brands if there is imitation of non-similar goods.

3. Result and discussion

3.1 *Need a redefinition of trade mark violation in the trademark law*

The legal basis for trademark violation under Indonesia's Trademark Law is governed and refers to Article 21 Paragraph 1 *b, c*, Article 76 (cancelation lawsuit), Article 83 (legal

damages/compensation lawsuit), Article 100 (criminal sanctions) based on Article 21 Paragraph (1) Subparagraph *b* and Subparagraph *c* of the 2016 of Indonesia's Trademark Law has stipulates that an application of mark is rejected if the mark has basic similarities or in entirety with:

- (a) The registered mark belongs to another party or has been applied in advance by another party for similar goods and/or services;
- (b) Well known mark belongs to other parties for similar goods and/or services;
- (c) Well known mark belongs to other parties for *different kind of goods and/or services* which meet with the specific requirements (will be further regulated).

Referring to provision (Point *c*) based on Supreme Court's circular letter 2012 stating that considering up until now such a regulation concerning in determining of trademark violation in terms of impersonation of the mark, including a well-known mark in different kind of goods has not been enacted therefore the legitimate owner of mark in case of well-known mark is not entitle to object or to take legal action against third parties who conduct to imitating of their mark in different kind of goods. Under Indonesia's Trademark Law the requirement of well-known mark must be the mark which is the product commercialized as well as registered internationally. Therefore, the registered mark with the products or services which is recognized and well known within Indonesian territory no opportunity to obtain status as a well-known mark, consequently for local registered well known mark's level impossible in obtaining protection such as to take objection and/or to bring a lawsuit against third parties who imitating their registered mark in different kind of goods. In other words based on Indonesia's Trademark Law the criteria of a well-known mark restricted to international mark only which is well-known globally. Therefore, the issue of a legal protection of registered mark against impersonation for different kinds of goods and a criteria or requirement of well-known mark is inherently or dependence between each other. Actually, this rule is not appropriate with the provisions of TRIPs and Paris Convention. Article 16 Paragraph 3 and Paris Convention do not regulate such requirements for well-known mark must be commercialized and registered internationally Article 16 Paragraph (3) of TRIPs:

Article 6 of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods services which are not similar to those in respect of which trademarks registered, provided that use that trademarks in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademarks and provided that the interest of the owner of the registered trademarks are likely to be damaged by such use.

Article 6 of the Paris Convention:

Article 6 [Marks: Well-Known Marks] (1) of the Paris Convention: the countries of the Union undertake, *ex officio* if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

On the basis of those provisions showing that there is no requirement to be a well-known mark must be commercialized and registered internationally instead of under joint recommendation of WIPO basically rules that a protection of well-known mark that means, member of country no need to protect an internationally known mark if that mark is not well known domestically. Also, the protection to be given to well-known mark at least with effect from the time when the mark has become well-known in the Member State, WIPO Joint Recommendation in September 1999 (Ong, 2005: 95, 126).

Further, the urgency to find out justification for impersonation offenses of trademark in different kind of goods as legal basis is with inserting the concept of unfair competition or passing off into Indonesia's trademark law. It is appropriate with the theory of law and economics, whereas in determining trade name by producer (manufacturer) is not a simple way, considering that it is as a part of strategic concept of marketing and selling. Actually, the product can be quickly recognized by the public of consumers as new producers (manufacturer) using the same name of product or having similarities with name of products which have already been known in the market previously. However, if this is done by the new producer referred to goods similar to their product, consequently will violate Article 21 Paragraph (1) *a* of Indonesia's Trademark Law of 2016. Otherwise If the product to be marketed uses a mark/brand which has similarities with the goods in different kinds of goods (not in the same type) that means contrary to Article 21 Paragraph (1) *c* of the 2016 Trademark Law that is related to a well-known mark with criteria the mark must be registered and commercialized overseas. Therefore, a registered mark that is not included into the said criteria of a well-known mark does not obtain legal protection when the mark is imitated by another producer (manufacturer). Based on perspective of Law and Economics theory stating that rationally economic actors will always effort to achieve and maximize the level of economic satisfaction even though this is related to unlawful acts, as long as the costs incurred for the settlement, it is necessary to have an economic target to be achieved. Therefore, the condition of the absence of rules/legal protection against trademark impersonation in different kinds of goods giving huge opportunity for business actors who in bad faith to shorten profits by violating the rights of registered trademark. Then, another perspective of law and economic theories relates to applying the concept of the legal rule as a Consideration (Price). In the economy the level of illegal actions can be reduced by increasing the value of fines for the violator. If to analogize for the imitation of the mark/brand in different kinds of goods considering that there is no clear regulation imposing to violators therefore in this regards needs to be governed (Mercurio & Medema, 1996: 51).

We believe that based on above illustration indicates that the issue of impersonation of trademark in different kind of goods in Indonesia is considered and inherently as unfair competition and passing off concept. This can be found in the trial of Commercial Court at the Central Jakarta District Court No. 39 / Brand / 2011 / PN. Commerce Jkt. Pst. in case of a trademark between IKEA (Inter IKEA Systems B. V.) originating from Sweden and the product of its goods registered as a mark in Indonesia in several classes with the Registration Number: IDM000092006 (class 21); IDM000092007 (class 24); IDM000092008 (class 11); IDM000092009 (class 35) and IDM000092010 (class 42) against IKEMA (PT. Angsa Daya) an Indonesian legal entity registered as a trademark with registration No. IDM 000247161 for class of goods 19. The IKEA brand, besides being registered in Indonesia, is also registered in 75 countries. As for the case, the court ruled in principle that: granting the lawsuit filed by IKEA, stated the registration of the IKEMA mark was carried out in bad faith, declaring IKEA to be a well-known mark and the registration of the IKEMA mark must be canceled. In the IKEA vs. IKEMA Trademark Case, whose case is registered under Number: 39 / Trademark / 2011 / PN. Commerce Jkt. Pst. In this case the object of the lawsuit is regarding brands with different classes of goods (types of goods). Then the commercial court's decision was corroborated by MA-RI's decision No. 697 K / Pdt.Sus / 2011. However, the cassation decision was canceled with Judicial Decision No. 165 PK / Pdt Sus / 2012 which basically states granting the Petitioner / Defendant I Review Appeal cancels the cassation decision with the consideration that the IKEMA trademark is in class 19 which is different from the IKEA brand and the provisions of Article 6 Paragraph (2) of the 2001 Trademark Law are not can be applied in a quo case because Government Regulations governing certain conditions have not yet been regulated, namely to apply equality in principle to goods of different classes so that the provisions of the convention cannot be implemented. Based on the supreme court decision indicated that Indonesia's trademark law had not recognized yet

legal protection for real trademark owner who their mark is impersonated by third party in different kind of goods.

In another case the court in render consideration of decision is more appropriate with the international convention (Article 16 Par. 3 of TRIPs and Article 6 of the Paris Convention) and giving protection to the trademark owner, although the point of consideration was not regulated and stated in Indonesia's trademark law. In can be found in the trademark case of BARBIE with the parties: plaintiff is MATTEL INC, United States, against Hendri Subun Kangdani, Jakarta, as defendant. In such case the plaintiff as the owner of the BARBIE trademark to protect the goods: fashion dolls (BARBIE dolls and their equipment and related products). In that case, the plaintiff objected to the registration of the BARBIE trademark conducted by the defendant to protect the kinds/types of goods: office equipment and school equipment, including bookbinding equipment, stationery, adhesive materials (for writing), educational and teaching tools except the tools, playing cards, printed letters, cliches, eraser liquid, writing eraser paper, book and paperclip tool, dapper (stepler), scratching devices, tools paper holes, pencil scrap, term, typewriter, tacks, eraser, stamp, pencil box, imitation leather and leather, fine skins, suitcases, and bags, purses, umbrellas – rain umbrellas and sun umbrellas, sticks, whips, horse clothes, and saddles, beauty cases made of leather, etc. Regarding the registration of the mark, the plaintiff has filed a cancellation claim at the Central Jakarta District Court. The legal considerations of judges in the Central Jakarta District Court include:

- (1) Based on the evidence the plaintiff's brand has long penetrated national and regional boundaries, so the plaintiff's trademark has been globalized and can be referred to as a brand that knows no world boundaries. The plaintiff's brand has entered Indonesian territory as a product of dolls with the brand BARBIE and has been widely circulated and everyone who uses the brand has its own taste compared to other brands;
- (2) Although the results of the plaintiff and defendant's products are not classified as one type, it is not a problem because based on the permanent jurisprudence of the Supreme Court it is not important whether or not the product/service is similar, because the mark is to provide identification about the origin of the item not the type of goods;
- (3) Grant the plaintiff's claim, declaring the defendant's mark to be null and void.

3.2 US rule of passing off

Unfair competition in the US is recognized with passing off or trademark unfair competition: "passing off" outside the trademark arena, the idea of unfair competition exists in common law and statutes to composite business that have suffered an injury party can bring an unfair competition claim in the Lanham Act. This act containing of trademark provisions. In terms of trademark unfair competition is governed under Section 43 (a) of the said act which states that:

- Any person who, on or in connection with any goods or services, uses in commerce any word, term, name, symbol or device or any false or misleading representation of fact which, is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person or origin;
- In commercial advertising or promotion, misrepresents the nature of his or her or another person's goods services or commercial activities, shall be liable in any civil action.

Passing off encompasses a lot of activity and is the oldest theory of unfair competition. Passing off happens when the defendant makes statement or representation that goods or services

are affiliated or come from the plaintiff. There can be direct or indirect false representation in this regards. An example of direct representation is when the seller/defendant claims the products are actually from plaintiff. It can happen indirectly when a customer places an order for plaintiff's product, but the order is actually filed with defendant's product. To be liable for passing off a defendant must simulate the plaintiff's mark, trade dress or trade name and plaintiff's product, but the order is actually filed with defendant's product.

Based on the Lanham Act shows that understanding of trademark violation is broader than what Indonesia's trademark law governed that means in Lanham act trademark violation deals included with unlawful act/tort action that is related to trademark issues happened, meanwhile, under Indonesia's trademark law the its scope is not restricted directly to connect a common issue of overall and/or basic similarities in similar goods either for the proceeding of cancellation or legal damages (compensation). In commercial advertising or promotion, misrepresents the nature of his or her or another person's goods services or commercial activities, shall be liable in any civil action.

3.3 *EU unfair competition*

Most civil law jurisdiction interpret unfair competition to include many practices that do not involve deception. According to the CJEU (Court of Justice of European Union), the requirement of honest practices in industrial or commercial matters, as reproduced in Article 6 (1) of the EC Trade Mark Directive, implies a duty to act fairly in relation to the legitimate interest of the trademark owner, language that leaves much room for interpretation, and that has been criticized as circular. The CJEU has identified as unfair not only those uses that misleadingly suggest a commercial connection between two parties, but also those that take unfair advantage the distinctive character or repute of a mark, those that discredit or denigrate a mark, and those that present a product as an imitation or replica of the trademark owner's product.

The term "free riding" has been used to describe the kinds of non-deceptive activities that may constitute unfair competition. The World Intellectual Property Organization (WIPO) has defined free riding as any act that ac competitor or another market participant undertakes with intention of directly exploiting another person's industrial or commercial achievement for his own business purposes without substantially departing from the original achievement.

Therefore, here we believe that free riding can be analogized as unlawful act or tort action which basically containing bad faith intention from the actor/defendant as well as is occurred in the passing off action. Hence, either unfair competition or passing of the purpose is to provide a legal basis for trademark owner to obtain remedy in terms of unauthorized party using their mark (La France, *Op. Cit.*: 1098).

4. Conclusion

The concepts of unfair competition and passing off basically reflect to the understanding of unlawful act (tort) which stating in the Article 1365 of the Indonesia's Civil Code. However, this understanding is not included in Indonesia's Trademark Law instead of it is regulated in Indonesia's civil law and civil procedure. Should there is a trademark impersonation dispute in the different kinds of goods, the resolution of the dispute will refer to unlawful act and that lawsuit will be trialed by district court. To include the concept of unfair competition/passing off as a part of trademark violation into Indonesia's Trademark Law enable to answer in reducing any kind of types trademark violation occurred including in the form of violation such impersonation of domestic well-known mark also providing a provision which becomes legal basis to examines trademark dispute excluded for regular trademark lawsuit namely cancelation and

legal damages lawsuit which refer to overall and/or basic similarity in the same kinds of goods. Hence, trademark law possible deals to related to trademark violation such as commercial advertising or promotion, trade dress, misrepresents the nature of his or her or another person's goods services or commercial activities.

Acknowledgements

This research did not receive any specific grant from funding agencies in the public commercial, or not-for-profit sectors.

The authors declare no competing interests.

References

- Ball, E. (2016). Trademark owners may find dilution claims out of reach. Fenwick & Wess LLP. Available at <https://www.fenwick.com/insights/publications/almost-famous-trademark-owners-may-find-dilution-claims-out-of-reach>.
- Cornell Law School (2019). Trademark infringement. Available at https://www.law.cornell.edu/wex/trademark_infringement. Accessed on January 2019.
- Gunawati, A. (2015). Perlindungan merek terkenal barang dan jasa tidak sejenis terhadap persaingan usaha tidak sehat [Protection of famous brands of different goods and services against unfair business competition]. Malang: Brijwijaya University.
- International Trademark Association (2017). Trademark dilution (Intended for a non-legal audience). Available at [https://www.inta.org/TrademarkBasics/FactSheets/Pages/Trademark-Dilution-\(Intended-for-a-non-legal-audience\).aspx](https://www.inta.org/TrademarkBasics/FactSheets/Pages/Trademark-Dilution-(Intended-for-a-non-legal-audience).aspx). Accessed on January 2019.
- International (Nice) Classification of Goods and Services (2020). Wikipedia, the free encyclopedia, Available at [https://en.wikipedia.org/wiki/International_\(Nice\)_Classification_of_Goods_and_Services](https://en.wikipedia.org/wiki/International_(Nice)_Classification_of_Goods_and_Services). Accessed on February 2020.
- Janed, R. (2006). *Penyalahgunaan hak eksklusif hak kekayaan intelektual* [Abuse of exclusive rights of intellectual property rights]. Surabaya: Airlangga University.
- LaFrance, M. (2012). Passing off and unfair competition conflict and convergence competition law. *The Law Journal of the International Trademark Association*, 102(5).
- Manis, C. R. M. C. (2014). *Intellectual property and unfair competition*. Nutshell: West Publishing Co.
- Mark, D. R. (2004). Actual confusion in trademark infringement litigation: Restraining subjectivity through a factor-based approach to valuing evidence. *Journal of Technology and Intellectual Property*, 2.
- Mercuro, N., & Medema, S. G. (1996). *Economics and the law from posner to post-modernism*. Princeton University Press, New Jersey.
- Narthy, J., & Thomas, Mc. (1995). Intellectual Property. In *Mc Narthy on trademarks and unfair competition*. USA: Thomson Legal Publishing, Third Edition.
- Ong, B. (2005). Protecting well-known trade marks: Perspective from Singapore. *The Law Journal of the International Trademark Association*, 95(6).
- Sommers, M. (1999). Taking an aggressive stance against counterfeiters: An overview of trademark counterfeiting litigation under the Lanham Act, September/October.

United States Patent and Trademark office (USPTO) (2019). *Well-known marks*. Available at <https://www.uspto.gov/ip-policy/trademark-policy/well-known-marks>. Accessed on November 2019.

Walker, J. T. (2017). *Beware of facilitating counterfeiting and trademark infringement*. Published in NH Bar News.

Well-known trademark criteria in Malaysia and Japan (2019). Available at <https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1142&context=fach>. Accessed on January 2019.

World Intellectual Property Organization (WIPO) (2020). Available at www.wipo.int. Accessed on February 2020.





Study of Omnibus Law on the Legal Politics of the Indonesian Government in Using Foreign Workers

B. Woeryono

Pasundan University, Faculty of Law, Bandung, INDONESIA

Received: 21 October 2020 ▪ Accepted: 7 December 2020 ▪ Published Online: 15 December 2020

Abstract

The Employment Law Cluster in the field of foreign workers, as summarized in the Employment Creation Law, as a result of the Omnibus Law method, is very important to implement because the existing regulations have become chronically obese, obese rules but many hinder investment, so that development and progress of the Indonesian state is hampered, even though Indonesia has declared that it is part of the ASEAN Economic Community (MEA) and is on the line of the 4.0 Industrial Revolution.

Keywords: legal politics, omnibus law, foreign workers, local workers.

1. Introduction

The problem of foreign workers entering Indonesia can no longer be avoided, this is a consequence that the movement of people from one country to another (migration) in the modern era has now become a necessity. The movement of population and labor across national borders is a very important phenomenon in the era of globalization. At least 69 countries in the world have experienced population displacement and around 40 million workers have been involved in this migration.¹ The entry of foreign workers to Indonesia cannot be separated from the discourse of globalization and free trade² the main objective is to push the Indonesian economy even further so that it can compete competitively. Apart from that, foreign workers can also support the smooth running and increase the rate of investment in Indonesia.

There is one problem that makes Indonesia a destination country for foreign workers, there will be many parties and groups who feel disturbed by the presence of foreign workers. In general, in international relations, the countries that are the main destinations for the movement

¹ Segal, A., *An Atlas of International Migration*, London: Hans Zell Publishers, 1993.

² The phenomenon of globalization that humankind has been facing since the 20th century can be characterized by several things, including: Ethnic currents are characterized by high human mobility in the form of immigrants, tourists, refugees, labor and migrants. This flow of people has crossed the territorial boundaries of the country; The flow of technology is marked by technological mobility, the emergence of multinational corporations and transnational corporations whose activities can cross national borders; Financial flows, which are marked by the increasing mobility of capital, investment, purchases via the internet, storing money in foreign banks; Media flows are marked by the increasingly strong mobility of information, both through print and electronic media.

are developed industrial countries in various regions of the world, such as the United States (US), England, France, Germany, Italy, and Australia. Meanwhile, countries in the Asian region which are the main destinations for the movement of workers in addition to countries in the Middle East are Japan, South Korea, Taiwan, Hong Kong, Singapore, and Malaysia.³

If it is studied theoretically using economics that the higher the economic development achieved by a country, the more job opportunities are available for workers, both local workers and foreign workers. This opinion is generally based on the Law of Jean Baptise Say (1767-1832);⁴ that supply will always create demand (supply create its own demand). Greenwood & McDowell;⁵ believes that the entry of foreign workers can encourage economic growth by increasing public demand for goods and services produced and the formation of capital that occurs in the country concerned. This is the reason why the existence of foreign workers is so important in the destination country, in addition to growing the economy (generating investment value), it is also hoped that the presence of foreign workers can bring the destination country to the flow of globalization. In the United States (US) a study by Simon (1988)⁶ was conducted, in the states of California and Los Angeles, the United States found that; "... The high influence of the entry of foreign workers (TKA) on economic growth is due to the high growth of labor in the two regions. During the period 1970-1980, the workforce grew by 46.1% in California and 52.7% in Los Angeles. The increase in workforce growth is the effect of the 5.2% decrease in wages caused by the entry of foreign workers into the labor market in the two states".

Indonesia is a destination country for the arrival of foreign workers (TKA), thus, the presence of foreign workers is expected to participate in national development. This is in line with the opening of the 1945 Constitution (UUD) of the Republic of Indonesia in paragraph IV, which states that; "... In order to advance public welfare, educate the life of the nation, and participate in implementing world order based on independence, eternal peace and social justice, the National Independence of Indonesia was compiled in a Constitution – the Constitution of the State of

³ The effect of the movement of labor on economic growth, employment opportunities and the prevailing wage rate in the destination country has long been the subject of research by economists and political experts. Even UNESCO in collaboration with various universities in the world has conducted various studies on this matter. See in Salt, J. & H. Clout, *Migration in Post-War Europe: Geographical Essays*. London: Oxford University Press, 1976. The research results from the studies that have been carried out lead to the international trade theory developed by Hecksher - Ohlin - Samuelson. See: Simon, J. L., *The Economic Consequences of Immigration in to United States*, Maryland: University of Maryland Press. Simon, J. L., M. Stephen, and R. Sullivan. 1993, The Effect of Immigration on Aggregate Native Unemployment: an Across-City Estimation. *Journal of Labor Resources*, 14(3), 299-316. The three economists argue that: labor as one of the input factors of production will move from one country to another because of the imbalance of human resources and capital between countries. Migration of workers is mainly caused by differences in production costs that occur due to differences in wage levels prevailing in various countries.

⁴ In *Traite d'Economie Politique* (1803), Jean Baptise Say was a supporter of the laissez faire ideology. Say's biggest contribution to the classical school was "every supply will create its own demand" or it is known as "supply creates its own demand". This opinion is often called the Say's Law. Say's law is based on the assumption that the value of production always equals income. Thus, in equilibrium, production tends to create its own demand. See in: Deliarnov, *Perkembangan Pemikiran Ekonomi*, Edisi Ketiga, Rajawali Pers: Jakarta, 2014.

⁵ Greenwood, M. J. and J. M. McDowell, The Factor Market Consequences of U.S. Immigration, *Journal of Economic Literature*, 24(4), 1986, 1773-1785.

⁶ Simon, J. L., *The Economic Consequences of Immigration in to United States*, Maryland: University of Maryland Press, 1998, Lihat pula: Simon, J. L., M. Stephen & R. Sullivan, The Effect of Immigration on Aggregate Native Unemployment: an Across-City Estimation, *Journal of Labor Resources*, 14(3), 1993, 299-316.

Indonesia ...". The excerpt of this sentence is a manifestation of the spirit of the 1945 Constitution which animates to support the existence that Foreign Workers.

As the mandate of the 1945 Constitution that in order to achieve the meaning of the 1945 Constitution, the Government undertakes a policy as a politics to use Foreign Workers, because with the use of Foreign Workers it can make Indonesian relations in the international arena more mature, and ushered into a Developed Country. This means that the Government in this case has its own role to grant permits to foreigners to enter Indonesia for the purpose of working, and directly Indonesia becomes the destination country.

The regulation regarding Foreign Workers is regulated in Law Number 13 Year 2003 which is regulated in Chapter VIII regarding the use of TKA. Then in the context of orderly administration and smooth service to foreigners who have legal certainty regarding the granting of an Immigration Stay Permit as a Foreign Worker it is considered very important for the role of the Immigration Service. The Indonesian Government's Politics regarding foreign workers can be found in various existing laws (positive law), for example we can see in the substance of Law No. 6 of 2011 concerning Immigration,⁷ as an implementation of the spirit of the 1945 Constitution.⁸ In the general explanation that the impact of the globalization era has affected the economic system of the Republic of Indonesia and to anticipate this, it is necessary to change laws and regulations, both in the fields of economy, industry, trade, transportation, manpower, as well as regulations on the traffic of people and goods.⁹

Based on the Selective Policy, which is described in paragraph VIII, the explanation of Law No. 6 of 2011 concerning Immigration which states that; only foreigners who provide benefits and do not endanger security and public order are allowed to enter and reside in Indonesian territory.

Foreigners can easily enter this country, one of which is the application of the visa-free visit policy which was in effect since mid-2015. The issuance of Presidential Regulation (Perpers) Number 21 of 2016 concerning Visit Visa Free, which provides visa-free visits to 169 countries. The existence of this visa-free policy by the government is actually aimed at increasing the number of Indonesian foreign tourist visits. However, the facts on the ground are that many foreign nationals (WNA) use tourist visas to work. The increasing number of foreign workers in Indonesia, especially from China, is very large due to the increasing openness of this country to the traffic of people from other countries. The number of foreign workers residing in Indonesia until November 2016 reached 74,183 workers, an increase of 7.5 percent.

2. Literature review

Etymologically, Omnibus Law is usually juxtaposed with the word law or bill which means a rule that is made based on the compilation of several rules with different substances and

⁷ Philosophical and sociological basis in Law No. 6 of 2011 concerning Immigration are: (a) preventing abuse of power; (b) reform of the bureaucracy and public services that are effective, efficient, and have legal certainty; (c) updating of the implementation of the immigration function based on the information system and immigration management; (d), modernizing the security approach with respect for human rights; (e), promote social welfare by supporting increased investment, tourism and protecting the socio-cultural relations of the Indonesian people in international relations.

⁸ General Elucidation of Law No. 6 of 2011 concerning Immigration.

⁹ C. Sumarprihati Ningrum, *Penggunaan Tenaga Kerja Asing di Indonesia*, HIPSMI: Jakarta, 2006, hlm: 56.

levels.¹⁰ It can be said that the omnibus law is a method or concept of making legislation that combines several rules with different regulatory substances, into a large regulation that functions as an umbrella act, and when the regulation is promulgated the consequences of replacing or changing some of the rules resulting from the merger are good in part or as a whole.

Omnibus Law is a concept as a tradition that grows and develops in countries with common law system traditions, such as the United States. The epistemological concept of the word omnibus is actually: a method, a technique, a way of compiling or normalizing and formulating norms in the draft legislation, then this word is embedded with the word law, which has a fairly broad meaning. In terms of omnibus law, it is omnibus law, so this word is not correct. So that the right word is the omnibus technique / omnibus method in drafting statutory regulations.¹¹

Omnibus comes from Latin meaning “for all”, in the *Black Law Dictionary*, Ninth Edition, Bryan A. Garner¹² mentions omnibus: Relating to or dealing with numerous object or item at once; including many things or having various purposes. This means relating to or dealing with various objects or items at once, including many things or having multiple purposes. This means that from the opinion expressed by Bryan A. Garner, that the omnibus is an effort to connect several diverse objects, which are then conditioned to be combined into an arrangement in a statutory regulation. If it is combined with Law, it means that a rule is made based on the combination of several material rules with different substances, even matter that is complex, even though the subject and object are not always related to each other.

Duhaime’s *Law Legal Dictionary*,¹³ defines Omnibus Law as; Omnibus is a drafts law before a legislature which contains more than one substantive matter, or several minor matter which contains more combined into one bill, ostensibly for the sake convenience. The interpretation of the above is that a bill before the legislature contains more than one substantive issue, or several minor issues that have been combined into one bill as if for the sake of convenience.

In an omnibus bill, sometimes the government can insert substantial changes in the law and present the omnibus bill as an all-or-nothing tactic. The omnibus bill, contrary to most bills presented before the legislature, proposes a mix of changes to various laws or existing subjects that force the body to approve or defeat the entire legislative package.

The definition of the omnibus bill above leads to the understanding that President Joko Widodo’s intentions and objectives are very simple when he says the Omnibus Law is carried out with the aim of overcoming the problem of job creation, micro, small and medium enterprises (MSMEs), and investment, namely to cut laws / regulations – existing regulations, whereby

¹⁰ The word Omnibus comes from Latin, means “for all”. When embedded with the word Law, it has the definition of “as the law for all”. According to some experts, the Omnibus Law is defined as a law designed to target major issues in a country, with the aim of repealing or amending several laws. It is a legal product concept that serves to consolidate various themes, materials, subjects and legislation in each different sector to become one large and holistic legal product. See: Agnes Fitryantica, Harmonisasi Peraturan Perundang-Undangan Indonesia Melalui Konsep Omnibus Law, *Jurnal Gema Keadilan*, Vol. 6, Edisi III (December, 2019), p. 303.

¹¹ As a note from the author, the mistake that occurs when some people say the Omnibus Law is a statutory rule, when in fact it is a method. The definition created is not wrong, because the President and his Ministers have echoed the term omnibus law as law. So the term omnibus law is a new, official term in the realm of law, but has changed to the substance or content of the omnibus law which is considered in various instances as an injustice.

¹² Bryan A. Garner, *Black Law Dictionary*, USA: A Thomas Reuters Business, 2004.

¹³ <http://www.duhaime.org/LegalDictionary.aspx>;
<http://www.duhaime.Org/LegalDictionary/O/OmnibusBill.aspx>.

interrelated laws / regulations can be made into a single regulation which aims to simplify these regulations so as to increase investment in Indonesia.

3. Finding and discussion

The Omnibus law or Omnibus Bill used in Indonesia is a legal concept in the form of a draft law (RUU), as in the draft law contains several pre-existing laws, the goal is to simplify existing regulations and overcome problems overlapping regulations. It is undeniable that Indonesia has too many regulations, both laws and other regulations where it is not uncommon to find overlaps between one another. Through the technique of statutory regulations known as omnibus law, the overlapping of various regulations can be eliminated by uniting (unity) these regulations.¹⁴

Studying changes to Law No. 13 of 2003 concerning Manpower, which was changed through the omnibus law method and then outlined in the Work Creation Act cluster, it is very clear that the position of foreign workers (TKA) is increasingly getting a place and it is easy to enter Indonesian territory.

The results of the author's research, found some disharmony (unsynchronization) between Presidential Regulation No. 20 of 2018 concerning the Use of Foreign Workers (TKA) with Law No. 13 of 2003 concerning manpower, one of which is Article 10 paragraph (1), that TKA employers are not required to have a Foreign Worker Utilization Plan (RPTKA) to employ TKA who are: (a) Shareholders who serve as members of the Board of Directors or members of the Board of Commissioners of the TKA employers; (b) Diplomatic and consular officers at representative offices of foreign countries; TKA in the type of work required by the government.

The provisions of the Presidential Regulation are contrary to Article 43 paragraph (3) of Law No. 13 of 2003 concerning manpower, which stipulates the preparation of the Plan for the Use of Foreign Workers (RPTKA does not apply to government agencies, international agencies and representatives of foreign countries. This disharmony is then eliminated in Article 81 (5) of the Work Creation Law, by removing the substance Article 43 paragraph (3).

Indeed, in the Job Creation Law, the cluster that is highlighted is the loosening of permits for Foreign Workers (TKA) to enter Indonesia, as previously questioned in Presidential Regulation No. 20 of 2018 concerning the use of foreign workers (TKA). There is concern that this clause will shift the rights of job seekers for Indonesian citizens (WNI) in obtaining employment opportunities in their own country.

The aim of the Government to facilitate permits in recruiting foreign workers (TKA), is to cut the bureaucracy so that it is not convoluted, the initial goal is that the transfer of science and technology is not hampered by difficult permits, then this licensing cut is also to reduce corruption in the licensing sector. The legal logic is that the level of investment in Indonesia is still quite good, this is indicated by the fact that there are still many investors who want to invest in Indonesia, both local and foreign investors. However, in investing in Indonesia, investors often come into contact with the complexity of the bureaucratic process. The same thing happened when

¹⁴ As a note that the theory of legislation in Indonesia, the position of the law from the concept of the Omnibus Law has not been regulated. The law resulting from the concept of Omnibus Law can lead to a law that can regulate comprehensively and then have power over other regulations (the Umbrella Law). However, Indonesia does not adhere to the Umbrella Law because the position of the entire statute must be given legitimacy in Law No. 12 of 2011 concerning the Formation of Legislation, which is amended into Law No. 15 of 2019.

dealing with licensing issues, whose requirements were quite complicated, and the processing process was quite long.

The Job Creation Act has a breath to bypass various tortuous investment regulations, and is in line with the spirit of reform. Especially reforms in the field of legislation and bureaucracy. Bureaucratic problems have become a major problem for the Indonesian nation. This problem has made many people, including investors, object to processing permits and choose to pay facilitation payments as a form of corruption, collusion and nepotism practice to make it easier. This of course will also burden investors with additional funds outside the official budget. Some people think that the rejection of the Job Creation Law due to the easing of the recruitment of foreign workers will also result in the existence of a law product which will only make it difficult for contract employees to become permanent employees. The use of foreign workers will be even greater.¹⁵

Based on the manuscript of the Job Creation Law, regulations regarding foreign workers are regulated in the second part of the employment cluster. Article 81 contains amendments, deletions and additions to several clauses in Law Number 13 of 2003 concerning manpower.

As the description above, the amendment is very clear in Article 42 paragraph 1. In Law No. 13 of 2003 concerning manpower that every employer who employs foreign workers is required to have a written permit from the minister or an appointed official. Meanwhile, in the new regulation, a written permit is only replaced by a Plan for the Use of Foreign Workers (RPTKA) which is approved by the central government. Then in paragraph 3, the government adds parties who are free from the requirements listed in paragraph 1. Previously, parties exempted from applying for permits as stated in paragraph 1 only applied to representatives of foreign countries who used foreign workers as diplomatic and consular employees. Meanwhile, under the Law on Job Creation, the exception to the requirements in paragraph 1 is widened not only for diplomatic and consular employees. But also for directors or commissioners with certain shareholdings or shareholders as well as foreign workers (TKA) needed by the employer in types of production activities that have stopped due to emergencies, vocational, start-up companies (start-ups), business visits, and research for a certain period of time.

The Job Creation Act actually regulates that foreign workers can be employed in Indonesia only in an employment relationship for certain positions in paragraph 4 of the article. However, paragraph 5 which states that the provisions in paragraph 4 which must be accompanied by a Ministerial Decree are deleted. As a substitute, in paragraph 5 of the Job Creation Law, the government only adds a clause that foreign workers are prohibited from holding positions in the personnel sector.

The government has also changed paragraph 6 which reads: Foreign workers as referred to in paragraph (4) whose working period has expired and cannot be extended can be replaced by other foreign workers. Article 42 paragraph 6 becomes: Provisions regarding certain positions and a certain time as referred to in paragraph (4) and paragraph (5) shall be regulated by a Government Regulation.

Article 45 in Law No. 13 of 2003 concerning manpower, the Government regulates that all foreign workers employed for technology transfer and skills transfer are required to have an Indonesian citizen companion. Then in the Job Creation Law, this rule is exempted for foreign workers (TKA) who hold positions of directors and / or commissioners. However, the Government added a regulation that accompanies the article, namely that employers are required to return

¹⁵ https://fokus.tempco.co/read/1394222/omnibus-law-karpet-merah-tenaga-kerja-asing-dari-pasal-pasal-yang-rontok?page_num=6.

foreign workers to their home countries after their employment relationship ends. This provision does not apply to foreign workers (TKA) who occupy certain positions.

Article 47 of Law No. 13 of 2003 concerning manpower, this Article regulates the payment of compensation for foreign workers who are employed in Indonesia. In paragraph 1, the article states that the employer is obliged to pay compensation for every foreign worker it employs. Then paragraph 2 reads: The obligation to pay compensation as referred to in paragraph (1) does not apply to government agencies, representatives of foreign countries, international agencies, social institutions, religious institutions, and certain positions in educational institutions. These two verses are not omitted. However, the government changed the sound of paragraph 3 from the beginning: provisions regarding certain positions in educational institutions as referred to in paragraph (2) shall be regulated by a Ministerial Decree; becomes: provisions regarding the amount and use of compensation as referred to in paragraph 1 are regulated in accordance with the provisions of statutory regulations.

The government has also removed paragraph 4 which contains provisions regarding the amount of compensation and its use shall be regulated by a Government Regulation. Instead, the government only includes a clause stating that the amount and use of compensation as stipulated in paragraph 1 are determined in accordance with statutory provisions.

Besides Article 81 of the Job Creation Law, the government abolished three articles in Law Number 13 of 2003 which regulate foreign workers. The articles that were deleted included Article 43, Article 44, and Article 46 of Law No. 13 of 2003 concerning manpower:

- (1) Article 43 regulates: The employer's obligation to have a plan for the use of foreign workers which is approved by the appointed minister;
- (2) Article 44 regulates the following provisions: Regarding the position and competency standards of foreign workers.
- (3) Article 46 regulates: Regarding the prohibition of foreign workers from occupying positions in charge of personnel and/or certain positions.

At first glance, it is very clear that the substance of the Job Creation Law has received too much priority from the government.¹⁶ The provisions in the Job Creation Act threaten the potential of local workers. This means that currently startups where the talents of Indonesian citizens (WNI) or local workers (TKL) have hopes, especially in the midst of the global flow of the Industrial Revolution 4.0, but the tap for foreign workers (TKA) is opened very wide. This means that the Job Creation Law is killing local talent opportunities to work at startups. Can this logic be justified? Maybe from one side of the analysis it is true, but when looking at other analyzes, the potential to be far more advanced with the arrival of foreign workers (TKA) is still very possible.

Economist Bhima Yudhistira Adhinegara assessed that opening the faucet through the loosening of the foreign worker permit (TKA) is also said to have an effect on:

- (1) Repatriation of funds abroad. This is because the salary received by foreign workers (TKA) every month will make foreign exchange abroad flow profusely. This condition is predicted to be detrimental to exchange rate stability in the long term;
- (2) The Job Creation Law deliberately eliminates the obligation to meet the competency standards of foreign workers (TKA). This means that unskilled workers can enter. If so, what is the transfer of skills and knowledge from foreign workers to local workers.

¹⁶ Bhima Yudhistira Adhinegara (*Economic Institute for Development of Economics and Finance (Indef)*). https://fokus.tempo.co/read/1394222/omnibus-law-karpet-merah-tenaga-kerja-asing-dari-pasal-pasal-yang-rontok?page_num=6.

Coordinating Minister for the Economy Airlangga Hartarto denied that the Job Creation Law provides a red carpet for foreign workers. He argued, the regulation regulates that workers who work in Indonesia must have competence and meet various required documents.

Apart from the above discourse, that the Omnibus Law model, to use foreign workers (TKA) as reflected in the Job Creation Act, which is currently being contested by many parties, actually has a positive value for the development and progress of the Indonesian nation, especially in inviting foreign investors, of course the transfer of knowledge and technology will not be hampered. Given current developments, the industrial revolution 4.0 cannot be overlooked.

The positive aspects with this Omnibus Law model are: can enhance the program of fostering basic views of the orientation of the reform of Indonesian workers; improve and develop the quality of Indonesian workers; build true partnerships in accordance with basic views, so as to create mutual loyalty, integrity and professionalism in all fields; as well as being able to resolve labor conflicts, mediator services are needed in case of disputes as well as legal defense for workers. Then the omnibus law model can also provide information services about job opportunities for workers.

4. Conclusion

The Omnibus Law is very important to implement because existing regulations are increasingly experiencing obesity, overweight regulations but hampering investment, so that the development and progress of the Indonesian state is hampered, even though Indonesia has declared to be part of the ASEAN Economic Community (AEC) and is on the line of the Industrial Revolution 4.0. through the omnibus law method, the Job Creation Law has the breath to bypass various tortuous investment regulations, and in accordance with the spirit of reform. Especially reforms in the field of legislation and bureaucracy. Bureaucratic problems have become a major problem for the Indonesian nation. This problem made many people, including investors, object to processing permits and chose to give pelican money as a form of corruption, collusion and nepotism practice so that it would be facilitated.

Acknowledgements

This research did not receive any specific grant from funding agencies in the public commercial, or not-for-profit sectors.

The author declares no competing interests.

References

- Abdussalam, H. R. (2002). *Hukum ketenagakerjaan* [Employment law]. Jakarta: Restu Agung.
- Deliarnov (2014). *Perkembangan pemikiran ekonomi* [Development of economic thought]. Jakarta: Edisi Ketiga, Rajawali Pers.
- Fitryantica, A. (2019). Harmonisasi peraturan perundang-undangan Indonesia melalui konsep omnibus law [Harmonization of Indonesian laws and regulations through the concept of omnibus law]. *Jurnal Gema Keadilan*, Vol. 6, Edisi III, p. 303.
- Garner, B. A. (2004). *Black law dictionary*. USA: A Thomas Reuters Business.

- Greenwood, M. J., & McDowell, J. M. (1986). The factor market consequences of U.S. immigration, *Journal of Economic Literature*, 24(4), 1986, 1773-1785.
- Karianga, H. (2011). *Partisipasi masyarakat dalam pengelolaan keuangan daerah perspektif hukum dan demokrasi* [Community participation in regional financial management from legal and democracy perspective]. Bandung: PT Alumni.
- Legal Dictionary (n.d.). <http://www.duhaime.org/LegalDictionary.aspx>; <http://www.duhaime.Org/LegalDictionary/O/OmnibusBill.aspx>.
- Nababan, B. S. P. (2014). *Pembentukan peraturan daerah tentang retribusi perpanjangan izin mempekerjakan tenaga kerja asing sebagai persiapan menghadapi Masyarakat Ekonomi ASEAN 2015* [Establishment of regional regulations on levies for permit extension to employ foreign workers as preparation for facing the 2015 ASEAN Economic Community]. 3rd Investigation.
- Ningrum, S. C. (2006). *Penggunaan tenaga kerja asing di Indonesia* [Use of foreign manpower in Indonesia]. Jakarta: HIPSMI.
- Salt, J., & Clout, H. (1976). *Migration in post-war Europe: Geographical essays*. London: Oxford University Press.
- Segal, A. (1993). *An atlas of international migration*, London: Hans Zell Publishers.
- Simon, J. L. (1998). *The economic consequences of immigration in to United States*. Maryland: University of Maryland Press.
- Simon, J. L., Stephen, M., & R. Sullivan (1993). The effect of immigration on aggregate native unemployment: An across-city estimation, *Journal of Labor Resources*, 14(3), 299-316.
- O'Brien, A. et al. (2009). *House of Commons procedure and practice*, 2nd Ed., Ottawa: Editions Yvon Blais, p. 724.



The Urgency for the Implementation of Transition Norm “Lex Favor Reo” in the Imposition of Tax Sanction in Indonesia

Arifin Halim, Sudarsono, Tunggal Anshari Setia Negara & Heru Ratno Hadi

Brawijaya University, Faculty of Law, Malang, INDONESIA

Received: 9 October 2020 ▪ Accepted: 18 December 2020 ▪ Published Online: 30 December 2020

Abstract

Taxation regulations in Indonesia are very dynamic, due to frequent changes in tax laws and regulations. Taxpayers need to make extra efforts to keep abreast of the latest tax regulations. This can cause taxpayers to experience difficulties in carrying out their tax obligations. On the other hand, Indonesia adheres to the principle of legal fiction, so that for every statutory regulation that has been promulgated, the public is deemed to have known the law and understands it, so that there is no excuse for the violations to the law. Problem may arise when the tax authorities conduct tax audits on taxpayers and find the taxpayers do not carry out tax obligations in accordance with the taxation provisions in effect at the time the transaction happens, so that the tax authorities will impose tax sanctions on taxpayers in accordance with the tax regulations in force at the time when the transactions happen, not based on the latest tax regulations, which are in effect when the taxpayer's error is discovered by the tax authorities. The imposition of these sanctions raises a problem: has the imposition of tax sanctions provided justice and legal certainty? How is the imposition of tax sanctions that provide justice and legal certainty? Legal certainty is one of the main factors for investors in deciding which countries to invest in. Therefore, in our opinion, a “new model for the imposition of tax sanctions” is needed in Indonesia, namely by applying the Lex Favor Reo Transitoir (transition) principle in the imposition of tax sanctions. This research is significant to conduct, so that the imposition of tax sanctions provides better justice and legal service. The application of the “new model of imposition of tax sanctions” also has urgency, so that the imposition of tax sanctions for taxpayers provides a sense of justice and legal certainty which in turn can attract investors to invest in Indonesia as well as to avoid *capital flight*. This condition will make Indonesian economy grow rapidly and, in the end, will increase state revenue from taxes.

Keywords: tax sanction, new model, legal certainty, legal justice.

1. Introduction

In Indonesia, tax regulations are very dynamic and change very rapidly. There are times when changes come and go. This certainly makes taxpayers need extra energy to keep abreast with the latest tax regulations. During the Covid-19 pandemic, the government issued so many tax regulations to provide tax and other incentives. For the most recent amendments, on 5 October 2020 the House of Representatives has completely ratified the Job Creation Act / Omnibus Law Bill into Law, but it has not been promulgated by the government to date. In the Omnibus Law which was recently passed by the House of Representatives, it also regulates

changes in taxation legislation, namely amendments to the Law on General Provisions and Procedures of Taxation (GPT Law), the Income Tax Law, and the Value Added Tax Law (VAT Law).

This dynamic taxation regulation in Indonesia can cause taxpayers to experience difficulties in carrying out their tax obligations. Meanwhile, on the other hand, there is a theory of legal fiction. If the taxpayer does not properly carry out tax obligations, he will be subject to sanctions. For taxpayers, especially investors, legal certainty is very important in running a business. Even potential investors place legal certainty as the main factor in determining which country to invest in.

In order to provide justice and legal certainty in the imposition of tax sanctions, in our opinion, a “new model in the imposition of tax sanctions is needed”. The new model for the imposition of tax sanctions is expected to provide legal justice and legal certainty, because taxpayers are guaranteed to be treated fairly if something goes wrong.

The urgency to implement a “new model for the imposition of tax sanctions” in Indonesia is for investors to choose Indonesia as an investment destination country. If in the future investment in Indonesia increases, then undeniably Indonesian economy will also grow and develop. This absolutely will also provide a multiplier effect to other companies, to communities around the company, as well as in creating jobs. This arrangement will simultaneously improve Indonesian economy which in turn will increase state revenue from taxes.

By looking at the existing problems, then the necessity and urgency for applying “a new model in the imposition of tax sanctions in Indonesia” makes the author interested in discussing and analyzing “The Urgency of a New Model in the Imposition of Tax Sanctions – in an Indonesian Perspective”.

The legal problems examined in this study are: First, whether the current tax penalties provide legal justice? Second, how to impose tax sanctions that fair and provide legal certainty? The author will discuss and analyze the imposition of tax sanctions that apply in Indonesia and diagnose the problems that occur, as well as provide solutions to overcome the problems regarding the imposition of tax sanction.

The systematic in writing this journal begins with an introduction, then continues with the imposition of tax sanctions in Indonesia; continued with the importance of legal certainty for investors; continued with a discussion about the imposition of tax sanctions, the implications of applying sanctions to taxpayers, the cumulation of cases in the tax court, and the counterproductive energy in dealing with tax disputes; then continued to discuss “The Urgency of a New Model in Imposing Tax Sanctions” as a solution to the problems that occur; and ends with conclusions, suggestions and expectation.

2. Imposition of tax sanction in Indonesia

The imposition of tax sanctions in Indonesia is regulated in Law Number 6 of 1983 concerning General Provisions and Tax Procedures as amended several times, most recently by Law Number 16 of 2009 concerning Stipulation of Government Regulations in Lieu of Law Number 5 of 2008 concerning Fourth Amendments on Law Number 6 of 1983 concerning General Provisions and Tax Procedures to become Law, hereinafter referred to as the Law on General Provisions and Procedures of Taxation (GPT Law). On 5 October 2020, the House of Representatives has just passed the Job Creation Act / Omnibus Law which includes changes to the GPT Law, the Income Tax Law, and the VAT Law.

There are 2 (two) sanctions regulated in the GPT Law, consisting of administrative sanctions and criminal sanctions. Administrative sanctions consist of administrative sanctions,

finances and interest sanctions. This is an additional sanction from the basic tax penalty that is still payable by the taxpayer based on the determination of the tax auditor.

The provisions on sanctions is not only regulated at the level of the GPT Law, but also contained in the taxation regulations which form the basis for determining the amount of tax payable by taxpayers in the form of principal payable tax. Taxation regulations governing principal tax sanctions are contained in tax regulations that govern Income Tax, hereinafter referred to as IT, or Value Added Tax, hereinafter referred to as VAT. This taxation regulation that regulates IT and VAT regulates the criteria and how to calculate the tax imposed. If the tax auditor finds that the taxpayer does not carry out tax obligations based on the criteria and provisions stipulated in the statutory regulations regarding IT or VAT, the tax auditor will impose tax sanctions on the taxpayer, namely principal tax penalties and additional sanctions in the form of fines, increase, and/or interest.

Tax regulations regarding IT and VAT often change from time to time. This change is very dynamic. In this study, the authors focus on the regulations governing the imposition of tax sanctions in the form of the amount of tax subject to be paid by taxpayers, before additional sanctions which can be in the form of fines, increase, and/or interest from the GPT Law, namely tax laws that govern payable tax calculation on IT and VAT.

3. The significance of legal certainty for investor

The issue on the significance of legal certainty for investors has often been raised by various parties. Sugianto, as Managing Partner of MUC Consulting, explained that many Japanese companies investing in Indonesia prioritize legal certainty. Japanese investors in Indonesia question the uncertainty of tax law in Indonesia, where tax officials often interpret taxation regulations differently, even though the regulations are still the same and have not changed. They are also shocked and questions, why in every tax audit they experience, the tax auditor always aims to find correction and it confuses them. They also question, why tax auditors do not appreciate taxpayers who have complied with tax obligations in accordance with tax regulations. According to Yustinus Prastowo, legal certainty in taxation is a very important factor for investors in making decisions in determining where to do business and invest.

Furthermore, according to Sofyan Wanadi as Chairman of the Indonesian Employers' Association, the main factor that entrepreneurs pay attention to when they want to invest is legal certainty. The same thing was conveyed by the State Financial Law Expert from the University of Indonesia, Dian Puji Simatupang in a written statement to Hukum Online, that 89% of investors wanted guarantees for continuous investment in Indonesia in the form of better legal products. Sofyan Wanadi also states that "The number of unclear regulations makes it difficult for entrepreneurs to calculate costs." Sofyan Wanadi also said that there were actually many who wanted to invest in Indonesia, but the uncertainty of law in Indonesia made potential investors cancel their intention to invest in Indonesia.

According to the Deputy Chairperson of Indonesian Chamber of Commerce and Industry, Department of Industry, Johnny Darmawan, the main factor of hesitance in foreign investors to put investment in Indonesia is the lack of legal certainty in Indonesia. Investors consider legal certainty and public support for the government. After the trade war between the United States and China, 33 companies made the option to relocate their business from China and they did not choose Indonesia (Kosijungan, 2020). Indonesia lose to Vietnam, Thailand and Malaysia in attracting relocation investment from the trade war (Crystalli, 2018). The complexities of regulations in Indonesia and the disharmony of existing regulations are feared to be one of the factors for investors to discourage investment in Indonesia (Kosijungan, 2020).

The amount of tax is not the main factor for investors in making investment decisions in a country, however, the legal certainty of tax regulations is the main factor (OECD, 2020). Certainty in tax regulations is an important factor for investors in making investment decisions and can have a big impact on economic growth (OECD, 2019).

4. Discussion

4.1 *Imposition of taxation sanction*

The dynamic changes of tax regulations in Indonesia obviously have resulted in changing the criteria and/or provisions for tax imposition. If in the future the tax auditor finds the taxpayer's error and determines the remaining tax that the taxpayer has to pay, the tax auditor will generally refer to the taxation regulations in effect at the time the error occurred. The dynamic of Indonesian taxation regulations can make it difficult for taxpayers to carry out tax obligations, so that the errors that occur are also not due to the taxpayer's deliberate factor. However, it is more due to the fact that it is difficult for taxpayers to follow changes in the applicable taxation regulations.

Another thing that may happen is that it is not easy for the taxpayer to understand well, whether the determination of the tax imposed on him is in accordance with his error or not? Besides that, are the tax regulations used for tax determination correct and provide legal certainty and justice?

As an example in the imposition of VAT on self-construct activities, there is a Minister of Finance Regulation which regulates the imposition of VAT that must be paid by the Taxpayer for self-building activities in the form of buildings for their own needs, which is known as “self-construct VAT”. In the Regulation of the Minister of Finance which regulates “self-construct VAT”, from time to time the regulations undergo changes, especially regarding the “criteria of minimum building area to be subject to Self-construct VAT”, as well as “the amount of percentage of the Tax Base”.

Since 1995 until now (October 2020) the Regulation of the Minister of Finance that regulates self-construct VAT has changed 5 (five) times, as described in the table below.

Table 1. Table of criteria for self-construct VAT according to the Regulation of the Minister of Finance

No	Number of Regulation	Execution Date	Criteria of Building Area (M ²)	TB from the Total Expenses Out of Land Price
1	595/KMK.04/1994	1 January 1995	400	40%
2	554/KMK.04/2000	1 January 2001	400	40%
3	320/KMK.03/2002 Amendment to 554/KMK.04/2000	1 July 2002	200	40%
4	39/PMK.03/2010	1 April 2010	300	40%
5	163/PMK.03/2012	20 Nov 2012	200	20%

Changes in the criteria for building area or the percentage of Tax Base (TB) in the Regulation of the Minister of Finance above will result in the imposition of sanctions for taxpayers to pay “Self-construct VAT” to be a separate problem in its implementation. This can be seen from the illustration below.

Illustration 1

For example, on 15 February 2012, Taxpayer A began constructing a building for office by using private masons. The building was completed on 10 October 2012. The building area is 305M² and the total cost to construct the building (excluding land price) is IDR 2,000,000,000.

On 5 April 2016, a tax officer examined taxpayer A and according to tax auditors, Taxpayer A had to pay “self-construction VAT”. When the tax auditor finds that taxpayer A has not fulfilled its tax obligations in accordance with the present Regulation of the Minister of Finance, Regulation of the Minister of Finance Number 163 / PMK.03 / 2012 has been enacted, and when taxpayer A starts to build his office until the construction finished, the Regulation of the Minister of Finance in effect is Regulation Minister of Finance Number 39 / PMK.03 / 2010. In this case, there will be a question, which regulation will be used by tax auditors to impose penalties to taxpayers?

Illustration 2

For example, on 10 February 2013, taxpayer B began constructing a building for his office using private masons. The building was completed on 10 October 2013. The building area is 305M² with the total cost to build (excluding land price) is IDR 2,000,000,000.

In this example, we equate the condition with taxpayer A, namely on 5 April 2016, the tax officer checks taxpayer B. When the tax auditor finds taxpayer B for constructing his own building, the Minister of Finance Regulation Number 163 / PMK.03 / 2012 has already been applied, and when the taxpayer B begins to build his building until it is finished, the applicable regulations are the same, namely Regulation of the Minister of Finance Number 163 / PMK.03 / 2012. Here the question that will arise, regarding the condition of taxpayer B who constructs a building with the same area and value as taxpayer A, what is the potential tax penalty for “self-construction VAT”² that will be imposed by the tax auditor?

4.2 Implication towards taxpayer

From the above illustration, the authors will carry out further analysis to find out the implications towards Taxpayer A and Taxpayer B. Let’s start the analysis as follows:

Analysis of implication towards Taxpayers A from Illustration 1

Known:

- The area of the building is 305m².
- The total cost for the construction, excluding the land price, is as much as Rp2.000.000.000,-
- Began the construction on 15 February 2012.
- Finished the construction on 10 October 2012.

Regulation of the Minister of Finance Number 39 / PMK.03 / 2010 regulates the following criteria:

- Minimum building area is **300m²**.
- Percentage of TB is **40%** from the total cost.
- Executed on 1 April 2010.

Regulation of the Minister of Finance Number 163 / PMK.03 / 2012 stipulates the following criteria:

- Minimum building area is **200m²**.
- Percentage of TB is **20%** from the total cost.
- Executed on 20 November 2012 and abort Regulation of the Minister of Finance Number 39/PMK.03/2010.

The tax auditor examines taxpayer A on 5 April 2016.

Calculation of imposed VAT must be paid by Taxpayer A:

If the tax auditor determines the self-construction VAT which must be paid by Taxpayer A based on the Regulation of Minister of Finance Number 39 / PMK.03 / 2010, the calculation is as follows:

Since the constructed building covers an area of 305M², according to the Regulation of Minister of Finance Number 39 / PMK.03 / 2010, taxpayer A must pay self-construction VAT, with the following calculation:

Total cost of construction Rp2.000.000.000,-

Tax Base Rp2.000.000.000 X **40%** = Rp800.000.000,-

Self-construction VAT Rp800.000.000 X 10% = **Rp80.000.000,-**

If the tax auditor determines the VAT that must be paid by Taxpayer A based on the Regulation of Minister of Finance Number 163 / PMK.03 / 2012, the calculation is as follows:

Since the constructed building covers an area of 305M², according to the Regulation of the Minister of Finance Number 163 / PMK.03 / 2010, taxpayer A must pay Self-construction VAT with the following calculation:

Total cost of construction Rp2.000.000.000,-

Tax Base Rp2.000.000.000 X **20%** = Rp400.000.000,-

Self-construction VAT Rp400.000.000 X 10% = **Rp40.000.000,-**

Analysis of implication towards Taxpayers B from Illustration 2

Known:

- The area of the building is 305m².
- The total cost for the construction, excluding the land price, is as much as Rp2.000.000.000,-
- Began the construction on 10 February 2013.
- Finished the construction on 10 October 2013.

Regulation of the Minister of Finance Number 163 / PMK.03 / 2012 stipulates the following criteria:

- Minimum building area is **200m²**.
- Percentage of TB is **20%** from the total cost.
- Executed on 20 November 2012 and abort Regulation of the Minister of Finance Number 39/PMK.03/2010.

The tax auditor examines Taxpayer B on 5 April 2016.

Calculation of imposed VAT must be paid by Taxpayer B:

When the Taxpayer B starts to build his office until the time when the tax auditor will determine the VAT to be paid by the taxpayer B, the applicable tax regulation governing Self-construct VAT is the Regulation of the Minister of Finance Number 163 / PMK.03 / 2012. Therefore, for taxpayer B, tax auditors will certainly use the Regulation of the Minister of Finance Number 163 / PMK.03 / 2012 in calculating the self-construction VAT that must be paid by Taxpayer B, the calculation is as follows:

Since the constructed building covers an area of 305M2, according to the Regulation of the Minister of Finance No. 163 / PMK.03 / 2010, Taxpayer B must pay self-construct VAT, e.g with the following calculations:

Total cost of construction Rp2.000.000.000,-

Tax Base Rp2.000.000.000 X 20% = Rp400.000.000,-

Self-Construction VAT Rp400.000.000 X 10% = **Rp40.000.000,-**

From the two analyzes above, it can be seen, that Taxpayer A and Taxpayer B made the same mistake, was discovered by the tax authorities at the same time, but from the current legal system in Indonesia, there is a tendency for Taxpayer A to be subject to be imposed with Self-construct VAT in the amount of Rp. 80,000,000 plus administrative sanctions in the form of interest for late payment of tax base according to the GPT Law. Meanwhile, Taxpayer B has the potential to be subject to the imposition of Self-construct VAT of Rp. 40,000,000 plus interest sanctions for late payment of the tax base according to the GPT Law.

From the results of the analysis above, it is illustrated that there is an injustice that will be experienced by Taxpayer A, because Taxpayer A has the potential to get more severe penalties than Taxpayer B. In fact, both Taxpayer A and Taxpayer B have made the same mistake found by the tax inspector at the same time, but Taxpayer A has the potential to bear a heavier penalty than Taxpayer B.

4.3 Accumulation of cases in tax court

From the two illustrations above, according to authors, this issue will encourage Taxpayer A to take legal remedies in the form of objections to the Director General of Taxes on the tax imposition against him. Generally, in this stage of legal remedies, taxpayers will be rejected by the Director General of Taxes, so that taxpayers will take further legal remedies to the tax court to seek justice. It can even reach the Supreme Court in the form of a judicial review.

Based on a research by Heru R. Hadi, tax dispute cases are piling up so high in the tax court. From year to year, the accumulation of cases tends to increase, which can be seen in the table below:

Table 2. Table of cases registered to tax court from 2005 until 2016

Year	Number of cases registered to Tax Court
2005	2,613 files
2006	3,317 files
2007	4,842 files
2008	6,428 files
2009	7,462 files
2010	6,669 files
2011	7,066 files

2012	7,352 files
2013	8,399 files
2014	10,866 files
2015	12,486 files
2016	10,153 files

Source: Hadi (2017)

Table 3. Mutation of case files in tax court

Year	Initial Cases	Registered Files	Completed Files	Remaining Cases
2011	9,448	7,066	7,818	8,696
2012	8,696	7,352	6,533	9,515
2013	9,515	8,399	7,376	10,538
2014	10,538	10,866	8,845	12,559
2015	12,559	12,486	9,032	16,013
2016	16,013	10,153	12,852	13,314

Source: Hadi (2017)

4.4 *The counter-productive of energy in finishing tax dispute*

Each of tax disputes are undoubtedly energy draining, both for the taxpayers and the tax officers. If a tax dispute which actually can be solved from the beginning and serve justice in a sense that can be agreed and enjoyed by taxpayers, certainly the taxpayer will not strive for further legal remedies. The legal remedies taken by taxpayers are in the objective to achieve justice, which according to taxpayers is worth fighting for.

For cases that can actually be minimized, even resolved if using a new model for the imposition of tax sanctions, it certainly will save energy which is counter-productive for both taxpayers and tax officers. This will provide space for tax officers to be more focused on carrying out other tasks, so that it is more effective than having to make preparations for dealing with tax disputes which can actually be minimized, even resolved in order to provide legal certainty and justice.

On the other hand, for entrepreneurs, the available energy can be used by taxpayers to think about how their business can be more efficient, more creative, more advanced, and more developed. This absolutely will also provide a multiplier effect to other companies, to communities around the company, as well as creating jobs. This will simultaneously improve Indonesian economy, which in turn will increase tax revenue for the country. Hence, both entrepreneurs and the country grow together.

5. The urgency of new model in the imposition of tax sanction

5.1 *Lex Favor Reo Transition (LFRT)*

Indonesian legal system has criminal law provisions regulated in the Criminal Code. The Criminal Code is a *lex generalis*, especially related to legal sanctions. The Criminal Code adheres to the Lex Favor Reo Transition principle (LFRT). It is regulated in Article 1 paragraph

(2) of the Criminal Code, which is an exception to the principle of “not retroactive” (Sasmito, 2017). The provisions in Article 1 paragraph (2) of the Criminal Code are as follows:

Article 1 Paragraph (2) of the Criminal Code

“If after the act has been committed there are changes in legislation, the lightest rules for the Defendant will apply.”

The provisions in Article 1 Paragraph (2) of the Criminal Code provide a guarantee that no person may be punished more severe than the existing provisions. In the case of state administration, it can be interpreted as the imposition of sanctions imposed by the state on its citizens for mistakes that have been committed in the past based on lighter laws in the event of a change in legislation. Therefore, the LFRT principle applies, where the sanction given is the lightest (Hiariej, 2018);

Furthermore, Wirjono Prodjodikoro gave an opinion regarding Article 1 Paragraph (2) of the Criminal Code, which according to Wirjono, that the application of Article 1 Paragraph (2) of the Criminal Code is the application of the law of exemption to the principle of non-retroactivity and may only be applied in passing lighter penalties to a suspect whose case has not been decided by the judge in a final legally binding decision and a new law has been issued with a lighter penalties than the previous law (Prodjodikoro, 2012).

According to Eddy O. S. Hiariej (2018), it is implicitly regulated in Article 11 Paragraph (2) of the Declaration of Human Rights to impose the lightest punishment in the event of a change in regulations. The provisions of Article 11 of the Human Rights Declaration are as follows:

(1) *“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial which he has had all the guarantees necessary for his defense.”*

(2) *“No one shall be had guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”*

Remmelink (2003) argues, that the provisions in Article 7 of the ECHR explicitly stipulate a lighter penalties if after the crime has been committed there is a new criminal code with a lighter penalties. The provision of Article 7 of the European Convention (European Convention for the Protection of Human Rights / ECHR) is as follows:

(1) *“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”*

(2) *“This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principle of law recognized by civilized nations.”*

5.2 The meaning of legislation change

Wirjono Prodjodikoro (2012) conveyed that the meaning of a change in law is if an article in the law is changed in such a way or the article is completely revoked, or the penalty is reduced, or the imprisonment penalties is replaced by a temporary detention or a fine.

Wirjono further explained that this would be different if a prohibition applied only for a certain period. In this condition, then the person who committed the offense during a certain

period and just tried after the past period, then the suspect is still punished (*temporaire strafbepalingen*), even though the act was an old act, because in this case there is actually no change in the laws and regulations.

5.3 What is meant by favorable (*Gunstigste*)?

It is not easy to determine which one is more favorable for a suspect, whether with the old law or the new law.

For example, in the new law the threat of imprisonment is reduced, but added with a new sentence of revocation to the right to perform certain jobs. Or the imprisonment sentence is replaced by a close supervision to the convicted person by the government for his actions.

Therefore, what is meant by favorable is the sentence imposed on the defendant with the lightest penalties between the old law and the new law. If the new law has lighter penalties, then the new law is used. However, if the lighter penalty is in the old law, then the old law applies.

5.4 The urgency of *Lex Favor Reo* Transition (LFRT) as the new model in the imposition of tax sanction

Based on the results of the analysis above and related to the LFRT principle, as well as seeing that two taxpayers who make the same mistake have the potential to be subject to different tax sanctions, it is necessary to provide justice and legal certainty. Therefore, according to authors, the two taxpayers in the illustrations above should be subject to the same penalty. This will also make it easier for tax officials to impose tax penalties with more legal certainty. Therefore, authors argue, Indonesian tax laws and regulations must strictly adhere to LFRT principle in order to provide justice and legal certainty. The urgency of strictly applying LFRT principle in Indonesian tax regulations is to provide a sense of justice regarding to the imposition of tax sanctions, so that the application of the principle of justice in taxation can in turn attract investors to choose Indonesia to be the country of investment destination.

However, LFRT principle should still apply as a *lex generali* in tax regulations, because the Criminal Code is a *lex generali* and tax regulations are *lex speciali*. In the principles of laws, if the *lex speciali* does not specifically provide a rule, then the *lex generali* applies. In the context of taxation legislation, since the GPT Law does not regulate the rejection of LFRT principle, then what applies is the LFRT principle contained in the Criminal Code as a *lex generali*. However, as a tax practitioner, we do not see the application of LFRT principle in the current taxation sanctions. Therefore, for legal certainty and preventing multiple interpretations, there is an urgent need to strictly adhere to LFRT principle in Indonesian taxation legislation, which is regulated in the GPT Law.

The LFRT principle will provide justice by providing the lightest punishment to taxpayers if there are changes in Indonesian tax laws. It certainly gives more sense of justice to taxpayers, because of the same mistakes, which when the tax auditors find them after a change in legislation will be punished with the lightest penalty. This of course will be very helpful in providing legal certainty, so as to reduce tax dispute cases and reduce the accumulation of case files in the Tax Court and the Supreme Court.

This solution is similar to the background of the birth of the Omnibus Law, which is to harmonize existing laws and regulations in Indonesia in order to improve investment climate in Indonesia. Where one of the most fundamental changes in the Omnibus Law for the taxation cluster is the imposition of tax sanctions on taxpayers who have clearly met the criteria as “Taxable Entrepreneurs”, hereinafter referred to as TE, but have not yet carried out VAT collection, so that

the tax auditors will billed through tax determination on the VAT that the TE must collect from the sales value.

In the VAT Law which is currently still in effect (before the Omnibus Law), for this error, TE must deposit VAT that should have been collected from its sales of “Turnover x 10%”, and cannot credit Input VAT that has been paid, or in other words, there is no “deemed VAT Input”. It certainly will be very burdensome and can ruin the TE, because TE’s profits are often below 10%. However, in the Omnibus Law Bill, for this error, TE may credit Input VAT which considered as “deemed”, as much as 80% of the Output VAT, so that the VAT that must be paid to the State is “Turnover x 10% x 20%”. The method regulated in the Job Creation Act / Omnibus Law provides more legal justice and does not threat entrepreneurs, especially those who are growing MSMEs. This is in accordance with the tax collection philosophy that is to take the eggs instead of slaughtering the chickens.

If later the Omnibus Law Bill is promulgated by the government, and it is true that it is allowed for Input VAT to be credited by “deemed” as much as 80% of the Output VAT, then the tax officer finds the taxpayer / TE error that must be subject to tax sanctions because they have not collected VAT. For example, since the Tax Period of January 2020, with LFRT principle, it will provide legal certainty that provides more legal justice. Whereas with LFRT principle, tax officials may only impose lighter sanctions, namely in accordance with the provisions of the Omnibus Law.

The LFRT principle can also be useful as a bulwark to protect taxpayers in obtaining legal certainty, legal protection and legal justice, if one day a taxation law is enacted, the material of which contains heavier penalties and is enforced accordingly. Either the retroactive arrangements are regulated explicitly or implicitly in tax laws, with the LFRT principle which strictly adhered to in the GPT Law, it will automatically fortify and abort the implementation of an arrangement in a taxation law whose materials retroactively imposing a heavier legal sanction. Therefore, according to authors, in this scientific research, it is very important that the GPT Law strictly adheres to the LFRT principle in order to provide legal certainty, legal protection and legal justice for taxpayers.

6. Conclusion, suggestion, and expectation

From the discussion and analysis above, the authors conclude as follows:

(1) Indonesia’s dynamic tax regulations have caused taxpayers to experience difficulties in carrying out their tax obligations appropriately. The tax sanctions that currently implemented have the potential to cause legal injustice for taxpayers who make the same mistake, but can be punished with different penalties. This also creates legal uncertainty because the LFRT principle has not yet got a place in the practice of imposing tax sanctions in the field.

(2) The need for Indonesia to strictly adhere to the GPT Law in the form of LFRT principle as a new model for the imposition of tax sanctions in Indonesia that provides more legal justice, legal certainty, and legal guarantees. The advantages of adhering strictly to LFRT principle in the GPT Law are as follows:

- a. Providing justice, legal certainty, and legal guarantee for taxpayers;
- b. The improved tax law certainty will attract investors to choose Indonesia as an investment destination country and prevent capital flight;
- c. Reducing tax disputes due to injustice in the imposition of tax sanctions, so that entrepreneurs’ energy can be focused more on thinking about business progress;

d. As a fortress that automatically rejects the imposition of taxation regulation that imposes burdensome sanctions that imposed retroactively. This principle is a guarantee of tax law certainty in Indonesia;

e. This principle will support the philosophy in tax collection, which says taking chicken eggs instead of slaughtering the chickens. Because if the chicken has been slaughtered, the state will no longer be able to take eggs.

Based on the above conclusions, the authors provide suggestions to Indonesian government as follows:

(1) A new model is needed in the imposition of tax sanctions in Indonesia that provides more justice, legal certainty and legal guarantees.

(2) The new model clearly stipulates and applies the LFRT principle in the GPT Law, so that taxpayers who make the same mistake will be punished with the same penalty. The LFRT principle will provide more legal certainty, legal protection and legal justice. In the event of a change in taxation laws, the taxpayer is only subject to the lightest sanctions from the old and the new laws.

Based on the above conclusions and suggestions, through strict application of the LFRT principle in taxation regulations in Indonesia, authors have the following expectations:

(1) Taxpayers will get more legal certainty, legal protection and legal justice. Legal certainty in Indonesian tax law is needed by investors. It is hoped that the LFRT principle will become a capital and comparative advantage for Indonesia in attracting investors to choose Indonesia as their investment destination.

(2) Increased investment in Indonesia will provide a multiplier effect to: other companies in Indonesia, to the communities surrounding where the companies are located, as well as creating jobs. This will simultaneously improve Indonesian economy and provide mutual growth, both to entrepreneurs and the state, which in turn will increase tax revenue for the state and provide progress for Indonesia and can be used to improve the welfare of the Indonesian people.

Acknowledgements

This research did not receive any specific grant from funding agencies in the public commercial, or not-for-profit sectors.

The authors declare no competing interests.

References

- Crystallin, M. (2018). *Indonesia: Worsening current account still manageable*. DBS Group Research. DBS Flash.
- Hadi, H. R. (2017). *Reformulasi pengaturan penyelesaian sengketa pajak di Indonesia* [Reformulation of tax dispute resolution arrangements in Indonesia]. Malang: Brawijaya University.
- Hiariej, E. O. S. (2018). *Prinsip-prinsip hukum pidana* [Principles of criminal law]. Yogyakarta: Cahaya Atma Pustaka.

- Kosijungan, P. A. (2020). Center for Indonesian Policy Studies, *Press conference* – Kepastian hukum diperlukan untuk memastikan iklim investasi Indonesia kondusif [Legal certainty is needed to ensure a conducive investment climate in Indonesia], 28 April 2020, accessed from <https://www.cips-indonesia.org/post/siaran-pers-kepastian-hukum-diperlukan-untuk-memastikan-iklim-investasi-indonesia-kondusif>, on 8 October 2020.
- OECD (2020). *Tax morale in businesses*. Available at <https://www.oecd-ilibrary.org/sites/f3d8ea10-en/index.html?itemId=/content/publication/f3d8ea10-en>, accessed on 12 October 2020
- OECD (2019). 2019 Progress Report on Tax Certainty, *IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors*. June 2019. Available at <https://www.oecd.org/tax/tax-policy/imf-oecd-2019-progress-report-on-tax-certainty.pdf>, accessed on 12 October 2020.
- Prodjodikoro, W. (2012). *Asas-asas hukum pidana di Indonesia* [Fundamentals of criminal law in Indonesia]. Bandung: Refika Aditama.
- Rommelink, J. (2003). *Hukum pidana* [Criminal law]. Jakarta: PT. Gramedia Pustaka Utama.
- Sasmitho, J. (2017). *Konsep asas retroaktif dalam pidana* [The concept of retroactive principle in criminal law]. Malang: Setara Press.



Traffic Policy towards the Current of Refugees and Subscribers Movement in Reforming State Sovereignty

Lisda Syamsumardian, Abdul Rachmad Budiono, Moh. Fadli & Dhiana Puspitawati
Brawijaya University, Faculty of Law, INDONESIA

Received: 1 November 2020 ▪ Accepted: 24 December 2020 ▪ Published Online: 30 December 2020

Abstract

Countries like Indonesia that have immigration routes will look at every foreigner's problem from an immigration point of view. Foreigners who enter Indonesia without travel documents are considered illegal. When referring to concrete cases, generally refugees or asylum seekers may not have complete travel documents. Because it is impossible for them to be forced to leave their country, by first obtaining a visa, passport, or other correspondence. In most cases that occur, refugees or asylum seekers do not have complete travel documents. So, in order to maintain sovereignty in the authority of immigration supervision, it is very important to research related Immigration traffic. The problem raised in this paper is how the monitoring mechanism of immigration traffic, in order to reinforce the concept of sovereignty. In writing this journal the author uses a statutory approach, a case approach, and a sociological approach. The method used in this paper is a normative juridical method so that answers will be found in the form of a descriptive perspective. The conclusion in this paper is that the policy on the flow of refugee movements into Indonesia is not in accordance with the concept of sovereignty, where the regulation of the flow of refugee movements is very vulnerable to the aspects of crime (trafficking in persons, narcotics, prostitution, etc.), in fact the sovereignty of the state become a protector for refugees who come to Indonesia, from international and national crime systems, and that is often misunderstood. So, the suggestion from this research is that immigration should be given space in the framework of supervision for Refugees and Asylum Seekers, which have been under the authority of the Immigration Detention Center (RUDENIM).

Keywords: refugees, asylum seekers, immigration control, state sovereignty.

1. Introduction

In Mochtar Kusumaatmadja's writing (1982), he states that sovereignty is an essential characteristic of a state, where the state is sovereign, but has its boundaries, namely the space for the highest power to be exercised and limited by the boundaries of the country's territory, outside of its territory the state no longer has such power. In this regard, sovereignty is not seen as something that is unanimous and intact, but in certain limits it has been subject to restrictions in the form of international law and the sovereignty of each other (Hadiwijoyo, 2008).

A sovereign state must still comply with international law, and may not prejudice the sovereignty of other countries, so it can be said that at present state sovereignty is the remainder of the power that is owned within the boundaries set by international law, although it tends to be every country the sovereign has distinctive sovereignty which is reflected in the national policy of the country. Indonesia has the context of sovereignty, namely, internal sovereignty where this

© **Authors.** Terms and conditions of Creative Commons Attribution 4.0 International (CC BY 4.0) apply.

Correspondence: Lisda Syamsumardian, Brawijaya University, Faculty of Law, INDONESIA. E-mail: lisda.fhub@gmail.com.

sovereignty can be demonstrated in the form and structure of the Indonesian state, as a unitary state characterized by the archipelago, as stated in article 25A of the 1945 Constitution, this is basically a manifestation of the geopolitical aspects of the State. Indonesia is an archipelago insight that we know about internal sovereignty, where sovereignty into Indonesia is manifested through the insight of the archipelago. The role of the archipelago's insight is as a manifestation of protecting the entire Indonesian nation and all Indonesian bloodshed. As a sovereign country, Indonesia cannot be separated from participating in solving international problems. Indonesia's position at the 1951 Protocol 1967 convention on the status of refugees is a country that is not a party to the convention. However, Indonesia continues to carry out its obligations as a country that prioritizes human rights, so that Indonesia's position.

In this Convention it is a transit country, and it is imperative for Indonesia to harmonize the National Law with the 1951 Protocol 1967 Convention, but in accordance with the aspects of state sovereignty and human rights as regulated in the 1945 Constitution of the Republic of Indonesia.

The presence of “refugees” and “asylum seekers” is a social phenomenon in international relations, which has a significant impact on the policies of the host country. This also happens in Indonesia, which seeks to provide protection for refugees and asylum seekers who come to Indonesia. In this case, the State's obligation to respect, protect and enforce Human Rights is not only aimed at Indonesian citizens, but also includes citizens from other countries who are in the territory of Indonesia, whether they are legally or illegally (Primawardani, 2018). Refugees have a different meaning from foreigners, the arrival of refugees and asylum seekers to Indonesian territory, have a different immigration administration flow from foreigners, given the flow of foreigners arriving through the Airport and Seaport routes, and with complete official documents (legal), if in the sense of illegal, are foreigners who enter the illegal route and do not have official documents (immigration), in this category foreigners who violate immigration laws can be given immigration sanctions until deportation (Interview with Pria Wibawa, Director of Supervision and Action of the Indonesian Directorate General of Immigration, 2 September 2020).

A strategy is needed to deal with this large flow. For many industrialized countries, migration is an advantage. State policies regarding migration flows and their consequences can be divided into at least three things, namely border control and management, citizenship and integration policies, and policies on diaspora (Adamson, 2007). The state has an interest in controlling its border territorials for reasons such as maintaining control over the population, restricting access to labor markets and public goods, and for maintaining domestic security.

2. Research problem

The problem raised in this paper is how the monitoring mechanism of immigration traffic, in order to reinforce the concept of sovereignty. In writing this journal the author uses a statutory approach, a case approach, and a sociological approach. Seeing the condition of the State of Indonesia in the territorial element, where the state carries out jurisdiction over its citizens and all objects and all activities that occur within the territory. Such state sovereignty is also known as territorial sovereignty (Survey and Mapping Center – TNI Headquarters, Indonesian Territory, 2018).

The flow of movement of refugees and like seekers is of concern, because refugees and asylum seekers are vulnerable objects in cases of human trafficking, smuggling and trafficking. Human cross-border mobility is now a business venture and various types of criminal offenses. Although the hidden nature of the phenomenon is not easy to investigate, uncertain and prone to controversy, the evidence is also increasing. Usually, said Pocoud and Guchteneire, strict border

controls are thought to contribute to fighting human trafficking. It is also clear that the more difficult it is to enter a country, the more it requires dependence on smugglers and the more profitable it is from the business aspect. Meanwhile, for the third challenge, related to the cost of migration costs for migrants themselves, the most tragic and clear illustration is the cost of lying to a number of people who die while heading to their destination country, or in transit.

For example at least one migrant dies every day on the border between America and Mexico, most of them hypothermia, dehydration, sunburn or drowning. In Europe in 2016 nearly 3,000 migrants died trying to reach Europe, most of them trying to cross the Gibraltar Strait.¹ The figures may be underestimated because no one really knows how many bodies were not found. In general, the vulnerability of undocumented migrants and their exposure to abuse and to exploitation stems largely from policies that fail to prevent illegal migration, leaving many legal loopholes.

Thus, border policy has become a big ethical challenge, at least according to Peceound and Guchteneire and Iman Santoso (2014) "There are four observations that can be made in this regard. First, the tension between security and human rights covers the response to this phenomenon, since the end of the cold war, migration has increasingly been understood as a security threat and with the growth of migration escalating and the asylum crisis of the 1990s was perceived as a potential source of destabilization of countries. That leaves little room for human rights. Other than that, the idea of security itself is ambiguous. Although a comprehensive understanding of security must include national and human security.

Second, different phenomena will attract different levels of attention and are needed in different ways. For example trafficking in persons is clearly recognized as a violation of human rights and fighting it has become a priority for many governments.

3. Results and discussion. Flow of national law policy for handling and supervision of overseas refugees

In the scope of the Indonesian state's authority in handling and supervising refugees, it is important in relation to the position of its laws and regulations, so that Indonesia can know the position and involvement of Indonesia's obligations to refugees.

The 1924 International Conference on Emigration and Immigration in Rome, defines immigration as: "Human mobility to enter a country with its purpose to make a living for residence", which means seeing from a classic perspective, that migration only means moving people entering a country with the intention to have the meaning of moving and settling there. There are 2 (two) patterns of migration flows by people to migrate from one country to another, namely the legal scheme migratory flows and the illegal scheme migratory flows (Syahrin, 2019). Legal schema migratory flows use stages according to official regulations. Migration of population with a pattern of using valid and valid travel documents and through the border regulated in the provisions of a country. Meanwhile, illegal scheme migratory flows use stages that violate official regulations. This migration of population uses a forged travel document mode and does not pass through border places regulated in the provisions of a country. This migration of population uses fake travel document mode and does not pass through border places regulated in the provisions of a country.

The flow of global population migration from countries of origin to other countries has caused various problems including illegal immigrants, human trafficking, people smuggling, and cases of refugees. This problem is very important to be traced or researched, because seeing from the point of view of changes in global human movement, by utilizing humanitarian issues, for

¹ <https://www.voaindonesia.com/a/hampir-3000-migran-meninggal-di-laut-pada-2016/3430506.html>.

example the issue of refugees, the state must uphold its sovereignty, place a problem in regulations and policies.

With regard to population migration between countries, the Government of Indonesia regulates this in Law Number 6 of 2011 concerning Immigration. Immigration is a matter of the traffic of people entering or leaving the territory of Indonesia and their guardians in the framework of maintaining the upholding of state sovereignty. In immigration regulations, every person who enters or leaves the territory of Indonesia is required to have a valid and valid travel document, except for other matters stipulated by the Immigration Law.

Based on Indonesian immigration regulations, a visa for foreigners which is a certificate of approval for foreigners to enter Indonesian territory is issued by an authorized official at the Representative Office of the Republic of Indonesia. Visas consist of, diplomatic visas, service visas, visit visas and limited stay visas, visas have a function as the basis for granting residence permits granted to foreigners in accordance with their visa residence permit consists of, diplomatic residence permit, official residence permit, visit residence permit, limited stay permit, permanent residence permit. A wide variety of destinations for foreigners at Indonesia includes tourism, official activities, diplomatic, business, family, journalism, clergy, experts, investors and workers (Syahrin, 2015).

The various activities and purposes carried out by foreigners while in Indonesia cause problems caused by violations of not complying with the law. In the immigration regulations in Indonesia it regulates immigration administration and immigration crimes and other general criminal acts for foreigners. Immigration administrative action is an administrative sanction imposed by immigration officials against foreigners outside the judicial process and immigration crime is an activity carried out by every person in certain circumstances and situations violating immigration regulations as referred to in Article 113-136 of Law Number 6 Year 2011 about Immigration. Meanwhile, general criminal acts for foreigners who commit criminal offenses in accordance with the actions committed while in Indonesia (Syahrin & Saputra, 2016).

For foreigners who have committed criminal acts in Indonesian territory, deportation may be carried out. This is based on Indonesian immigration regulations, namely Immigration Officers are authorized to carry out immigration administrative actions against foreigners who are in Indonesian territory who carry out dangerous activities and are reasonably suspected of endangering security and public order or not respecting or not complying with statutory regulations.

However, in the case study efforts to deportation could not be carried out because it was hampered by the status of Ali Reza Khodadad Sharq bin Mojtaba, in this case he committed a criminal act, namely narcotics using Narcotics Group I for himself in accordance with Article 113 paragraph (1) subside Article 111 paragraph (1) more subsidiary to Article 127 paragraph (1) letter (a) of Law Number 35 of 2009 concerning Narcotics on 11 January 2017, the Tangerang District Court sentenced a criminal sentence with imprisonment of 1 (one) year and 8 (months) imprisonment at the Class II A Correctional Institution (LAPAS) Tangerang youth. After serving his sentence, at this writing the status of Ali Reza Khodadad was placed in the Detention Room at the Directorate General of Immigration to wait for a decision on immigration action. However, the person concerned is still the subject of a refugee card holder established by the United Nations High Commissioner for Refugees (UNHCR) (Interview with Pria Wibawa, Director of Supervision and Action of the Indonesian Directorate General of Immigration, 2 September 2020). The card stipulates that deportation cannot be carried out for each refugee card holder because there is a non-refoulement principle which is the principle of prohibiting repatriation to the country of origin.

From the case above, it seems that it limits the authority of immigration control regulated in Presidential Decree No. 125 of 2016, giving the impression that immigration control

has limitations and categories in handling and monitoring of foreigners, in terms of legal or illegal foreigners.

In this matter, law enforcement in immigration violations violated by foreigners is the domain of the Directorate General of Immigration, and if a foreigner violates a criminal act, the sanctions received are from court decisions to deportation. However, when refugees who are found to have violated a criminal act have a different mechanism, a judicial mechanism in accordance with the Criminal Law that is violated, after that, the refugees are returned to the holding center to be given a decision from UNHCR.

The concept of immigration control in Presidential Decree 125 of 2016 and the Immigration Law Number 6 of 2011 is very different, seeing the position of refugees and foreigners in the statutory regulations is clearly different, so the handling is different. In the same sentence from the nomenclature "Immigration Control" but has a different meaning and meaning, it can be seen in the handlers and their supervisors, if we examine the implications that arise, in acts that violate the laws of RI, between refugees and foreigners, the treatment differentiated, so that the enforcement of immigration law and Indonesian law cannot be carried out equally between refugees and foreigners.

The category of law enforcement must reflect certainty, justice and benefit (Radbruch, 2012). Sajtipto Raharjo identifies the nature of law in its basic values and implications in the meaning of essence or philosophy, in terms of sociological and juridical values. In fact, law must reflect the values that can be accepted in society, in its implementation which is reflected in the applicable regulations. In regulating refugees, it appears that both national and international legal aspects are involved.

4. Conclusion

The policy on the flow of refugee movements into Indonesia is not in accordance with the concept of sovereignty, where the regulation of the flow of refugee movements becomes very vulnerable to the aspects of crime (trafficking in persons, narcotics, prostitution, etc.). Indonesia, from the international and national criminal systems, and that is often misunderstood. So the suggestion from this research is that immigration should be given space in the framework of supervision for Refugees and Asylum Seekers, which have been under the authority of the Immigration Detention Center (RUDENIM).

Acknowledgements

This research did not receive any specific grant from funding agencies in the public commercial, or not-for-profit sectors.

The authors declare no competing interests.

References

- Adamson, F. B. (2007). International Migration and Nation Security: Maximizing benefits and minimizing risks. Presented in *The 2007 Atlantic Conference on Migrant and Migrant Integration in The Atlantic Region*, 22-24 March 2007, Seville, Spain, published in *International Security*, 31(1), Summer 2006.

- Center for Survey and Mapping (PUSURTA) – TNI Headquarters, Indonesian Territory (2018). *Legal Basis and Problems*. Jakarta.
- Hadiwijoyo, S. S. (2008). *Batas Wilayah Negara Indonesia dimensi permasalahan, dan strategi penanganan (Sebuah tinjauan empiris dan yuridis) [Indonesian state boundary dimensions of the problem, and strategy for handling (An empirical and juridical review)]*. Jakarta: Gaya Media.
- Kusumaatmadja, M. (1982). *Pengantar hukum internasional, Buku I, Bagian Umum [Introduction to international law, Book I, General Section]*. Bandung: Bina Cipta.
- Radbruch, G. (1961). *Einführung in die rechtswissenschaften*. Koehler Verlag.
- Raharjo, S. (2012). *Ilmu hukum [Legal studies]*. Bandung: Ciyta Aditya Bakti.
- Santoso, M. I. (2014). *Diaspora globalisme, keamanan dan keimigrasian [Diaspora globalism, security and immigration]*. Bandung: Pustaka Rekacipta.
- Syahrin, M. A. (2015). *Imigran ilegal, migrasi atau ekspansi? [Illegal immigrants, migration or expansion?]*. Depok: Akademi Imigrasi.
- ... (2016). *Eksodus warga negara Tiongkok: Antara kebijakan dan penyelundupan [The exodus of Chinese citizens: Between policy and smuggling]*. Depok: Politeknik Imigrasi.
- Primawardani, Y. (2018). *Penanganan pengungsi dari luar negeri oleh petugas rumah detensi imigrasi di provinsi Sulawesi Selatan [Treatment to international refugees by the officials of immigration detention center in the province of South Sulawesi]*. *Legal Policy Scientific Journal*, 12(2), 179-197. <http://dx.doi.org/10.30641/kebijakan.2018.V12.179-197>
- Syahrin, M. A., & Saputra, S. (2016). *Tindakan hukum terhadap orang asing mantan narapidana yang memiliki kartu pengungsi UNHCR dalam perspektif keimigrasian [Legal action against foreigners. Ex-prisoners with UNHCR refugee cards from an immigration perspective]*. *Legal Policy Scientific Journal*.
- ... (2020). *Interview with the Director for Supervision and Action of Indonesian Immigration, Mr Pria Wibawa, Jakarta, 2 September 2020, at the Directorate General of Immigration, Jakarta.*



AIMS AND SCOPE

The OJLS, as an international multi-disciplinary peer-reviewed **online open access academic journal**, publishes academic articles deal with different problems and topics in various areas of legal studies and close scientific disciplines (theory of law, history of law, philosophy of law, sociology of law, Roman law, international law, civil law, constitutional law, administrative law, criminal law, contract law, tort law, property law, religious law, immigration law, human rights law, family law, social security law, labour law, company law, commerce law, intellectual property law, methodology of legal studies, legal education, etc.).

The OJLS provides a platform for the manuscripts from different areas of study. The journal welcomes original theoretical works, analyses, reviews, etc. The manuscripts may represent a variety of theoretical and epistemological perspectives and different methodological approaches.

The OJLS is already indexed in Crossref (DOI), HeinOnline, DOAJ (Directory of Open Access Journals), BASE (Bielefeld Academic Search Engine), Google Scholar, J-Gate, ResearchBib and WorldCat-OCLC, and is applied for indexing in the other bases (Clarivate Analytics – SCIE, ESCI, and SSCI, Scopus, ERIH Plus, Ulrich’s Periodicals Directory, Cabell’s Directory, SHERPA/RoMEO, EZB - Electronic Journals Library, CiteFactor, Open Academic Journals Index, etc.).

The authors of articles accepted for publishing in the OJLS should get the ORCID number (www.orcid.org), and Thomson-Reuters’ Researcher ID (www.researcherid.com).

The journal is now publishing 2 times a year.

PEER REVIEW POLICY

All manuscripts submitted for publishing in the OJLS are expected to be free from language errors and must be written and formatted strictly according to the latest edition of the [APA style](#). Manuscripts that are not entirely written according to APA style and/or do not reflect an expert use of the English language will **not** be considered for publication and will **not** be sent to the journal reviewers for evaluation. It is completely the author’s responsibility to comply with the rules. We highly recommend that non-native speakers of English have manuscripts proofread by a copy editor before submission. However, proof of copy editing does *not* guarantee acceptance of a manuscript for publication in the OJLS.

The OJLS operates a double-blind peer reviewing process. The manuscript should not include authors’ names, institutional affiliations, contact information. Also, authors’ own works need to be blinded in the references (see the APA style). All submitted manuscripts are reviewed by the editors, and only those meeting the aims and scope of the journal will be sent for outside review. Each manuscript is reviewed by at least two reviewers.

The editors are doing their best to reduce the time that elapses between a paper’s submission and publication in a regular issue. It is expected that the review and publication processes will be completed in about 2-3 months after submission depending on reviewers’ feedback and the editors’ final decision. If revisions are requested some changing and corrections then publication time becomes longer. At the end of the review process, accepted papers will be published on the journal’s website.

OPEN ACCESS POLICY



The OJLS is an open access journal which means that all content is freely available without charge to the user or his/her institution. Users are allowed to read, download, copy, distribute, print, search, or link to the full texts of the articles, or use them for any other lawful purpose, without asking prior permission from the publisher or the author. This is in accordance with the BOAI definition of open access.



All articles published in the OJLS are licensed under a [Creative Commons Attribution 4.0 International License](https://creativecommons.org/licenses/by/4.0/).

Authors hold the copyrights of their own articles by acknowledging that their articles are originally published in the OJLS.



Center for Open Access in Science