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***The Role of Environmental Organizations in Protecting Human Rights and
Performing Social Justice in Indonesia***

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Abstract

Mining activities carried out by Transnational Corporations (TNCs) may cause positive and negative impacts in developing countries, such as in Indonesia. The positive impacts of TNCs may enhance economic growth in Indonesia, on the other hand, the negative impacts of TNCs may cause environmental pollution and environmental degradation. The activities that have been done by the TNCs violate the right to enjoy healthy environment in Indonesia which has been recognised as the constitutional right and as part of human rights in Indonesia. The paper analyses comprehensively the role of environmental organizations in protecting human rights as well as performing social justice in Indonesia. Furthermore, it examines conceptually what are the challenges and opportunities of environmental organizations in protecting human rights as well as performing social justice in Indonesia. The paper is a normative research and the methodology employed in this paper is library research. While the approaches employed in the paper are statute approach and conceptual approach. The article is analysed qualitatively and presented descriptively. The research finds that the role of the environmental organisations in Indonesia in protecting of human rights as well as performing social justice is paramount.

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1. Introduction

Environmental Organizations in Indonesia have significant role in law enforcement especially in environmental cases. The environmental organizations are not directly protected the human right, but what have been done by the environmental organisations in protecting the environment¹ have indirect impacts of human right protection especially the right to enjoy healthy environment that has been recognized as constitutionnal right in Indonesia. Protection the right to enjoy healthy environment is one aspect to peform social justice in Indonesia. Social justice is one of the national objectives which is stipulated in Indonseian constitution.

One of the most outspoken environmental Non –Governmental Organization (hereinafter NGOs) to emerge since the establishment of the Ministry for the Environment is the Indonesian Forum for the Environment, known by its Indonesian acronym WALHI (Wahana Lingkungan Hidup Indonesia). Founded in 1980, WALHI is a Jakarta-based network of local and regional NGOs located throughout the Indonesian archipelago.² The organization concern a lot with the environmental protection in Indonesia. Most of the activities of WALHI reflect the objective of the organization.

Mining activities and the exploitation of the forest, such as the conversion of the forest into palm plantation may cause positive and negative impacts. The positive impacts of mining activities and exploitation of the forest may enhance the economic development in Indonesia. On the other hand, mining activities and exploitation of the forest may cause negative impacts to the environment such as cause pollution and environmental degradation which affect the right of healhty environment that has been recognized as part of human right as well as constitutional right in Indonesia. However, the goverment lacks of capacity to protect the right to enjoy healthy environment.

The research analyses comprehensively what are the role of environmental organisations in protecting human rights as well as performing social justice in Indonesia. *First*, it discusses the legal standing of environmental organisation in Indonesia. *Second*, it examines the social justice in Indonesia. *Third*, it discusses the right to enjoy healthy environment as part of human right and as constitutional right. *Fourth*, it analyses the role of environmental organization in protecting human rights as well as performing social justice in Indonesia. *Fifth*, it analyses the challenges and opportunities of environmental organizations in protecting human rights as well as performing social justice in Indonesia, and it followed by the conclusion.

² Joshua Gordon, “NGOs, the Environment and Political Pluralism in New Order Indonesia”, A Journal of the Southeast Asian Studies Student Association , Vol 2, No. 2 Fall 1998, <
<http://scholarspace.manoa.hawaii.edu/bitstream/10125/2544/1/NGOs,%20the%20Environment%20and%20Political%20Pluralism%20in%20New%20Order%20I.pdf> > Accessed 12 May 2016.

2. Problem Statements

Based on the background which is mentioned previously, the questioned are what are the role of environmental organizations in protecting human rights as well as performing social justice in Indonesia and what are the challenges and the opportunities of environmental organizations in protecting human rights as well as performing social justice in Indonesia.

3. Objective of the Research

The objectives of the research are to analyse comprehensively the role of environmental organisations in protecting human rights as well as performing social justice in Indonesia and to examine conceptually the challenges and the opportunities of environmental organizations in protecting human rights as well as performing social justice in Indonesia

4. Research Method

It is qualitative research. The methodology employed in this article is library-based research. It employs statutory and conceptual approaches. While the main research materials used in the research are primary and secondary sources. The primary sources consist of Indonesian Constitution, Act No. 32 /2009, regarding Environmental Protection and Management, Act No.14/2008 regarding Public Information, Act No. 39 / 1999 on Human Rights. While the international instruments, such as Universal Declaration of Human Rights, Stockholm Declaration, and Rio Declaration, International Covenant on Economic, Social and Cultural Rights (ICESCR). The secondary sources consist of books, Journal, report and internet which are relevant to the subject matter.

5. Results/ Findings

Based on the research that has been carried out concerning the Role of Environmental Organizations in Protecting Human Rights and Performing Social Justice in Indonesia, there are some results that can be presented based on the analysis that has been determined in the objective of the research.

5.1 Legal Standing of Environmental Organisation

Legal standing can be defined as a right which is owned by individuals or groups/organisation to bring a case before the court as a plaintiffs in civil lawsuit (civil law procedure), without any legal interest. Thus, it can be simplified as a "right to sue". While, conventionally right to sue only rooted in the principle of "no lawsuit without legal interest" (poit d' interest point d' action).³ The legal interest in question is the interest relating to the ownership (proprietary interest) or a material interest in the form of losses suffered directly injury. The development of the legal concept of right to sue conventionally grown rapidly as well as the legal developments concerning the interest of many people in which a person or group of people or

³ Erna Herlinda, "Tinjauan Tentang Gugatan Class Actions Dan Legal Standing Di Peradilan Tata Usaha Negara Fakultas Hukum Universitas Sumatera Utara", < <http://library.usu.ac.id/download/fh/fh-erna5.pdf>>. Accessed on 1 April 2016.

organisation can act as a plaintiff, even though they do not have legal interest directly, but based on the need to promote the interests of the wider community. It can be submitted that the legal standing of environmental organisation is the right to sue of the environmental organisation on behalf of environment⁴ which affect directly the interest of human being.

The opinion to recognise the legal standing of environmental organisation is based on the theory proposed by Christopher Stone which recognises legal rights of natural objects, such as forests, oceans, rivers, mountains as natural objects. Though, these objects do not have capability to speak. The theory it was written in his famous article in 1972, namely “*Should Trees Have Standing? Toward Legal Rights for Natural Objects*”.⁵ Based on the theory, the natural objects should have the legal rights, since the natural objects does have any capability to speak and to carry out legal action, so the entity which represent the interest of the environment is the environmental organisations. The milestone of recognizing the environmental organization in Indonesia was the success of WALHI recognized has a legal standing in the case of *WALHI vs PT Indorayon Utama* in Sentral Court Jakarta 1988.⁶ What had been conducted by the environmental organisations as the participation of the public to enforce the law is the obligation of all stake holders to be actively participate in the environmental law enforcement.⁷

Legal standing of environmental Organizations is regulated by Act No. 32 Year 2009 regarding Environmental Protection and Environmental Management on Article 92 states that :

(1) In the framework of executing responsibility for environmental protection and management, environmental organization shall reserve a right to file lawsuit in the interest of environmental function conservation.

(2) The right to file lawsuit shall be limited to the implementation of certain measures without demand for compensation, except the real cost or expenditure.

(3) Environmental organizations may file lawsuit if the following requirements are fulfilled:

- a. in the form of legal entity;
- b. affirming in their memorandum of association that the organizations are established in the interest of environmental function conservation; and
- c. already executing concrete activities in accordance with their memorandum of association for 2 (two) years at the minimum.

⁴ Paulus Effendi Lotulung, 1993, *Penegakan Hukum oleh Hakim Perdata*, PT. Citra Aditya Bakti, Bandung, at. 51.

⁵⁵ Christopher D. Stone, *Should Trees Have Standing? –Toward Legal Rights for Natural Objects*, <<https://iseethis.files.wordpress.com/2013/02/stone-christopher-d-should-trees-have-standing.pdf>> Accessed on 20 May 2016.

⁶ Fajar Winarni, “Pergunaan Legal Standing Organisasi Lingkungan Hidup Dalam Kerangka Penegakan Hukum Lingkungan”, *Mimbar hukum*, Vol. 20, Februari 2008, 153, <<http://mimbar.hukum.ugm.ac.id/index.php/jmh/article/viewFile/229/84>> Accessed on 30 March 2016.

⁷ Koesnadi Hardja Soemantri, *Hukum Tata Lingkungan*, Cetakan ke-18, Edisi ke 8, Gadjah Mada University Press, Yogyakarta, 2000, at 398-399.

Based on the Article 92 Act No. 32 Year 2009 has an objective to preserve the environment with certain conditions. Any environmental organisations who are willing to protect the environment can presumably linked to the capacity of guardianship.⁸

5.2 Social Justice in Indonesia

Performing social justice in Indonesia is one of the mandates of Indonesian constitution. Consequently, it becomes the obligation of state how to achieve social justice in Indonesia. Definitely, social justice in Indonesia is stipulated in our Way of Live Pancasila, namely at the fifth Principle of Pancasila. Beside that, it is also stipulated in the Paragraph fourth of the Indonesian Constitution Preamble.⁹ In many cases, the public especially the affected communities are often unaware or even if realized, they do not have any capability to bring the case before the court, even they do not realise that their right to enjoy healthy environment has been violated.¹⁰ Therefore, in order to materialise social justice in Indonesia, the government has to be responsible to protect the right to enjoy healthy environment as the condition to perform social justice as well as protection of human right.

Thus, state serve as an instrument board and organiser of policies aimed at protecting and promoting human rights on the environment and also performing social justice. The notion of the rights to be controlled by state over the various branches of production that are important for the state and the life of many people is legitimate to augment the prosperity of the citizens. The citizens's right, particularly in terms of access to natural resources and the environment should be used as the primary means and the ultimate goal of the right to enhance the social welfare under the control of state which is contemplated by Article 33 (3) of the 1945 Constitution.¹¹

Consequently, state has an obligation to manage natural resources to be used in improving the people's welfare and the pursuit of happiness of life based on Pancasila. Therefore, it is necessary to implement sustainable development principle based on the national policy by integrating the principle of sustainable development¹² in the development programmes taking also into account the needs of the present generation

⁸ Achmad Santosa dan Sulaeman Sembiring, *Hak Gugat Organisasi Lingkungan (Environmental Legal Standing)*, ICEL, 1997, at 19.

⁹ Jimly Asshiddiqie, *Konstitusi Bernegara Praksis Kenegaraan Bermartabat dan Demokratis*, Setara Press, Malang, 2015, at 102-103.

¹⁰ UNEP Background Paper . “Asia-Pacific Roundtable on Environmental Rule of Law for Sustainable Development in Support to the Post-2015 Development Agenda”,
<http://www.unep.org/roap/Portals/96/Ministerial%20Forum%20Agenda/V2_01%2005%202015%20Background%20Paper_Asia-Pacific%20Roundtable%20on%20E> Accessed on 8 April 2016.

¹¹ Article 33(3) Indonesian Constitution states : “The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people”.

¹² Cristina Voigt, *Legal Aspects of Sustainable Development as A Principle of International Law, Resolving Conflicts between Climate Measure and WTO Law*, Leiden-Boston: Martinus Nijhoff Publisher, 2009, h. 14. See, Philippe Sands, *Principles of International Environmental Law, Second Edition*, Cambridge University Press United Kingdom 2003, at .352. See also, David A. Wirth, “The Rio Declaration on Environment and Development: Two Steps Forward and One Back or Vice Versa?”, vol. 29 , *Ga. L. Rev*, Spring, 1995, at 601.

and the future generation by implementing the principle of inter-generational equity¹³ and intra-generational equity,¹⁴ in order to achieved social justice.

5.3 The Right to Enjoy Healthy Environment as Constitutional Right and Human Rights

The impacts of development to the environment cannot be avoided. Development is the right of every state, thus it is important to find solution how to harmonise the need of development and environmental protection at the same time. The United Nations Conference on Human and Environment in Stockholm, Sweden, on June 5 to 6, 1972, adopted the Stockholm Declaration.¹⁵ The Conference was a milestone of the international community awareness regarding the importance of environmental sustainability as a fundamental part for the fulfillment of human rights. It states in Principle 1 of the Stockholm Declaration:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

Based on the principle, there is equality among people, every person has the same right to enjoy healthy environment, and each person has the responsibility to protect the environment.

The right to enjoy healthy environment includes "physical environment" and "social environment". In the International Covenant on Economic, Social and Cultural Rights (ICESCR) explicitly, stated the theme of "environment" in Article 12, which is one part of "the right of everyone to enjoy a standard of physical and mental health is the highest that can be achieved". In Indonesia, the environmental rights has been adopted in various regulations including the Indonesian Constitution in Article 28 H. The same protection also adopted in the Act No. 39 of 1999 on Human Rights and act No 32 Year 2009 concerning Protection of the Environment and Management. Similarly, according to Article 33 (4) of the Constitution, "the organization of the national economy shall be based on economic democracy that upholds the principles of solidarity and efficiency along with fairness, sustainability, keeping the environment in perspective, self-sufficiency and by maintaining the balance between development

¹³ M. Hadin Musjad, *Hukum Lingkungan Sebuah Pengantar untuk Kontek Indonesia*, Genta publishing, Yogyakarta, 2015, at 16.

¹⁴ Annika Oskarson, *Intergenerational Equity - Protecting Future Generations Through Domestic Action*, Narter Thesis, Faculty of Law, University of Lund
<<http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1561052&fileId=1565510>>
Accessed on 20 May 2016.

¹⁵ M. Fitzmaurice, "The Principle of Sustainable Development in International Development Law" <<http://www.eolss.net/sample-chapters/c13/e6-67-03-02.pdf>> Accessed on 20 May 2016.

and the unity of the national economy.”¹⁶ Therefore, the Indonesian Constitution 1945 can be said as green constitution.¹⁷

Thus, the right to enjoy healthy environment has been recognised as the constitutional right and as a human right. The right to enjoy healthy environment cannot be maintained without respecting to human rights, and human rights can not be obtained without a good environment. Therefore, human rights such as the right to life, the right to health is very dependent on the existence of a healthy environment.¹⁸ Respect, protection, enforcement and fulfillment of human rights are very dependent on a healthy environment. The obligation of the government are to respect, to protect and to fulfill¹⁹ the basic rights to enjoy healthy environment and to access to justice.

5.4 The Role of Environmental Organisation in Protecting Human Rights and Performing Social Justice in Indonesia

Non Governmental Organization (hereinafter NGO) began to be recognized in Indonesia in the early 1970s in line with the development activities carried out by the Soeharto government. Although the government was able to maintain high economic growth of 8% per year, widespread poverty and lack of community participation in development activities created room for NGOs to play a role in community based social and economic activities. The environmental organisations were involved in a wide variety of fields, either as a complementary provider or as an agent of government programs that could not reach the lowest strata of society. Their programs covered health services, nutrition, clean water and sanitation.²⁰ These environmental organisations started to carry out advocacy activities in support of those whose rights were violated by the regime, such as indigenous communities, people who are suffering from industrial activities, and also from the exploitation of forest by companies.²¹ Indeed, the role of the environmental organisations can be presented as followed :

First, the role of environmental Organization is important in protection of the environment and performing social justice as well as protecting the human rights, because the environmental organization is able to assist the society in protecting their rights. By protecting the environment at the same time also protecting the right to enjoy healthy environment as part of human right and as one of the conditions to

¹⁶The Indonesian Constitution was created in 1945 and has been amended four times. The First Amendment was made in 1999, the Second Amendment in 2000, the Third Amendment in 2001 and the Fourth Amendment in 2002.

¹⁷ Jymly Asshiddiqie, *Green Constitution, Nuansa Hijau Undang-Undang Dasar Republik Indonesia Tahun 1945*, Jakarta, Rajawali Pers, 2009, at. 90. The Provisions regarding the Environment adopted in Article 28(1) H and Article 33(4) of Indonesian Constitution.

¹⁸ Alan Boyle, “Human Rights or Environmental Rights? A Reassessment” *Fordham Environmental Law Review*, Vol. 18, 2007, h. 472-473.

¹⁹ Bagir Manan et.al, *Dimensi Dimensi Hukum Hak asasi Manusia*, Pusat Studi Kebijakan Negara Fakultas Hukum Universitas Padjadjaran, Bandung, 2009, 162-163.

²⁰ Hans Antlöv, Rustam Ibrahim and Peter van Tuijl, “NGO Governance and Accountability in Indonesia: Challenges In A Newly Democratizing Country” <http://www.icnl.org/research/library/files/Indonesia/Peter_NGO%20accountability%20in%20Indonesia%20July%2005%20version.pdf> Accessed on 20 May 2016.

²¹ William D Sunderlin and Ida Aju Prandnja Resosudarmo, “Rates and Causes of Deforestation in Indonesia: Towards a Resolution of the Ambiguities” <http://www.cifor.org/publications/pdf_files/OccPapers/OP-09n.pdf> Accessed on 23 April 2016.

perform social justice in Indonesia. Consequently, the existence of environmental organisations as the partner²² of the government to participate in protecting the environment is important.²³

Second, relating to the resources such, as river, forest and mining is under the control of state based on Indonesian constitution . The Control of resources has the legal implication that the state has the authority to issues policy regarding the exploitation of the resources and also the utilisation of the resources. However, state often ignores the obligation to maintain the sustainability of the resources, the state gives more priority to the economic growth rather than the protection of environment and respect the right to enjoy healthy environment. Thus, the environmental organisations also have the role to affect the changes and the innovation of the policy and also the changing of the bureaucracy of the government.

Third, the environmental organisations has the legal standing to represent the interest of the environment by representing the environment before the court, when the right of the environment is violated, such as industrial activities caused pollution or environmental damage in certain area in Indonesia. For example, WALHI believes that one of the main problem of the environmental problem in Indonesia is also not systematically touched, which is about the inequality of control of natural resources. WALHI actively watches over the activities of TNCs and other companies who conduct mining activities in Indonesia, since they often violate the right to enjoy healthy environment in Indonesia.

Fourth, the environmental organisations strengthen the capacity of people in building initiatives and sustain efforts to protect and to manage the environment and natural resources. Furthermore, the environmental organisations has the capability to interfere policies of the state as well as regional and global institutions that will affect the environment and people's livelihood.

Fifth, the environmental organisations are able to assist the government to solve the environmental problems, in order to protect the right to enjoy healthy environment. In the case, it can be proven by the activities that carried out by the environmental organisations, such as , various local and regional environmental organisations played a key role in the government's programmes. Providing pollution monitors and community organizers that the government could scarce afford.

Sixth, the environmental organisations also have the role to affect the behaviour of the society to enhance the awareness of the society regarding the protection of the environment. The capability of the environmental organisations are supported by the global relationship between the environmental organisations with the international donor countries or international environmental organisations enable them to be the agent of change in the society to protect human right and to perform social justice in indonesia. Beside that, the environmental organisations have the capability to

²²Barbara Gemmill and Abimbola Bamidele-Izu, "The Role of NGOs and Civil Society in Global Environmental Governance", < <http://environment.yale.edu/publication-series/documents/downloads/a-g/gemmill.pdf>> Access on 21 May 2016.

²³Wahana Lingkungan Hidup Indonesia , <http://www.foei.org/member-groups/asia-pacific/indonesia>

empowering the society by utilising their programme to encourage the society to participate in the protection of the environment, such as the “BIO-Right”.²⁴

5.5 The Challenges and opportunities to Perform Social Justice and to Protect Human Right in Indonesia

The role of environmental organizations in protecting the right to enjoy healthy environment in order to perform social justice as well as human right protection that has been discussed previously are not an easy task. In performing the role of environmental organisations, there are many challenges that have to be overcome, however, there are also many opportunities that can be obtained. Based on the experiences and cases which occur in Indonesia, it can be presented the challenges and opportunities that are facing by the environmental organisations.

5.5.1 The Challenges of Environmental Organisations to Perform Social Justice and Human Rights Protection in Indonesia

First, the environmental organisations do not have capability to sufficiently protect the interest of the environment, if there is no support from the government. *Second*, the environmental organization often get some intimidation from the government if they frontally against the environmental policy of the government. *Third*, the environmental organisation lack of financial support, since the organization is an independent organization without any support of the government budget. Fourth, sometime the member of the organisation who directly against the project which are proposed by companies, their life are threaten

5.5.2 The Opportunities of Environmental Organisation in Protecting Human Rights and Performing Social Justice in Indonesia

In line with the ongoing democratisation process in Indonesia, perceptions of the government, the private sector and donors about the existence and role of civil society in general and Environmental organisations in particular have also changed. Except for some vocal NGOs working on human rights and environmental issues, the government seldom intervenes anymore directly in NGO activities. Therefore, the opportunities of the environmental organisations in protecting human right and performing social justice in Indonesia as followed :

First, there are indications of increasing appreciation of the role of environmental organisations, for example in the post-tsunami disaster and relief operations in Aceh. The government begins to see the need to create a new division of roles among stakeholders (government, private sector and NGOs) by giving opportunities to independent community initiatives, as well as encouraging them to actively participate in government programmes. According to government statements, it is hoped that a stronger, more democratic and more dynamic community will emerge through improved community capacity to solve their own problems.

²⁴ Bio-right is a mechanism of innovative financial support to overcome the environmental damage by providing soft loan to the society with certain condition if they are able and success to make conservation of the wetland, so the environmental organisation will let them not to repayment their loan, however, if they failed to conduct conservation, they have to pay back their loan.

Second, the government appreciates environmental organisations efforts in promoting good nonprofit governance, and in improving professionalism, transparency and accountability. The government also sees the need for a forum of environmental organisations. Thus, a strong networks and coalitions can provide capacity development support for organisations to improve their technical capabilities, introduce them to resources and sources of diverse funding. The cycle is self-sustaining, and that leads to sustainability²⁵

Third, the private sector primarily views environmental organisation as institutions with a capacity to influence corporate missions and motivate corporations to develop and improve their performance in corporate social responsibility. Environmental organisations can motivate changes in corporations' approach towards its social function from a charity-based to a community-empowerment approach. The environmental organisations are also viewed as being closer to the grass-roots community and therefore as having the potential to collaborate with corporations in developing better community development programmes.

6. Conclusion

There is close relationship between the protection of the right to enjoy healthy environment and the protection of the human right as well as performing social justice in Indonesia. When the right to enjoy healthy environment is violated, it will cause the violation of human right, and it also simultaneously affects the performing of social justice in Indonesia. Consequently, in order to perform the obligations of state in order to protect the human right and to perform social justice needs the active participation of environmental organisation as the partner of the government. Based on the previous explanation it can be concluded that the role of the environmental organisation is very important in protecting the right to enjoy healthy environment as part of human right as well as performing social justice in Indonesia. However, there are some challenges and opportunities of the environmental organisations in participating to the protection of human right and performing social justice in Indonesia.

²⁵ Megan McGlynn Scanlon and Tuti Alawiyah, "The NGO Sector in Indonesia: Context, Concepts and an Updated Profile", Prepared for the Department of Foreign Affairs and Trade. < [http://www.ksi-indonesia.org/files/1450223618\\$1\\$5JYTU3D\\$.pdf](http://www.ksi-indonesia.org/files/1450223618$1$5JYTU3D$.pdf) > Accessed on 12 May 2016.

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Access to Justice for Foreigners Before Constitutional Court of Indonesia

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The European Conference on Politics, Economics & Law 2016
Official Conference Proceedings

Abstract

In 2007, Indonesian constitutional court refused judicial review submitted by 3 Australian citizens. Those people have been verdicted in death penalty before Indonesian district court on abused of drugs. The Australian citizens considered that death penalty stipulated in Indonesian Law regarding narcotic law violated their constitutional right, namely the right to life. Therefore they asked the court to abolish the death penalty clause. Unfortunately the court refused their request for judicial review with the reason because as foreigners, they have no legal standing before the constitutional court, whereas the right access to justice is non derogable right.

This research analyse whether the refusal of constitutional court violated international human right law on access to justice.

The research is doctrinal research that used normative and comparative approach.

The result of the research showed that the refusal of judicial review by the constitutional court did not violated international human right. All of constitutional rights are human rights. However not all human rights can be recognized as constitutional rights. As a sovereign state, Indonesia have right to determine the human rights that can be categorized as constitutional rights that owned for its citizen. However Indonesia has obligation to provide access to justice for foreigners for any kind of purposes.

Keywords: constitutional rights; human rights; access to justice

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Introduction

In 2007 three Australian citizens, accused of drug cases, and has been sentenced to death penalty by an Indonesian court, submitted judicial review on Law No. 22 Year 1997 regarding Narcotics. Those men feel that their constitutional rights violated by the existence of death penalty stipulated at Law Number 22 of 1997. The existence of death penalty is contrary to fundamental rights in human rights law, namely the right to life.

Unfortunately the court refused their request for judicial review with the reason because as foreigners, they have no legal standing before the constitutional court. The Court stated that Article 51 paragraph (1) of the Law no 24/2003 regarding the Constitutional Court explicitly and clearly stated that individuals or groups only of Indonesian Citizen who have constitutional rights granted by the 1945 Constitution

The wishes of the foreigners who have been convicted of death penalty to conduct a judicial review against the Indonesian narcotics law is very understandable considering the existence of the death penalty violates the right to life of a person guaranteed under international human rights law instruments. Article 6 (1) International Convention on the Civil and Political Rights (ICCPR), which has been ratified by the Government of Indonesia through Law No. 12 of 2005 stipulated as follows : Every human being has the inherent right to life. The prohibition of the death penalty in the human rights conventions is motivated by the beliefness that the abolition of the death penalty will contributes to increase human dignity and the progressive development of human rights.¹ The right to life is categorized as non-derogable rights which is can not be derogated under any circumstances. Whatever crime was committed, some one still entitled to the right to life

Judicial review submitted by applicant including foreigners is part of the efforts of that persons to access justice for his rights that have been impaired by the existence of the requested legislation to those tested.

Not only the right to life, Access to justice is also non-derogable rights which can not be derogated and discriminated base on sex, ideology, language, religion, race, nationality etc.

Access to justice is the fundamental right of every person regardless the citizenship. This right stipulated at article 16 ICCPR as follow:

“Everyone shall have the right to recognition everywhere as a person before the law. This right provide the right of access to justice before the court wherever the court exist

¹ Paragraf 1, Second Optional Protocol to ICCPR

There is no clarity whether the court in question as well as the constitutional court or not. Is there a hierarchy between supreme court with the constitutional court? Does the state has right to restrict a person's right to access justice only because that person is foreigner?

Problem Statements

Base on the background which is mentioned previously, the questioned are: first, why Indonesian constitutional Court decide that the foreigners did not have legal standing before this court. Second, wheter Indonesian constitutional Court decision in accordance with international human rights law or not

Objective of the Research

The objective of the research are to analyse comprehensively why does Indonesian constitutional Court decide that the foreigners did not have legal standing before this court and whether the Indonesian constitutional Court decision provide no legal standing in accordance with international human rights law or not

Research Method

This is qualitative research, The methodology employed in this research is library-based research. It employed statutory, conseptual, and comparison approachs. While the main research materials use in this research are primary and secondary sources. The primary sources concist of Indonesian law No 24/2003 regarding Indonesian constitutional court, and constitutional court decision no Nomor 21-22/PUU-V/2007, and ICCPR

Results/Findings

Base on the research that has been carried ot concerning the access to justice of foreigners before Indonesian constitutional court , there are some results that can be presented .

1. Legal standing of Foreigners under Indonesian Constitutional Court Decision

The primary arguments was delivered by the applicant in this present case is that the access to justice is the right of every person regardless the citizenship. The law of Constitutional Court which provide no access to foreigners before this court is contradict with Article 28D paragraph (1) of the 1945 Indonesia Constitution.

Responds this claim, the indonesian constitutional court reminded that since 2005, under the Decision No. 006 / PUU - III / 2005 which was followed by subsequent decisions agreed that become applicant before indonesian constitutional court should meet five requirements , namely :

- a. there is rights granted by the 1945 Constitution ;

- b. those rights was impaired by the enactment of the law concerned for reviewed
- c. The constitutional impairment must be specific (special) and actual or at least potential which according to logical reasoning , will surely occurred
- d. there is causal link between the losses in question and the enactment of the law for reviewed
- e. there is a possibility that with the granting of the claim , the constitutional impairment will not or no longer occurred .

Moreover, Indonesian constitutional court stated that the three Australian citizens has no legal standing because :²

- a. Article 51(1) Indonesian constitutional Law and its explanation stipulated that an individual who entitle delivered judicial review before the Indonesian constitutional court only indonesian citizens.
- b. Even though foreigners has no access before Indonesian constitutional court does not mean that foreigners do not obtain legal protection because they are still have access before other public courts.

2. Indonesian constitutional court decision is not violated international human right law.

2.1. Constitutional right and obligation of citizen

Human rights is different with constitutional rights. Human rights is the right inherent on each human person because they are human, not because they are citizen. While constitutional rights is the rights provided by state to its citizen only. However , due to human rights it has been stipulated in 1945 indonesian constitution, so that human rights officially become a constitutional right of every citizen or " constitutional rights" .

Not all constitutional rights identical with human rights. There are some citizen's constitutional rights can not be categorized as human rights. the right of every citizen to occupy positions in government is " the citizen's constitutional rights" , but could not be applied to any person who is not a citizen . Therefore , not all " the citizen 's rights is " the human rights" , but it can be said that all " the human rights" also is at once a " the citizen's rights" .³

There are certain rights that can be categorized as the constitutional rights of citizens in indonesia as follow :

1. certain human rights which are provided by state to Indonesian citizens only. For example the rights to get equal opportunity in terms of governance ; the right to work

² See indonesian constitutional court decision no 21-22/PUU-V/2007

³ Jimly Asshiddiqie, "Hak konstitusional perempuan dan penegakannya", Presented on an events of Public Dialogue and Consultation of the National Commission of Women ". Jakarta, 27 November 2007 p. 1, Last accessed april 05 2016 at http://www.jimly.com/makalah/namafile/8/HAK_KONSTITUSIONAL_PEREMPUAN.doc

and a decent living; the rights and obligations in the defending of state efforts , the rights and obligations for the defense and security of the state ; the right of education.

2. certain human rights that applied to everyone, but in certain cases, Indonesia citizen entitle certain privileges regarding that rights. For example, 1945 constitution guarantees rights to work for everyone. In practice, states may restrict the right of foreigners to work in Indonesia with many administrative requirements. The right to freedom of association, assembly and expression for everyone. The foreigners and a citizen can not be treated equally in the implementation of this rights. Foreigners prohibited to interfere in the domestic affairs of Indonesia. For example, they are not allowed to freely express opinions that may raise a particular social tensions. In a larger scope, for example, foreigners have no legal basis to establish a political party for any purpose at indonesia, even it will be strongly contested if that political party potentially try affect political policy of Indonesia

3. The right of citizens to occupy positions that are filled through general election procedures , such as the president and vice president ; governor and vice governor

4. The right of citizens to be appointed in certain positions , such as the military , the state police , prosecutors , other civil servants within the structural and functional personnel

The policy of State to distinguish between human right and constitutional rights are very common. United States distinguish between "the people 's rights" versus " the citizen 's rights" . Human rights arise simply by a human being while Civil rights arise only by virtue of a legal grant of that right, such as the rights imparted on American citizens by the U.S. Constitution.⁴ In America, civil rights protected by the U.S. Constitution and many state constitutions. Civil rights protect citizens from discrimination and grant certain freedoms, like free speech, due process, equal protection, the right against self-incrimination, and so forth. Civil rights can be thought as the agreement between the state and the citizens

In an international framework, civil rights derive from the constitutions or laws of each country, while human rights are considered universal to all human beings. As a result, international players are less likely to take action to enforce a nation's violation of its own civil rights, but more likely to respond to human rights violations. While human rights are universal in all countries, civil rights vary greatly from one nation to the next. No nation may rightfully deprive a person of a human right, but different nations can grant or deny different civil rights and liberties.⁵

How does the civil rights at US can be described by some questions as follows:, "Are you one of the People of the United States as contemplated by the U.S. Constitution Preamble ? Or , are you one of the citizens of the United States as defined in the U.S. Constitution

⁴ What is the Difference Between a Human Right and a Civil Right?, Last accessed april 05 2016 at www.hg.org/article.asp?id=31546

⁵ ibid

14th Amendment ? " . " If you are one the People of the United States , then all Ten Amendments are available to you . You have natural rights . If you are a citizen of the United States , then you have civil rights (properly called civil privileges) " . " Civil privileges " that are not owned by US residents who are not the United States citizens ⁶

Not only the differences between constitutional rights and human rights . it is important also to distinguished between constitutional rights and legal rights . Constitutional rights are rights guaranteed within and by 1945 Indonesian constitution, while the legal rights guaranteed by the laws or regulations beyond 1945 Indonesian constitution. ⁷

After provisions on human rights adopted completely in 1945 Indonesian constitution , ⁸ the notion of human rights and the rights of citizens can be attributed to the notion of " constitutional rights" guaranteed in the 1945 Constitution. furthermore Indonesian citizen has also legal rights more detailed and operational regulated by legislation or other subordinate .

As a counterweight to the guarantee of citizens' constitutional rights mentioned above , 1945 Indonesian constitution was also regulated the constitutional obligation of every citizen . Almost similar to the constitutional rights ,the constitutional obligations consist of :

1. the obligation as a human being or a human obligation
2. the obligation as citizen

these are the explanation of human obligation and citizen obligation :⁹

1) The obligation of every person to respect the human rights of others in the society as stipulated in Article 28J paragraph (1) of the 1945 Indonesian Constitution

2) The obligation of every person in the perform of their right and freedom to be subjected to the restrictions established by law with the purpose is solely to ensure recognition and respect for the rights and freedoms of others and to ac and to meet the demands of a fair in accordance with morality considerations , religious values , security and public order in a democratic society , as stipulated in Article 28J paragraph (2) of the 1945 Indonesian Constitution ;

3) The obligation of every person and every citizen to pay taxes and other Additional compulsory charges , as stipulated in Section 23A of the 1945 Indonesian Constitution ;

4) The obligation of every citizen to participate in the efforts of state defense as stipulated in Article 27 (3) and to participate in the defense and security of the country referred to in Article 30 paragraph (1) of the 1945 Indonesian Constitution¹⁰

⁶ Jimly Asshiddiqie *op.cit*, p.2

⁷ Ibid

⁸ See second amendment of 1945 constitution at year 2000.

⁹ Jimly Asshiddiqie, *op.cit*, p.12

¹⁰ Ibid, p.13

2.2 The right of access to justice is non- derogable

Indonesia already ratified the ICCPR 1966 . This fact raised consequences that all categories of civil and political rights were guaranteed by the ICCPR must stand on non - discrimination requirements ¹¹.

Although it requires the absence of state interference, the state must create a protection mechanism in a formal legal instrument . In the modern political civilization generally civil and political freedoms guaranteed by the Constitution as the highest of legal instrument or guaranteed by penal law system..¹²

Political and civil rights can be divided into non- derogable and derogable rights These groupings raised different opinion regarding hierarchi among human rights base. on the argument that the nature of interdependence and indivisability of that human rights ¹³

According to Article 4 paragraph 2 of the ICCPR there are seven kinds of non- derogable rights , namely the rights mentioned in articles 6, 7 , 8 (paragraphs I and 2) , 11 , 15 , 16 and 18 consists of :¹⁴

1. the right to life ;
2. freedom from torture ;
3. freedom from slavery ;
4. freedom from arrest for failing to pay the debt
5. freedom from retroactive punishment
6. the rights as legal subjects ;
7. the right to freedom of thought, conscience and religion

Thus it is not justified for any country to reduce the fulfillment of non derogable rights. Everyone whose rights are violated shall obtain effective remedy in the e form of compensation , restitution and rehabilitation or reparation. All States parties are required to provide regular accountability toward the international community , such as make regular reports to the Human Rights Committee.¹⁵

Even though article 4 stipulated that those seventh rights could not be derogated by who ever and in whatever conditions however actually this convention still give possibility to derogated the right to freedom of thought, conscience and religion.

¹¹ Todung Mulya Lubis, "Menjaga Kebebasan Sipil", at Kompas , 3 february 2006

¹² Francisco Forrest Martin, Stephen J. Schnably, Richard J. Wilson, Jonathan S. Simon Mark V. and Tushnet, *International Human Rights and Humanitarian Law Treaties, Cases and Analysis*, Cambridge University Press, New York, 2005, p.. 46

¹³ Teraya Koji, "Emerging Hierarchy in International Human Rights and Beyond: From the persepectife of non derogable right", *European Journal of International Law (EJIL)* 2001, Vol 12 No 5 p. 917

¹⁴ see article 4 paragrap 2 ICCPR

¹⁵ Francisco Forrest Martin Stephen J. Schnably, Richard J. Wilson, Jonathan S. Simon Mark V. and Tushnet, *op.cit*, hlm.64

For an example, article 18 ICCPR stipulated that the right to express of religion is limitable by the law to protect public security, public order, health or moral and fundamental rights and other freedoms.¹⁶

The limitation toward non derogable rights could not be found at other six non derogable rights such as right to life, the rights as legal subjects , freedom from torture, freedom from slavery , freedom from arrest for failing to pay the debt, freedom from retro active punishment

Convention also stipulated that non derogable right could be derogated or limited only in the emergency situation and fulfill all requirements mentioned at covenant. The requirements are cumulative in nature. Those cumulative requirements as follows:¹⁷

1. there is emergency situation which formally noticed as threat of continuing living of State
2. suspension or restriction is not allowed base on discrimination of race, colour, sex, language , religion or social status . The limitation and suspension concerned should be reported to United Nations
3. those rights could be restricted or derogated with the reason to protect *national security or of public order (ordre public), or of public health or morals, healthy and fullfilment other rights*

The scope of non derogble rights mentioned in ICCPR different with African Charter also American Convention. There are eleven rights belonging to non- derogable rights under the American Convention. This Convention allows the violation at the time of war, public danger , or other emergency that threatens the security of the state.¹⁸

As stated above, one of the rights that can not be restricted under any circumstances are right as a legal subject . This is stated expressly in Article 16 of the ICCPR that Everyone shall have the right to recognition everywhere as a person before the law .. Everyone has the right to be recognized as a person before the law . As a person before the law means that it can sue or be prosecuted before the law.¹⁹

Nowdays quite a lot of countries which stipulate that foreigners have legal standing to claim the fulfillment of their constitutional rights before their constitutional court. German Bundesverfassungsgericht verdict , May 22, 2006 , granted a constitutional complaint (' *Verfassungsbeschwerde* ') of a foreign student from Morocco , which considers the prevention of data screening (' *Rasterfahndung* ') , which is held by The Federal Policy Agency in order to anticipate the danger of terrorists after the Sept. 11 ,

¹⁶ see pasal 18 ICCPR

¹⁷ Francisco Forrest Martin Stephen, Richard J.Wilson,Jonathan S. Simon Mark V. and Tushnet *op.cit*, p.65

¹⁸ see <http://www.interights.org>. Compare with an article at <http://www.amnestyusa.org>. The last visited 23 march 2016

¹⁹Dixon, Martin, *op.cit*, hlm.105

2001, contrary to the right for informational self-determination guaranteed by the Grundgesetz Republic German federation . Another example is the Constitutional Court of Mongolia , commonly called Constitutional Tsets (*or Tsets*) recognizes the rights of foreign citizens and those without citizenship , who are not staying lawfully in the territory of Mongolia apply for judicial atau Tsets referred to the Constitutional Tsets²⁰

In the United States , in the case of *Asakura v . City of Seattle* , 265 US 332 (1924), the court allowed Japan citizen filed a judicial review of a city ordinance that prohibits foreigners to do business on the pawnshop , and only gave such permits to citizens. Furthermore, in the case of *Cabell v .Chavez - Salido* , 454 U.S. 432 (1982) foreigners were allowed review on Article 1031 (a) Of Cal.Govt Ann , which requires that public officers or employees declared by law to peace officers , must be an American citizen.

Furthermore , the Constitution of Dominica in 1978 , stipulated Foreigners were allowed conduct a judicial review. Moreover, Dominica Constitution states that foreigners are "a person" , within the purview of s.100 (a) , and is entitled to judicial review under s.103 (1) , eventhough has been debarred from entering the territory of the country. ²¹

The right to be recognized as legal subjects in this particular case manifested by its legal standing before the Constitutional Court . Basically This rights should be extended to foreigners. However, statement above should not be interpreted that the rights of a foreigners in every thing should be same with the rights of citizens .

The Indian Constitution clearly divides fundamental rights into two parts , namely :

1. the rights which only exists for citizens , and
2. the rights which are exist for people " , including for foreigners, which include :
 - A. equality before the law ,
 - B. the right not to be prosecuted with recroactive criminal law or double jeopardy (be tried again after a decision of the magnitude) ,
 - C. the right to life and the right to personal freedom , etc.²²

Related to 1945 indonesian constitution, although it uses the formula "everyone " , not by itself all the rights contained in Chapter XA of these also apply to foreigners . Political rights that are closely related to the duty of citizens of the country, can only be acquired because of his position as a citizen. It is different with the human rights of foreigners , who also received protection before the Indonesian law.

Indonesia's participation in the Convention on International Human Rights , on a reciprocal basis also provide rights to Indonesia whether juridically and morally the implementation of international obligations of other countries , to protect and guarantee human rights of Indonesian citizens abroad are equal to the minimum standard of national

²⁰ Constitution Magazine , No. 17, November-December 2006, p. 13).

²¹ Francisco Forrest Martin Stephen J. Schnably, Richard J.Wilson,Jonathan S. Simon Mark V. and Tushnet, *op.cit*, p.69

²² Note (*risalah putusan*) of indonesian constitutional court decision

treatment. The practice of other countries shows that they accept the locus standi for foreigners to obtain access to justice through a judicial mechanism, in an effort to obtain the protection of human rights of foreigners who breached by legislation of host state to foreigners, whether they are living temporarily or not.

There are still many other cases referring to international practice that do not close access of foreigners before constitutional court to claim any rights which is universally recognized and protected, although limited to rights which by their nature involve a relationship between citizens and its state and the rights which demands loyalty arising from obligation of a citizens of the country.

The right to life is the right owned by every human not only Indonesia citizen. This rights by their nature do not involve a relationship between citizens and its state and also do not related with a demands of loyalty arising from obligation of a citizens of the country. There fore foreigner should have the right to ask judicial review before indonesian constitutional court for this right.

2.3 Indonesia had not implemented yet ICCPR to Its National Law

As legal subjects Indonesia hold rights and obligations under international law. Some obligations were derived from international treaties that already ratified by indonesia. Base on pacta sunt servanda principle, those treaty is legally binding to its parties and should be performed with good faith.²³

The majority of international human rights instruments currently established through international treaty. Those treaties bound to State through ratification. Until now Indonesia has ratified²⁴ many international human rights instruments. Ratification is not an obligation in international law. Ratification has been known in international law by the ratio :

1. state's right to reexamine and reconsider the international treaty that already signed by its representatives
2. implementation of democracy principle and the sovereignty of the people

Related to the first Ratio, state has right to examine more whether the treaty contradict to the national interest or not. While related to the second ratio, base on the principles of democracy, what has been agreed upon representatives of the state in an international conference need to be aware and seek approval of the people, especially when the contents of the treaty have a direct impact on the interests of the people. Indonesian law number 24 of 2000 on international treaties, stipulated that ratifications require the approval of Parliament when the material regarding the following matters :

- a. political, peace, defense, and security of the state
- b. changes or delimitation of the territory of the Republic of Indonesia

²³ Martin Dixon, *Textbook on International Law*, Blackstone Press Limited, fourth edition, 2000, pp24-25

- c. sovereignty or sovereign rights
- d. human rights and the environment
- e. establishment of new legal rules
- f. loans and / or grants

In 2005, Indonesia has ratified the ICCPR through Law No. 12 of 2005. ICCPR legally binding to Indonesia including Right to access justice, recognized as a person before the law means that everyone has the right to access a justice before the law. The right to recognized as a person before the law, equality before the law is categorized as non-derogable rights.²⁵

Thus unwarranted presumably what is stipulated in Article 51 (1) of the Law on Constitutional Court which does not grant access to foreigners to ask judicial review before Constitutional Court on the reason only that they are foreigners is not compatible with Article 4 regarding non derogable rights. Providing access to foreigners before Constitutional Court will not threat the life of the state. The right of access to justice is the right of every person because they are human beings who entitle right to life, not because of their citizenship status.

It is legal for the government do not accede some or all what prompted by the foreigners in their judicial review. However it will be violated the international human right law if the government do not provide access to foreigners to claim their constitutional right before Indonesian constitutional court regarding the right to life. The right to life is owned by every human not only Indonesia citizen. This rights by their nature do not involve a relationship between citizens and its state and also do not related with a demands of loyalty arising from obligation of a citizens of the country. There fore foreigner should have access to justice asking judicial review before Indonesian constitutional court for this particular right.

Conclusion

Indonesian Constitutional Court decision refused legal standing of foreigners before this court solely due to normative considerations that Article 51 (1) of the Law of constitutional Court restricted its jurisdiction.. This provision provide legal standing only for:

1. Indonesian citizens or groups of people who have the same interest
2. community of indigeneous people
3. The public or private legal entity
4. State institution

There is no satisfactory explanation why the Indonesian constitutional court limited its jurisdiction only for citizen or national legal entity and do not provide access to foreigners

²⁵ Art 4 ICCPR

The decision of Indonesian Constitutional Court's which provide no access to foreigners deliver judicial is not violate international human rights law. because Human rights is different with constitutional rights. constitutional rights is the rights provided by state to its citizen only. Not all " the citizen 's rights is " the human rights“:

The policy of State to distinguish between human right and constitutional rights are very common. United States distinguish between "the people 's rights" versus " the citizen 's rights/civil rights

Access to justice is non derogable right, Even though foreigners has no access before Indonesian constitutional court does not mean that foreigners do not obtain legal protection because they are still have access before other public court

If Indonesia want to provide access to justice for foreigners before indonesian constitutional court, it can be provided for the right by their nature do not involve a relationship between citizens and its state and also do not related with a demands of loyalty arising from obligation of a citizens of the country

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The Framework of Corruption as a Human Rights Violation and its Implication to Indonesian Penal System and Corruption Judicial Decision

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Abstract

The Indonesian Anti Corruption Act perceives corruption is not only related to state financial loss, but also as a violation of economic and social rights. However, the formulation of penal system and corruption judicial decision ignore the principle. Forms of criminal sanction and their impositions merely consider the rights of an accused and eliminate the economic and social rights of the society as a whole. These reflect in the corruption judicial decision where corruption cases become the scope of criminal law. The paper analyses deeply the factors why the dimension of human rights violation resulted from corruption is eliminated in the corruption judicial decision. Furthermore, it examines the implication of the framework of corruption as human rights violation to the formulation of penal system and corruption judicial decision. The methodology employed in the research is library research and deep interview, while the approach is conceptual. The paper is both empirical and normative research. The research reveals that the framework of corruption as a human rights violation changes the paradigm of Indonesian penal system and corruption judicial decision.

Keywords: corruption, economics and social rights violation, penal system, judicial decision

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Introduction

It is not an exaggeration to say that corruption strongly relates to human rights violation.¹ Considering this close connection, the Indonesian Anti Corruption Law perceives corruption as not only related to state's financial loss, but also as a violation of economic and social rights, as clearly stated in the consideration that 'the widespread cases have not only inflicted losses on the state but also violated the social and economic rights of the general public so that corruption needs to be categorized as a crime that must be eradicated in an extraordinary way'. In this sense, a human rights based approach in eradication corruption is one of the extraordinary ways. This approach is taken into account in suppressing corruption in Indonesia because traditional ways appears to be unsuccessful to minimize the rate of corruption cases committed by the state officials. In some corruption cases, there is also a fact that corruption has a close connection to human rights violation.

In the case of former General Secretary of Ministry of Sports, Wafid Muharram, it is proven that the accused received bribery in the amount of 3,2 billion IDR from marketing manager of Duta Graha Indah Ltd, Mohammad El Idris and managing director of Anak Negeri Ltd, Mindo Rosalina Manulang. The money was given as a reward for scheming Duta Graha Indah as the winner of public procurement for the 2011 SEA Games athlete buildings in Palembang. Due to the bribery, the opportunity for the parties to obtain the same right for public service did not appear.

It is also proven that former Governor of Banten, Ratu Atut Chosiyah was guilty of corruption in the procurement of medical equipment of Banten Province. In this case, there is a close connection between corrupt practices of the accused and the violation of the rights to health. If, for instance, a medical patient passes away because of the unavailability of particular medical equipment corrupted by the accused, then right to live is also violated. Unfortunately, it is difficult to find corruption judicial decisions that insert a human right dimension. Corruption cases are eliminated from human rights violation.

This paper analyses deeply the factors why the dimension of human rights violations resulted from corruption is eliminated in the corruption judicial decision. Furthermore, it examines the implication of the framework of corruption as human rights violation to the formulation of penal system and corruption judicial decision.

Corruption as a Human Rights Violation; A Theoretical Framework

Although all forms of corrupt practices may have the long-run have on human rights, it cannot be concluded mechanically that a given act of corruption violates a human right. This means that it is necessary to distinguish corrupt practices which directly violate a human right from corrupt practices which lead to violation of a human right, and from corrupt practices where a causal link with a specific violation of rights cannot practically be established. Corruption is a direct violation of human rights. Corruption may be linked directly to a violation of human rights when a corruption

¹ Matthew Lister, "There Is No Human Right to Democracy, But May We Promote It Anyway?", *Stanford Journal of International Law*, 2012, p. 259-260

act is deliberately used as a means to violate a right.² For instance, a bribe offered to a judge directly affects the independency and impartiality of that judge, hence, violates the right to a fair trial. When an individual must bribe a doctor to obtain medical treatment at a public hospital, or bribed a teacher at a public school to obtain a place for his child at school, corruption infringes the right to health and education.

Corruption is also an indirect violation of human rights. Corruption can be an indirect cause for the violation of human rights when it is a necessary condition for the violation of the right. In this case, corruption will be an essential factor contributing to a chain of events that eventually leads to the violation of human rights. Hence, the right is violated by an act that is derived from a corruption act and the act of corruption is a *sine qua non* for the violation.³ Corruption can be an essential factor contributing to a chain of events that eventually leads to the violation of a right. This situation will arise, for example, if a public official allowed the illegal importation of toxic waste from other countries in return for a bribe, and that waste is placed in, or close to, a residential area, the right to life and health of residents of that place would be violated, indirectly, as a result of the bribery.

Finally, corruption as a remote violation/where corruption is one factor among others. Corruption can be one of several factors that result in the violation of human rights.⁴ Sometimes corruption will play a more remote role. When corruption during an electoral process raises concern about the accuracy of the final result, social unrest and protests may occur and these may be repressed violently. In such case, the right to political participation may be violated directly, and the repression of social protests may also cause serious violation of human rights, for example, the rights to life, prohibition of torture and ill-treatment and freedom of assembly. Nonetheless, the electoral corruption would not necessarily be the only determining cause of such riots or their repression. Many other factors might contribute and, to that extent, the corruption has a more remote link to the violation in question.

Finding the Factors

Based on the interview and discussion with several judges, this paper reveals that there are at least three factors in which the dimension of human rights violations resulted from corruption is eliminated in the corruption judicial decision. The first factor is that the framework of corruption as a human right violation is a relatively new discourse. When the Corruption Law was issued and entered into force in 2001, the discourse of corruption as a human rights violation is relatively new. Researchs, books, and academic conferences on the issue are rarely found. Many judges still consider that corruption case is a matter of criminal law. As the result, the scope of corruption judicial decisions has not been extended to cover human right dimension.⁵ To prove each element of *delict* and consider aggravating circumstances, judge stands

² Ardian Adzanela, *Corruption as a Violation of Human Rights in South East Europe*, International Summer School Sarajevo Alumni Conference "Transitional Justice and Democracy Transition, 29-30 July 2011, p. 14

³ Berihun A Gebeye, *Corruption and Human Rights: Exploring the Relationships*, in <http://ssrn.com/abstract=2075766>, p. 23-24

⁴ International Council on Human Right Policy, *Corruption and Human Rights: Making the Connection* Transparency International, 2009, p. 28

⁵ Interview and discussion with GES, a judge of district court of Wonosari at Jogja Plaza Hotel 16 April of 2015.

for facts that correspond to them and eliminate indirect and irrelevant other circumstances.

Specifically, in proving the elements of *delict* the judges are exploring the theoretical bases, proposing the legal facts revealed before the court suit the evidence, and taking a summary of whether or not the accused is guilty. All facts that corrupt practices committed by an accused infringe certain rights of individual citizen and all society as a whole had been ignored. It is also found that punishment imposed to the accused is intended to prevent him from reoffending crime in the future, to deter people to commit similar crime, and to educate the accused. Punishment will be aggravated when the accused does not admit his fault and degrade the government effort in suppressing corruption.⁶

Another factor is misunderstanding a human rights violation concept. Some judges argued that both corruption and human rights violation have different concept and application. When a judge receives bribery from an accused in order to release his charge, it is a matter of corruption cases. The judicial process of the case refers to Corruption Law. Meanwhile, human rights violation refers to genocide and crime against humanity mentioned in Human Rights Court Law Number 26 Year 2000. All human rights violations refers to this act.⁷ This phenomenon shows that some Indonesian judges cannot distinguish between the term of 'human rights violation' and 'most serious crimes'.

Theoretically, a human rights violation concept relates to state obligation. It is commonly understood that state has three levels of obligation in relation to human rights: 'to respect', 'to protect' and 'to fulfil'. The obligation to respect requires the state to refrain from any measure that may deprive individuals of the enjoyment of their rights or their ability to satisfy those rights by their efforts. The obligation to protect requires state to prevent violations of human rights by third parties. This obligation is normally taken to be a central function of state, which has to prevent harms from being inflicted to the society. This requires state to prevent violations of rights by individuals or other non-state actors, to avoid and to eliminate incentives to violate rights by third parties, and to provide access to legal remedies when violations have occurred, in order to prevent further deprivations.⁸

The obligation to fulfil requires the state to take measures to ensure that people under its jurisdiction can satisfy basic needs which they cannot secure by their own efforts. Although this is the key state obligation in relation to economic, social and cultural rights, the duty to fulfil also arises in respect to civil and political rights. It is clear, for example, that enforcing the prohibition of torture or providing the rights to a fair trial, to free and fair election, and to legal assistance, all require considerable costs and investments.⁹

⁶ Interview and discussion with AM, a judge of district court of Sukabumi, 17 April of 2015

⁷ Interview and discussion with FHS, a judge at district court of Maros, South Sulawesi, 16 Mei of 2015, and with EM, a judge of district court of South Jakarta, 20 April 2015

⁸ Olivier De Schutter, *International Human Rights Law Cases, Materials and Commentary*, Cambridge University Press, 2010, p. 242-243

⁹ *Ibid.*, p. 243

The human rights violation appears in relation to those three levels of state obligation. Two forms of human rights violation by state; by commission and by omission. Human rights violation by commission is defined as the condition where state breaks the obligation to respect the rights of their citizens. Whereas human rights violation by omission refers to state's ignorance to protect and fulfil the rights of citizens as a whole. Then the question arises is, who is state? State is any person given authority to do and/or not to do an activity on behalf of state. Kinds of state obligations in relation to human rights are provided in the Human Right Law Number 39 Year 1999. The Law also covers civil and political rights, economic, social and cultural rights, and collective rights.¹⁰ This normative framework becomes a legal basis to link between corruption and human rights violation. Therefore, it is a mistake when some judges argued that no connection between corruption and human right violation by referring to Corruption Law and Human Rights Court Law as different laws

Most serious crimes, on the other hand, is a legal term of international criminal law related to genocide, crimes against humanity, war crimes, and aggression.¹¹ The actors who can commit these crimes are both state and non-state actors. In international level, these four crimes are found in the 1998 Rome Statute ratified by more than 60 countries.¹² The criminal tribunal for the allegation of these crimes is the International Criminal Court. The existence of Indonesian Human Rights Court Law thus is recognized as the extraction of Rome Statute. Most of the substantive elements of crime refers to this Statute. The different is that the former limited kinds of crime to only genocide and crimes against humanity. Eventhough it is entitled human rights court, but it is not like human rights courts established in Europe (*European Court of Human Rights*). It is actually a national court of international crimes. Meanwhile, human rights court in some countries has an authority to hear any state allegation related to its obligation to respect, to protect and to fulfil human rights of citizens.

In the context of corruption, it is clear that corruption has a close connection to human rights violation as mentioned in Law Number 39 Year 1999, that states, 'corruption...violated the social and economic rights of the general public...' found in the consideration of Indonesian Corruption Law also refers to Law Number 39 Year 1999. The term 'human rights violation' must be distinguished with the term 'most serious crimes'. Eventhough Law Number 26 Year 2000 uses 'human rights court' as the title, but it obviously refers to most serious crimes in the Rome Statute.

Some judges also explain that although a discourse on the relation between corruption and human rights violation is promoted through research and legal training, this tendency cannot be justified to change the paradigm of corruption judicial decision. Consideration of corruption law mentions human rights dimension in an effort to prevent and to eradicate corrupt practices of state officials, but not sufficient to framework corruption as a human rights violation since no wording written in each article of law. No possibility to put human rights consideration into form of corruption judicial decision because it is formulated in the fixed format. Besides, judges are strictly prohibited to relate corruption to human rights violation. He has been mandated to apply law the way it is, no authority to change and to put human rights

¹⁰ See Indonesian Human Right Act number 39 of 1999

¹¹ See Mahrus Ali dan Syarif Nurhidayat, *Penyelesaian Pelanggaran HAM Berat In Court System & Out Court System*, Gramata Publishing, Jakarta, 2011

¹² Indonesia has not ratified yet the Rome Statute

approach into his judicial decision.¹³ This perspective shows that the judges still stand for legal positivistic fashion as proposed by John Austin and Hans Kelsen. According to legal positivism, judge is nothing more than human being without soul and feeling. Legal creativity must be avoided. In relation to corruption cases, linking to human rights violation is also prohibited because the corruption law enables it to extend to human rights approach in preventing and suppressing corruption.¹⁴

The Fullfilment of Human Rights Based Corruption Penal System

Penal system in a narrow definition is seen as a norm of substantive criminal law, all statutory rules/norms relating to substantive criminal law to punishment, or entire statutory rules to criminal sanction imposition and execution.¹⁵ In the wide definition it is the statutory rules relating to penal sanctions and punishment.¹⁶ In this paper, the scope of penal system is limited to formulation of criminal sanction.

The primary sentence of Anti Corruption Law consists of capital punishment,¹⁷ imprisonment, and fine. Whereas one of the additional sentences is the compensation paid shall be to a maximum of the wealth obtained from the corruption.¹⁸ These formulations still have some weaknesses in the sense that all forms of the sentences do not correspond to the fulfilment of victim's rights. Eventhough the accused is imposed much fine or heavy imprisonment, the sentences still ignore the victim's rights. Therefore, it is necessary to change the sentence paradigm, from criminal law *per se* to human rights approach. If imprisonment becomes the primary sentence in the Indonesian criminal statutory laws, this tendency is percieved as elimination of human rights dimension.

According to Anti Corruption Law, the amount of fine has also been set its maximum and minimum sum which is no more than 1 billion IDR and no less than 50 million IDR. The judges have no authority to exceed or decrease its amount. Furthermore, the fine paid by the accused is not directed to repair the victims harm. This formulation, once again, ignores human rights dimension in preventing and suppressing corruption. From a human rights perspective, fine needs to place at the front of sentence of Anti

¹³ Interview and discussion with SM, a judge of distric court of center of Jakarta, 16 April of 2015, and with SH, a judge of district court of center of Jakarta, 20 April 2015.

¹⁴ Austin introduced the concept that the law is a command of the sovereign, closed logical system, and consists of command, sanction, obligation, and sovereignty. Laws are properly so called as positive law. Meanwhile, Kelsen argued that law must be separated from morality, politic, and culture. There must be separation between law and morality. All law is enacted law. A concrete manifestation of law is the law that has been produced by the legislature in the form of written law. When a law is issued by the legislature, judges are strictly prohibited to interpret. See R.M.W Dias, *Jurisprudence*, Fifth Edition, Butterworhts, London, 1985, p. 346; Hans Kelsen, *Introduction to the Problem of Legal Theory*, Translated by Bonnie Litschewski Paulson dan Stanley L. Paulson, Clarendon Press, Oxford New York, 1992, p. Xxvi.

¹⁵ Barda Nawawi Arief, *Pembaharuan Hukum Pidana dalam Perspektif Kajian Perbandingan*, First Edition, Citra Aditya Bakti, Bandung, 2005, p. 262

¹⁶ L.H.C. Hulsman, *The Dutch Criminal Justice System from a Comparative Legal Perspective* dalam D.C Fokkema (Ed), *Introduction to Dutch Law for Foreign Lawyers*, quated by M. Sholehuddin, *Sistem Sanksi dalam Hukum Pidana*, First Edition, Rajagrafindo Persada, Jakarta, 2003, p 55

¹⁷ Based on articel 2 (2) of Anti Corruption Law number 20 of 2001, capital punishment may be imposed in certain conditions that may serve as as reason for meeting out heavier punishment to those embazzling for the control of emergency state, national disaster, widespread social unrest, economic and monetary crisis, and corruption offences.

¹⁸ Article 18 (1) a of Anti Corruption Law number 31 of 1999

Corruption Law by changing its formulation referring to the concept of maximizing social welfare. In this context, social welfare is the sum of the offenders' benefits from committing offences, minus the harm caused by offences, minus governmental law enforcement expenditures.¹⁹

In more detail explanation, the amount of fine must consider the following aspects:

- a. The factual loss of state from the corrupt practice of the accused;
- b. The expenses of the potential victim in order to prevent from being a victim in the future;
- c. The expenses of law enforcements in investigation, prosecution, and criminal proceeding.

Those expenses are then multiplied by maximum of three times to prevent overpenalization and overenforcement.²⁰ The principle of multiplicity of fine is not something new in the Indonesian penal system. There are three statutory penal laws imposed to the company who commits certain offences that accomodate the principle; Article 130 of Law Number 35 Year 2009 on Drugs, article 15 of Law Number 21 Year 2007 on Preventing and Suppressing Human Traffickings, and Article 40 (7) of Law Number 44 Year 2008 on Pornography. By applying the principle, the compensation paid shall be to a maximum of the wealth obtained from corruption as it mentioned in article 18 (1 b) above is not needed. In addition, it must ascertain that the fine paid by the accused is used to repair the harm of the victims.

Another change that should be made is introducing the community service order as an alternative sentence to fine. Frankly, this form of sentence has not been recognized in the Indonesian penal code and other statutory penal systems. Under the principle that work is a penalty, the sentence can be imposed to public servants or judges who corrupt state budgets, receive money, goods, or promises and involved in unfair public procurement with private actors. The forms vary from being a cleaning service in certain district court or in public areas under the control of police other legal institutions, to be involved in building public facilities.

The last is revoking the right of the accused to work as a public servant such as governor, minister, or House of Representatives member. When a governor corrupts state budgets, one of the adequate sentences to him is revoking his right public occupation permanently. This sentence, referring to the principle of limitation in international human rights law,²¹ removes the opportunity of the accused from being a public servant.

Reformatting Corruption Judicial Decision

The format of judicial decision in all criminal cases is similiar each other. It begins with the indictment and legal basis used to sue an accused in the first step, then followed by an exploration of testimony of witnesses, experts, and other evidences. By referring to the legal facts revealed before the court, judges make legal summary

¹⁹ Nuno Garoupa dan Daniel Klerman, "Optimal Law Enforcement with a Rent-Seeking Government", *American Law and Economics Review*, 2002, p. 117

²⁰ Richard A. Bierschbach, "Overenforcement", *Georgetown Law Journal*, No. 93, 2005, p 1743-1744

²¹ See Part B point 15 to 38 of Siracusa Principle on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).

of all evidences to ease them asses and evaluate the relevant facts in accordance with the elements of *actus reus* and *mens rea*. Whether or not an accused has *actus reus* and *mens rea* depends on the conformity of legal facts to the elements of crime.²²

In relation to the aggravating circumstances and the use of theory of punishment, the judges did not involve human rights perspective in his consideration. The severity of punishment considers the fact that the accused did not admit his guilt and no support for the government program in suppressing corruption. These considerations are generally found in most corruption judicial decisions. This means that the right of the victims is not taken into account in corruption judicial decision.

What should be existed in corruption judicial decision that accomodates human rights approach? What needed is to reformulate the corruption judicial decision that inserts human rights approach in certain parts of judge's consideration. If the legal facts of all judicial decisions still refer to the relevant facts corresponding to element of *actus reus* and *mens rea*, a judge must mention clearly the rights of the victim violated by the accused committing a corrupt practice at the end of every element of crime. In doing this, a judge is deemed to have a deep understanding of a theoretical framework of corruption as a human rights violation and applies it to a case. Furthermore, he must find which human rights violated by the corrupt practice of an accused. In this sense, only corruption that directly violates human rights that is included in his consideration.

In the case of bribery, for instance, a judge has to find a direct human rights violation as a result of an accused corrupt practice by identifying who bribes and who receives the money or promise, the position of state official, as well as the goal and motive underlying the bribery. Several human rights violations might be found; right to a fair trial if bribery is given to release the accused from punishment, right to healthy and medical treatment if bribery is given in context of procurement of medical equipment, right to equal opportunity to public service if bribery is given to get favourable service from public servant in term of public procurement, and right to education if bribery is given to a teacher/lecturer at a public school (university) to obtain a place in that school.

It is also necessary to argue that a judge needs to extend the categories of an expert to including a human rights expert. Under law of Indonesian criminal procedure,²³ there are three categories of experts whose duties are to clarify certain cases; legal expert, medical expert and psychological expert, and other experts. Human rights expert can actually be included in the legal expert since his legal opinion related to doctrine of law and human rights. Although he never becomes an expert in criminal proceeding particularly corruption cases,²⁴ it is beneficial to represent him before the court in order to explain clearly which direct human rights and their forms infringed by

²² The *actus reus* is sometimes said to be the physical element of a crime which is prohibited by law. Meanwhile, *mens rea* is the mental element required by the definition of a particular crime. The doctrine of *mens rea* originated in the idea that a man should not be held criminally responsible and so liable to punishment unless he is morally blameworthy. See Russell Heaton, *Criminal Law Textbook*, Second Edition, London: Oxford University Press, 2006; Mike Molan, Duncan Bloy & Denis Lanser, *Modern Criminal Law*, Fifth Edition, London: Cavendish publishing, 2003

²³ Article 186 on Indonesian Law of Criminal Procedure

²⁴ In all criminal cases, a prosecutor often asks lawyer to be an expert and gives legal opinion on the case besides medical and psychological expert

corrupt practice of the accused. The legal opinion of human rights expert before the court is more practical for a judge than oblige him to have a formal certificate in corruption and human rights training.

A judge also needs to put the kinds of human rights violated by the accused in the aggravating circumstances. An example of this is indicated in the corruption case of Angelina Sondakh, former member of House of Representative. In this case, the accused is legally guilty for receiving 12,58 billion IDR as bribery from Permai Grup Ltd in the project of athlete buildings and state universities. In one of the aggravating circumstances, the court argued that the accused infringed economic and social rights of the society.²⁵ Notwithstanding the general term used to indicate a human rights violation, the court begins to connect between corruption and human rights violation. If the court mentions and finds that the accused also violates a human right besides corruption, then this indication can be made to severe the scale of punishment. The more the human rights violations are found, the severer the punishment imposed.

Conclusion

This paper concludes that some factors causing the dimension of human rights violations resulted from corrupt practices of state officials is eliminated in the corruption judicial decision, namely the framework of corruption as a human rights violation is a relatively new discourse, misunderstanding a human rights violation concept, and the judges follow the idea of legal positivism. It is also necessary to place fine at the front sentence of Anti Corruption Law by changing its formulation referring to the concept of maximizing social welfare and adopting the principle of multiplicity. The community service order and revoking the right of the accused to work as civil servant permanently should be made as the alternative sentences to fine.

Human rights approach can also be applied in the corruption judicial decision by mentioning clearly the rights of the victim which are violated by the accused committing a corrupt practice placed at the end of every element of *actus reus* and *mens rea*. It is also important to extend the categories of an expert to including a human rights expert. In the context of aggravating circumstances, each corruption judicial decision must mention the kind of human rights violated by the accused.

²⁵ Corruption judicial decision number: 54/Pid.B/TPK/2012/P.Jkt.Pst, p. 360

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Justice for Psychopaths: Punishment or Therapy

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Abstract

Psychiatry and law approach the problem of human behaviour from different philosophical perspectives. The Criminal law is, however, 'a practical, rational, normative science which, draws upon theoretical science but is concerned with the issue of passing judgment on human conduct'.

Mental diseases need to be explicable in reference to their severity and gravity especially having the instinct towards crime. Psychopathy is one of the most dangerous mental diseases and provides a theoretical and practical challenge to the Criminal law and the Criminal Justice System.

Due to the lack of information and awareness about psychopaths they are generally considered as monsters, not patients, moreover, rather than punitive a therapeutic approach should be followed for the benefit of society, human rights, and psychopaths. Efforts have been made in countries like U.K. and U.S.A. in this direction. Special laws have been promulgated keeping in view the scientific fact that mentally ill offenders are not criminals but victims in their own ways as they are generally unaware of the disease and the consequences of the crime committed by them. There is an urgent need to create mass awareness of this disease and to make separate sentencing policy for psychopaths.

Keywords: Psychopaths, justice, punishment, therapy, law

Prof. Gellin has aptly observed that "*it is not the humanity within criminal but criminality within human being which needs to be curbed through effective administration of criminal justice*" (Blackstone, p.5)

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Introduction

One of the challenges of crime is that any attempt at its understanding demands knowledge across a wide range of disciplines. The causes of crime are one of the important segments of the crime problem that require more discussion, investigation, research and call for more social, governmental and judicial action.

It is important to understand that punishing all type of criminal or deviant acts will not serve any purpose. Crime control can be achieved only by knowing the reason behind the crime and other correlated factors influencing the personality of the offender.

The principle of criminology and penology serves as effective guidelines for formulating the penal policy for such offenders. Both when applied together give a more effective explanation of crime as it explains the reason and causes for the same.

A knowledge of the inter-linkages between various key concepts is helpful in understanding the whole issue holistically. To transform anyone from an evil man to an innocent victim, we must understand the notions of responsibility and excuses. This requires an understanding of the whole institution of punishment and its justification. It is only with an understanding of the nature of the mental illness that one can appreciate concepts such as responsibility, excuse, punishment and evil (Reznek, 1997).

The present research work initiates the discussion on justice by explaining the procedure for sentencing and its practical application with respect to psychopaths. This is followed by a discussion on various opinions on mentally ill offenders. The whole issue is discussed in the backdrop of the sentencing policy evolved in other parts of the world, particularly the therapeutic approach being used in the U.S.A. and U.K.

Psychopaths and their traits

A psychopathy is a form of the mental disease mainly linked to anti-social personality disorder. The study of psychopaths reveals that they are incapable of feeling guilt, remorse or empathy for their actions. They are generally cunning, manipulative and know the difference between right and wrong. They are incapable of normal emotions such as love and generally react without considering the consequences of their actions and show extreme egocentric and narcissistic behaviour.

A narrower meaning of the term 'psychopathic' first appeared in the work of Koch(1891) who under the heading 'Psychopathic Inferiorities', grouped abnormal behavioural states, which he believed resulted from psychological weaknesses in the brain. Koch's work was succeeded by the writings of Schneider (1923) who established psychopathy as a subclass of abnormal personality and suggested ten different forms of the psychopathic syndrome.

Henderson (1939) contributed to the concept through his threefold subdivision of psychopaths into aggressive, inadequate and creative forms. Later authors such as Cleckley (1964) and McCord and McCord (1964) went even further by narrowing the category to aggressive psychopaths and establishing core criteria for the disorder

centred on antisocial behaviours. Undeniably, Cleckley's publication of *The Mask of Sanity* (1964) has proved to be one of the most influential sources of the view that the psychopathic personality is a distinct clinical entity.

In order to explain Psychopathy, several checklists were proposed by psychologists and psychiatrists. The most commonly used are called the Psychopathy Checklist-Revised (PCL-R), developed by Dr. Robert Hare and his colleagues. Hare's Psychopathy Checklist (1985) has been able to establish some validity to core diagnostic entities for psychopathy and as a result, these are now the most widely used classifications of the disorder (Coid, 1993).

Robert Hare (1999) describes psychopaths as "intraspecies predators who use charm, manipulation, intimidation and violence to control others and to satisfy their own selfish needs. Lacking in conscience and in feelings for others, they cold-bloodedly take what they want and do as they please, violating social norms and expectations without the slightest sense of guilt or regret."

Remarkably, however, they understand from an early age that society expects them to behave in a conscientious manner and therefore they mimic this behaviour when it suits their needs. Dr. Newman (1998), a psychologist who has studied psychopaths, believes that psychopathy is essentially a type of "informational processing deficit" that makes individuals oblivious to the implications of their actions when focused on tasks that promise an instant reward. They are focused on a short-term goal such as sexual pleasure and are indifferent to other cues such as the victim's fear and become insensitive to emotions entirely.

Psychopaths are diagnosed by their purposeless and irrational antisocial behaviour, lack of conscience and emotional vacuity. They are thrill seekers, literally fearless. Punishment rarely works, because they are impulsive by nature and unafraid of the consequences. Incapable of having meaningful relationships, they view others as fodder for manipulation and exploitation.

It is important to stress that psychopaths commit crime due to disease and not due to any other motive. They are victims, not criminals and for this reason, this paper suggests the need for a therapeutic approach towards psychopaths.

Definition of crime

In view of the recent spurt in the number of criminal acts allegedly committed by psychopaths, it is necessary to discuss the concept of crime, criminal responsibility, punishment and legal and medical issues pertaining to psychopaths, in order to explain the argument for therapeutic approach.

A crime is a violation of the criminal law, which meets with the disapproval of society. According to Sir William Blackstone (Volume IV), '*A crime is an act that is capable of being followed by criminal proceedings, having one of the types of outcome (punishment) known to follow these proceedings.*

This definition clearly has a number of important consequences. First and foremost an act has to be committed before a crime can be said to have occurred as thought

without some action there is no crime. Further, the act must be legally forbidden because 'anti-social' behaviour in itself is not a crime unless specifically and explicitly prohibited by law (*actus reus*). Keeping this in mind, in the majority of instances, the individual must also have had criminal intent in committing the act (*mens rea*), the exception being crimes of strict liability. An interesting discrepancy arises here between what might seem morally wrong, as opposed to 'wrong' in the legal sense.

Criminal responsibility

It is worth noting that mentally ill offenders usually stand trial in the same way as the other offenders, but if proper care is taken at the time of sentencing of their mental state then there is a possibility of psychiatric treatment. Not only is it important to determine whether a person is guilty it is equally important to consider his mental state at the time of commitment of the act.

Before conviction, it is necessary to prove -

1. That he carried out an unlawful act (*Actus reus*) (Intent).
2. That he had a certain guilty state of mind at the time, namely *mens rea* (Guilty mind).

When a person is charged with an offence, the defence can be made that he is not capable because he did not have a sufficient degree of *mens rea*. Psychopaths never have *mens rea*, in fact, their act is due to disease.

Essentiality of *mens rea*

Mens Rea is an essential element in every crime. There may be no crime of any nature without an evil mind. The concurrence of act and guilty mind constitutes a crime (Srivastava, 2005). Lord Diplock in the case of *Swet v. Parsley*¹ said, '*An act does not make a person guilty of a crime unless his mind is so guilty*'. It is, however, important to distinguish *mens rea* from motive. Motive should be taken into consideration at the sentencing stage and not at the time of deciding the question of *mens rea*.

Many crimes include an element that actual harm must occur, in other words, causation must be proved. For instance, homicide requires a killing, aggravated battery requires serious bodily injury and without this outcome, no crime would have been committed (Srivastava, 2005).

Every crime is legally a wrong, but not every wrong is defined as a crime. Linking crime and morality, Garafalo (1914), an eminent Italian criminologist observed that "*crime is an immoral and harmful act that is regarded as criminal by public opinion because it is an injury to the moral sense as possessed by a community*" (Paranjape, 2009).

Morality is defined as "the principle of right and wrong." As moral creatures, humans deserve praise for good deeds and punishment for bad ones. Punishment may range

¹ 1970 AC 132.

from a slap on the wrist to death, but the punishment must fit the crime. This is known as *lex talionis*, or in common jargon, "an eye for an eye"(Rodriguez). Abolitionists often insist that if we argue for *lex talion* justice we must be prepared to rape rapists, beat sadists, and burn down the houses of arsonists. Certainly, this is the case if *lex talion* is taken literally, as criminals do deserve severe punishments, but such a literal interpretation is unacceptable to any civilized criminal justice system"(Rodriguez).

Psychiatry and law

Psychiatry and law approach the problem of human behaviour from different philosophical perspectives. Psychiatry purports to be scientific and takes a deterministic position with regard to behaviour. Its view of human nature is expressed in terms of drives and dispositions which, like mechanical forces, operate in accordance with universal laws of causation. Criminal law is, however, a practical, rational, normative science which, although it draws upon theoretical science, its concern is also to pass judgment on human conduct. Their view of human nature asserts the reality of free choice and rejects the thesis that the conduct of normal adults is a mere expression of imperious psychological necessity (Judge Leven, 1965).

In Courts of law, Psychiatrists talk of manic-depression, schizophrenia, and psychopathy while lawyers of insanity and diminished responsibility. Psychiatrists make deterministic assumptions and explain behaviour in terms of desire and beliefs and analyze the causes of behaviour, while lawyers assume free will and explain behaviour in terms of desires and beliefs. Psychiatrist analyses the cause of behaviour, while lawyer looks for the reasons. How do these different concepts and theories relate to one another? Is there a way of reconciling the assumption of determinism and free will? Is insanity a moral or legal concept with no relation to psychiatric concepts? Or is insanity a scientific concept, the presence of which is settled by facts? (Reznek, 1997)

Although considerable efforts are being made at various forums, generally due to the lack of information and awareness about psychopaths, they are considered as monsters, not patients. This mindset needs to be changed and they should be treated rationally, i.e. as a patient, not as an offender.

Contemporary form of punishment

The term punishment is defined as, "pain, suffering, loss, confinement or other penalty inflicted on a person for an offence by the authority to which the offender is subjected to (Julican, 1922-23)."Punishment is a social custom and institutions are established to award punishment after following criminal justice process, which insists that the offender must be guilty and the institution must have the authority to punish.

Mainly there are four theories of punishment (Dutta online):-

1. Deterrent: - This is one of the primitive methods of punishments which believes in the fact that if severe punishments were inflicted on the offender it would deter him from repeating that crime.
- 2.

3. Retributive: - This theory underlines the idea of vengeance and revenge rather than that of social welfare and security. They believe in the theory of 'an eye for an eye and tooth for a tooth'.
4. Preventive: - Unlike the former theories, this theory aims to prevent the crime rather than avenging it. Looking at punishments from a more humane perspective it rests on the premise that the need of a punishment for a crime arises out of mere social needs i.e. while sending the criminals to the prisons the society is, in turn, trying to prevent the offender from doing any other crime and thus protecting the society from any anti-social element.
5. Reformative: - The most recent and the most humane of all theories is "Reformatory theory", based on individual treatment and rehabilitation. This theory puts forward the changing nature of the modern society where it presently looks into the fact that all other theories have failed to put forward any such stable theory, which would prevent the occurrence of further crimes. This theory condemns all kinds of corporal punishments.

It is interesting to note that according to the contemporary approach of punishment, the intention is to transform the offenders into a normal citizen through reformation and rehabilitation. The prisons or correctional homes promote vocational training for the inmates to lead a good life in the society. They even release them early on the ground of good conduct. In the cases of mentally ill patients, they are sent to the hospital for treatment rather than prisons for punishing them. But unfortunately in the case of psychopaths mostly punitive approach is taken rather than reformative.

Psychopaths and present judicial system

In this paper, an attempt has been made by discussing some cases; to point out that psychopathy is generally a non-emphasised area in the present judicial system. It is a challenge to criminal law and the criminal justice system in general because psychopaths are very difficult clients. They are very complicated at times because at one point they understand the nature of charges; on the other hand, they do not have any *mens rea* behind it. They admit the entire criminal act without showing any remorse. However, these entire acts are due to disease but it appears to be an act of a blatant criminal, which eventually punished them severely. They appear to be fit to stand trial but medically they are sick.

Psychopaths may be at a risk of malingering incompetence if they believe that it would be in their interest to be found incompetent, but the risk of malingering is distinguishable from genuine incompetence to stand trial or from any other criminal law criterion related to mental abnormality (Cleckley, 1976).

The nature of the crime committed by psychopaths is very heinous in nature, at first glance, anyone can allege to award severe punishment to them, but after understanding the reason behind the crime it is evident that the crime committed is not due to any *mens rea* but only under the influence of serious mental disease. As per law, any crime committed by a mentally ill criminal is subject to treatment, not punishment. On the contrary, there are many cases in which severe punishment has been imparted to the psychopaths. Some of the notable cases are:-

1. Albert Fish (truety, online)

Albert was a sado-masochist who had a bizarre behaviour of self-flagellation and sticking needles in his body, as well as religious delusions, he declared: "I always had a desire to inflict pain on others and to have others inflict pain on me. I always seemed to enjoy everything that hurt." He believed that God had ordered him to torment and castrate little boys. He actually killed fifteen children and mutilated about a hundred others, in 23 states, but the figures may be much higher. He tortured, decapitated, castrated, drank their blood and ate several parts of his small victims cooking them with delicacies. Albert Fish was executed for his crimes in the electric chair in 1936, totally without shame or remorse

2. Ted Bundy(truety, online)

Bundy (Theodore Robert Cowell) was a handsome man with an attractive personality, who was initially a Grocery clerk and later a Stocker. He was a necrophile who abused the bodies of his victims until they began to rot. He decapitated at least 12 of his victims and kept some of the severed heads in his apartment for a period of time as mementos. He was given the death penalty twice for those crimes.

3. Elizabeth Bathory (Positivemed, online)

Elizabeth Bathory is notoriously known for the brutal serial killing of hundreds of girls and women. She was a countess who belonged to the Bathory noble family of Hungary during the late 1500s. Atrocities inflicted by her include severe beatings; burning or mutilation of hands, faces, and genitalia; freezing of victims; biting of the flesh of faces and other body parts; surgery on victims; starving of victims; and rape and molestation of victims.

Though unconfirmed, it is said that she killed up to 650 women. She believed that blood from virgin can keep her skin forever young. There were more than 300 witnesses who were willing to testify against her. She was eventually sentenced to home arrest, where she died in 1614.

4. The Nithari killer (Scoopwoop, online)

Surinder Koli was the domestic help of Moninder Singh Pandher, a wealthy businessman from Noida. Initially, in 2006, they were both arrested in connection with the discovery of skulls of missing children in Nithari village on the outskirts of Noida. The case took many twisted turns and there was a huge media furore over what was really going on. There were accusations of rape, cannibalism, pedophilia and even organ trafficking - some of these had substance, while others were mainly rumours. As of now, Surinder Koli has been found guilty of 5 homicides and is on death row while Pandher awaits his fate as there are 11 other unsolved murders under the same investigation.

5. John Wayne Gacy (Reitwiesner, online)

John Wayne Gacy, Jr. was an American serial killer active between 1972 and 1978. Until he was arrested, Gacy raped and murdered at least 33 young men and boys,

mostly teenagers. Although some of his victims' bodies were found in the river, he buried 26 of them in the small crawl space underneath the basement of his home and three more elsewhere on his property. He was sentenced to death.

6. **Raja Kalinder-The brain eater** (Express News Service, online)

Raja Kalinder was a low-level employee at the Central Ordinance Depot (COD) in Naini who was convicted nearly 12 years after Kalinder's nefarious activities including killing people on the slightest pretext, dismembering their bodies and keeping their skulls in his house came to light in 2000. He admitted to killing at least 11 other people following his arrest. During the course of the investigation, the police found that he killed people almost without reason, or if he got angry. He behaved "as a king", who would "hand out punishment" to anyone who crossed his path. He was sentenced to life imprisonment.

From the cases stated above it is evident that mostly death penalty is given to the psychopath. However, it is undeniable through facts and figures that they are patients, not the criminals. As discussed earlier, it becomes a challenge for the medical and judicial system, whether to penalise them or send them for treatment because psychopaths appear to be fit for trial.

Grounds for Therapeutic approach

"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person" (UNICCP, 1966).

According to the principle of penology the very idea of punishment is: -

- to make a criminal understand the consequences of his act,
- to create a feeling of fear in society in order to stop the repetition of the crime
- to formulate a feeling of regret and guilt in a particular person for his act,
- to help an offender to become a better person and to live a better life through a reformatory or correctional method.
- to abolish crime not the criminals.

Psychopaths do not have a feeling of "guilt" and "regret" and hence punishing them is not a solution to the problem. They commit a crime only due to disease and not due to guilty mind. They do not understand the nature of the crime.

As per procedure, almost every offender is subjected to clinical test and psychiatric test in these cases. The problem with psychopaths is that they seem to be fit for trial. Moreover, they do not hide anything and admit their crime with no remorse. This attitude and acceptance of crime commission mislead the case and they are deemed as a gruesome offender with no repentance for their act. Hence, it should be mandatory that such type of behaviour should be immediately taken into account and as a matter of standard procedure, such offenders should essentially be subjected to a medical test involving psycho-analysis for confirming the mental state of such offenders.

Therapeutic approach in U.K. and U.S.A

In U.K. and U.S.A. laws have already been framed for psychopaths in which they not only identify them but also deal with them suitably.

In England and Wales, the law has accepted the medical view that antisocial behaviour may result from a psychological abnormality, distinct from mental illness and that it may be appropriate to divert offenders suffering from this disorder to the mental health system for treatment rather than punishment (Higgins, 1995). According to Chiswick (1992), tests with those who have been legally defined as psychopathic indicate that the disorder has a high comorbidity with other clinical syndromes, and this has an important bearing on their treatment.

Therapeutic communities (TCs) were developed after the Second World War. One of the oldest is the **Henderson Hospital** which has had some success in treating patients with personality disorder, some of which would be regarded as severe. **HMP Grendon Underwood** (operating since 1962) deals with prisoners who may be regarded as having moderate to severe personality disorders. High-security hospitals **Ashworth, Rampton and Broadmoor** all have some provision specifically for people with severe personality disorder, who pose a high risk. There are a few specialised prisons or wings which concentrate on treating particular disorders. **Grendon Prison**, for instance, has a therapeutic community treatment programme for personality disorder and 'C' wing in **Parkhurst Prison** runs a programme for inmates with severe personality problems. Dangerous Severe Personality Disorder (DSPD) individuals are held in both the prison system and health service facilities. The majority of this group is managed by the prison service. The government in U.K. first introduced the term DSPD in a consultation paper, 'Managing Dangerous People with Severe Personality Disorder' in 1999, which proposed how to detain and treat a small minority of mentally disordered offenders who pose a significant risk of harm to others and themselves. Specialist services to deal with these people, most of whom are thought to be serious violent and sex offenders, were proposed in the white paper *Reforming the Mental Health Act* in December 2000.

In U.S.A. various states have enacted laws specific to dealing with psychopaths. Washington State Legislature defined a "*Psychopathic personality*" and "*sexual psychopath*" and proposed *Sentencing Reform Act of 1981*.

California enacted a psychopathic offender law in 1939. In 1995, California and many other states in the US have passed a special statute for psychopaths.

To a certain extent, this is due to the intense demand for medical and legal practitioners as well as some civic groups who are convinced that the commissions of the sex crime are usually, if not always, evidence of a mental disorder which should be treated rather than punished. Approximately 20 states in U.S have statutes that address dangerous sex offenders and sexual psychopaths (Federick and Marchel, 1995).

These statutes permit the state to retain custody of the sexual psychopath, or sexually dangerous person until he or she is cured of the mental illness. In effect, this allows the state to impose an indeterminate and often lifetime, sentence.

In 1939, Minnesota enacted a "psychopathic personality" (PP) law that provides for indefinite civil commitment of dangerous sex offenders to the Department of Human Services for treatment. The State of Minnesota uses civil commitment to institutionalize certain sex offenders in highly secure treatment facilities.

Conclusion

The paper concludes firstly, that psychopaths are complex, dangerous and serious mentally ill criminals/patients. The nature of the crime they commit is mostly heinous, but at the same time, they do not have any *mens rea* behind that. The driving force behind the crime is their serious mental disease. This has led to the rethinking that Psychiatry and law approach human behaviour from different philosophical perspectives. Psychiatry professes scientific and psychological approach towards the disease, whereas, law stress upon reason, *mens rea* and *actus reus*. Every offender has a different state of mind and reason to commit any offence or it may be due to a certain disease.

Secondly, when the competence of the accused is questionable, the Court should order an evaluation, which should be performed by a psychiatrist or psychologist. Hearing should then be held to determine whether the defendant is competent enough to stand a trial. In the case of mentally ill criminals, it is essential to stress upon the disease and accordingly quantum of punishment should be decided.

Thirdly the paper proposes therapeutic approach towards psychopaths rather than punitive because they are victims in their own way. They do not understand the nature of the crime. They do not have any guilt or remorse of their action. They need to be kept in hospital or asylum for the treatment because they are very dangerous. U.S.A and U.K. have set an example for other countries by implementing a therapeutic approach for psychopaths.

The paper additionally tries to highlight the fact that the fundamental problem in the implementation of the therapeutic approach is that most people are not aware of this disease and its implications. To address this issue certain measures have to be taken, for instance, a proper training program must be designed for the police to make them familiar with the psychological aspect of criminal behavior, crime and mental illness. Subjects like 'Mental Illness and the Criminal Mind', must be included as a subject for law graduates so that advocates and judges are sensitised towards this problem from the beginning. Lectures and workshops by Psychiatrists, visits to the mental hospital, meeting mentally ill offenders and frequent interaction with doctors dealing with such patients must be made an integral part of legal teaching. Separate wards must be made in the hospitals for psychopaths and if they are serious then proper asylums should be made for their treatment. Provision for separate high-security prisons or Psychiatric Prisons where only mentally ill prisoners can be housed for treatment and management of the psychiatric illnesses will further help this cause. The Correctional home staff and Medical officers of such institutions should be trained in the art of mental illness screening, identification, counselling, and referral

services. All stakeholders like NGO's, parents, schools, etc should also be included in mass awareness programme by involving the media.

In summary, stress should be given to the therapeutic approach than the punitive approach on the humanitarian, medical and legal ground. Justice for psychopaths can only be imparted through therapy and not by inflicting punishment because patients should always be treated not punished.



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The Contract of Assignment in Public Procurement Law

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Abstract

Contracts are legally binding between two signing parties. In some cases, rights can be transferred to third parties with respect to certain conditions, expressly and strictly mentioned in the Civil Code. The assignment is one of this type and means the transfer of rights from one person, the transferor, to another person, the transferees. It is commonly used by lawyers and legal counselors when dealing with private law issues and less when we are encountering public law relationships. Public procurement is a public field with strict rules regarding the ongoing of the public procurement procedure, the signing of the contract and the modification of the contract during its implementation. This analysis tries to seek the conditions in which the assignment is possible in public procurement law with its risks and benefits. For example, it is strongly believed that is the solution for avoiding the resolution of the contract when the winner of the contract has a subcontractor and is not paying him for his works. In essence, the conditions imposed by the Civil Code are discussed in terms of public procurement contract.

Keywords: assignment, third parties, public procurement law

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European and national legislation have imposed strict rules regarding the procedures of public procurement, the signature and the modification of the contract. The procedure starts with the publication of the contract notice and procurement documents. There is a period for preparation of offers and, then, every offer is analyzed through the intermediate of evaluation criteria imposed by the contracting authority. The offer that meets the criteria and is on the first place after the application of evaluation factors is declared winner of the procedure and will be invited to sign the contract.

Thus, the public procurement contract is legally binding between two signing parties, the contracting authority and the winner of the procedure. The contract establishes the rights and obligations clearly stated in the procedure followed in respect to the European and national provisions.

During the performance of the contract, rights can be transferred to third parties in certain conditions, expressly and strictly mentioned in the Civil Code. There are different techniques and the assignment is one of this type. The assignment is a contract where rights are transferred from one person, the transferor (assignor), to another person, the transferee (assignee). It is commonly used by lawyers and legal counselors when dealing with private law issues and less when we are encountering public law relationships. In essence, the conditions imposed by the Civil Code are discussed in terms of public procurement contract.

In the public procurement contract, there is no question of universal transmission of the patrimony, but only about transfer *ut singuli* (1) and on *inter vivos* (2) contracts. The possibility of such transfer is expressly regulated by law for practical necessities. If, for example, a person has a right to claim affected by a certain term and needs its performance prior to the expiration of that period, may alienate to other people the debt, usually, at a lower price than its nominal value (Liviu Pop and others 2012, p. 632).

It is important to distinguish between the assignment of rights, reglemented by the Civil Code in art. 1566-1592, and the assignment of the whole contract, from art. 1315-1320 Civil Code. The analysis will look only into the first type.

The legislation taken into consideration is the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement, repealing Directive 2004/18/EC (hereinafter called "Directive 24" or "directive") and the national Law of transposition no. 98/2016 on public procurement (hereinafter called "Law 98").

This analysis tries to seek the conditions in which the assignment is possible in public procurement law with its risks and benefits. For example, it is strongly believed that is the solution for avoiding the resolution of the contract when the winner of the contract has a subcontractor and is not paying him for his works.

The mechanism of the assignment will respect the essential principles of transparency, non-discrimination, equal treatment, publicity, mutual recognition, proportionality as set

forth in the article 18 of Directive 24. The contracting authority and the winner have to respect all the other rules established by the legislature for the modification of public procurement contracts (3).

The obligation of transparency incumbent upon the contracting authority and winner implies an obligation to ensure that competition rules are respected during the performance of the contract.

The essay will analysis, step by step, different elements of the contract formation, such as the definition, the scope, validity and enforceability conditions and effects of the contract.

Nonetheless, it is necessary the distinction between a public procurement contract and the concession contract. The European case-law has undelined that a public contract within the meaning of that directive involves consideration which is paid directly by the contracting authority to the service provider, meanwhile a concession exists where the agreed method of remuneration consists in the right of the service provider to exploit for payment his own service and means that he assumes the risk connected with operating the services in question. (CJUE, T-382/05, 2007, para 32-33).

1. Definition

As stated before, the assignment means the transfer of rights from one person, the transferor, to another person, the transferee. The contract involves the following subjects: creditor transmitting rights, called assignor, and the acquirer of the rights, called assignee. There is a third party, borrower indebted to execute the contract, called the assigned debtor. The assigned debtor is considered to be a third party, not a signing party. The parties of the contract of assignment are the assignor and assignee (Liviu Pop and others, 2012, pp. 636-637).

In public procurement, the winner is the assignor, another economic operator is the assignee, and the contracting authority is the assigned debtor. The contract of assignment is signed by the winner of the public procurement procedure and another operator which is in legal relationship with the winner. The contract should be signed, also, by the contracting authority, who is in charge of money and will benefit from the performance of the contract.

In Romanian law, it was first expressly introduced through Law no 279/2011 for the modification of the Government Emergency Ordinance no 34/2006 on public procurement contracts, public works concession contracts, and services concession contracts, art. 204¹, which provided that under a public procurement contract it is only the rights arising from that specific contract that may be assigned, whereas the liabilities deriving from such contracts shall remain under the responsibility of the contracting parties as initially assumed.

The present law in force, no. 98/2016 on public procurement, transposing Directive 24 has no expressed provisions, but Government Decision no 395/2016 regarding the

approval of the Methodological rules of implementation of Law no. 98/2016 on public procurement has two articles for assignment.

” Article 50

(1) If the contractor has difficulties during the execution of public procurement contract / framework agreement and the support from third parties is intended to fulfill the criteria of economic and financial situation and/or technical and professional capacity, the contracting authority will request the bidder/candidate as the act concluded with the third party/third parties to ensure the respect of the commitment. Contractual provisions between the contracting authority and the main contractor shall ensure that the contracting authority may impose this obligation.

(2) The contracting authority must also include in the contract specific clauses that allow the contracting authority to pursue any claim for damages which the contractor would be able to have against the third party for non-compliance with the obligations assumed by the firm commitment such as, but not limited to, assignment of rights by the contractor to the contracting authority as a guarantee”.

Art. 151 stipulates

(1) According to art. 218, the contracting authority shall establish mandatory contractual assignment of receivables in favor of subcontractors linked to the part/parts of the contract performed by them”

(2) In determining the amount of the claim, the bidder is required to include in its offer the name of subcontractors, contact details, the part/parts of the contract to be fulfilled by them, the value to which amounts the party/parties concerned and agreement of the subcontractors on these issues.

It can be seen a change in the mode of reglementation imposed by the legislature. The general provision from GEO 34 is, now, expressed in two very specific provisions, for third parties obligations and subcontractors. Nonetheless, it could be extended to other similar situations encountered during the performance of the contract based on the provisions in Civil Code and with the respect of the general principles of public procurement.

As a principle, in public procurement, only the assignment of receivables is allowed, not the assignment of liabilities.

2. The scope of the assignment of receivables

3.

In general, it may be transferred any right regardless of its subject, such as pecuniary rights (4) or otherwise (to do or not do), arising from any contract or promises. Practice certifies that, most times, there are assigned receivables that correspondes to a duty to pay a sum of money affected by standstill period or claims arising from a bilateral promise of alienation. There are exceptions, such as rights declared by law or by parties not transferable, rights *intuitu personae* (Liviu Pop and others, 2012, p. 637).

When talking about public procurement, any right of the winner will be transferred towards another operator with whom has a legal relationship.

The transfer of right does not change the entire contract. The legislature has taken into account the necessity to respect the principles of equal treatment, transparency and non-discrimination. The public procurement contract, which is awarded following a procedure of selection of bidders, has certainly a character *intuitu personae* because was taken into account the quality/performance of economic operator declared winner on the contrary to the counter-candidats (Calin Alexe).

According to case-law, it is open to the contracting authority when choosing the most economically advantageous tender to choose the criteria on which it proposes to base the award of contract, provided that the purpose of those criteria is to identify the most economically advantageous tender and that they do not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract to a tenderer (Cour de Justice, C-448/01, para 37).

4. The validity conditions

Assignment is a bilateral contract as emerges from the legal definition of art. 1566 of the Civil Code. The bilateral character is due to the fact the contract is sign by two parties, the assignor and the assignee (Gabriel Boroi, 1997, p. 92). The contracting authority is obliged to sign the contract with the economic operator that was declared winner of the procedure, base on the tehcnical and financial offer presented before the deadline presented in the tender documents (Dumitru Florescu, 2013, p. 145).

The assignment is a disposal contract and parties must have full legal capacity. The person lacking capacity or having limited legal capacity shall conclude the assignment contract through his legal representative or with his consent (Ovidiu Ungureanu, 2007, p. 78).

The winner is, in most of the cases, an economic operator and should have as the principal or secondary object activities similar to the object of the contract. Moreover, during the procedure, a contracting authority does not have the right to impose criteria for subcontractors. The European and national provisions leave it to the contracting authority to choose the criteria on which it intends to base its award of the contract, that choice may relate only to criteria aimed at identifying the offer which is the most economically advantageous (CJUE, C-315/01, para 64).

Accordingly, in terms of validity, it must meet the general legal conditions imposed any contract (capacity, consent, subject determined and licit, legal and moral cause). If not met, any party can ask for the annulment of the contract under the general rules expressed in the civil code. The consent should be expressed with the intent to produce legal effects and be freely expressed, not affected by error, fraud or violence.

The contract is, generally, legally binding through the simply will of the parties, being a consensual agreement, except when the transfer is free of charge and the assignment is actually a donation and the mandatory rules involve the authentic form.

The contract completed can be free of charge as a donation or can be an onerous one. The onerous contract means that each party follows a patrimonial interest in exchange for the obligations assumed in the contract (Gabriel Boroï and others, 2012, p. 79). In case of the onerous transfer, the special provisions in sales or any other contract could become applicable (Liviu Pop and others, 2012, p. 640).

Moreover, the new Civil Code introduces partial assignment in order to facilitate the free movement of legal entities and making more flexible the relations between professionals (Calin Alexe).

5. Conditions of enforceability

Although the assignment of receivables produces its full effect between the transferor and transferee from the time of concluding the contract, in order for the contract to be enforceable and opposable to third parties, certain formalities of advertising must be fulfilled towards third parties, for example the assigned debtor and other parties that might have an interest.

In respect of the debtor, the time of enforcement is essential, because only at this time, he will be required to pay directly to the transferee. There are different types of advertising, expressly mentioned by the legislature in art. 1578-1581 Civil Code, such as: acceptance of the assignment by the debtor through an act under private signature with certain date, written notification (7) of the assignment (5), enrollment in the electronic archive with regard to third parties (6), file in court that incorporates the debtor notification and notification in Land Registry (Liviu Pop and others, 2012, pp. 642-643).

For public procurement contracts, the opposability formality will be realized towards the contracting authority by the assignor - winner of the procedure or by the assignee. Generally, the contract is signed also by the contracting authority, which means that the formalities will not longer have to be achieved. It is considered that the signature proves the notification legally binding.

6. The effects of the assignment of rights

The main effect of the contract is the transfer of rights from the transferor to the transferee. The effects of the assignment must be analyzed on the one hand, between the transferor and transferee to third parties and, on the other hand, the parties (Liviu Pop and others, 2012, p. 643).

➤ Effects between parties

The primary effect of the contract is *the transfer of receivables, ut singuli* from the transferor's patrimony to the transferee's patrimony. The right is transmitted together

with all the rights that the assignor has on the ceded debt, the warranties (pledge, mortgage, privilege) and its accessories.

In terms of accessories, mainly, the legislature refers to interests and other income related to receivables. The translatative effect of the transfer will occur also on the future interests and income, but even on those that became due on the date of assignment, the assignor but not cashed yet.

The receivable is transmitted at the nominal value (i.e., the value resulted from the receivable, remained unpaid at the date of the assignment), regardless if the assignment is realized at a lower price or is free.

It is also possible a partial transmission of the claim (partial assignment). In this case, the transferor and transferee have proportional rights in receiving payment from the assigned debtor, as required by art. 1584 C. civ.

The transferor has the obligation to transmit to the transferee the title that ascertains the assignment and all the written documents related to the title (Liviu Pop and others, 2012, p. 644). In the event of partial assignment, certified copies of the document are hand to the assignee, copies on which are mentioned the partial assignment and the signature of the parties (art. 1574 of the Civil Code).

Thus, doctrine raised the question whether the assignment of receivables may be regarded as a consensual agreement taking into account the formalities described above. The doctrine considered the formalities are not required for the validity of the contract, but an obligation resulted from the contract for the transferee who has the right to claim the title of the transferor acknowledging the claim. In this respect, handing the title does not refer to the assignment contract, but the actual title regarding the right transferred (Ileana Vali - Nita, Journal of Legal Sciences, p. 138).

Another effect of the contract in the relation between signing parties is the *obligation of the assignor to guarantee the assignee*. The guarantee obligation is different from case to case. The obligation regards the current and valid existence of the claim and its accessories.

The guarantee does not cover the solvency of the assigned debtor. If wanted, the assignor expressly assumes the obligation to guarantee the solvency of the debtor through contract provisions. If it is assumed such obligation, without otherwise indications, the law presumed that the assignor had agreed to cover only the actual solvency debtor, the one existing at the time of assignment. The special obligation of guarantee covers only up to the purchase price (Liviu Pop and others, 2012, p. 645).

The warranty obligation does not exist in the event of the assignment free of charge and when the ceded right has been annulled due to posterior causes.

Finally, in addition to the existing obligation to guarantee the validity of the claim and, eventually, the solvability of the assigned debtor, the transferor is liable for eviction. According to art. 1586 C. civ., assignor is liable if, through its own act or combined with the action of another person, the assignee does not acquire the right or can not do it opposable to third parties.

Under the obligation to guarantee, the assignor is bound to compensate the assignee for the damaged caused, consisting of the price of the purchased receivables, contract fees, court costs and other damages incurred by the assignee.

All the elements above apply to any contract of assignment in public procurement law. The specificities of the effects will be established through the provisions of the contract. All the elements must be clear and expressly stated so that the obligation of transparency is achieved.

The assignee will be willing to perform of the remaining duties under the agreement. All the sums which become payable by the contracting authority for the services/works rendered on and after the date of the assignment will be made to the assignee.

The assignee may acknowledge that no time extension or requests for additional compensation will not be granted.

➤ Effects towards third parties

On the contrary to the contract parties, the assignor and the assignee with their hereders, any other person will have the status of third parties, including the assigned debtor. Regarding the relation with the assigned debtor, *until notification or acceptance* with certain registered date, the assignment of claims is inapplicable to them. Therefore, before accepting or receiving the notification, the debtor can execute its obligations through payments made to the assignor. The payment made to the assignor has discharging effect for the debtor.

As a consequence, operations such as debt forgiveness that will free the debtor or the opposition of the extinctive prescription or compensation should be available. The same logic applies when, sued by the assignee, the debtor refuse the payments and opposes the receipts obtained from the assignor, even when the receipts do not have a certain date.

If the assignor accepts some form of payment (split, for example) and, subsequently, are meet the requirements of publicity, the assignee is obliged to accept the agreement between the assignor and the assigned debtor (Liviu Pop and others, 2012, p. 647).

In case of lack of acceptance and notification, according to the legal provisions, the contract of assignment of receivables has no effect, although the title has already been transmitted to the assignee. The contract has effect only between the parties to the transfer, not to the assigned debtor, which is a third party. Assigned debtor is entitled to behave as if the assignment does not exist, even though he knows it from another source than acceptance or notification.

After meeting the publicity requirements, the assigned debtor becomes the exclusive debtor of the assignee and he will not be able to pay to the assignor. As consequences, the assigned debtor may oppose the assignee all defenses that we could have raised against the assignor, the payment realized in good faith to an apparent creditor.

If the assigned debtor has accepted the assignment through an act under private signature, the debtor could not invoke the compensation that could be opposed to the assignor (Liviu Pop and others, 2012, p. 648).

In public procurement, the links created between the contracting authorities, the winner and the third party have to respect the conditions mentioned above.

7. Conclusion

As a conclusion, it is believed that the assignment of rights is possible in public procurement law and economic operators tend to use this operation to resolve different problems encountered in the performance of the contract. For example, it is strongly believed that is the solution for avoiding the resolution of the contract when the winner of the contract has a subcontractor and is not paying him for his works.

The logo for 'iafor' is centered on the page. It consists of the word 'iafor' in a light blue, lowercase, sans-serif font. The text is enclosed within a circular graphic composed of several overlapping, semi-transparent arcs in shades of blue and red, creating a stylized, modern circular emblem.

References

➤ Explanations

- (1) Transfer of individualized assets (one or more assets). On the contrary, the transfer *ut universali* of the assets is considered a universality of goods.
- (2) The contract is signed between living persons and not through a will.
- (3) Article 72 from Directive 2014/24/UE on public procurement clearly establishes the rules for the modification of the contract in order to avoid financial corrections for substantial modification.
- (4) involving amounts of money.
- (5) on support paper or electronically (on the condition it shows the identity of the transferee, the debt ceded and the assigned debtor, and if it is a partial assignment, notification must also indicate its length).
- (6) If the assignment's object is a universality of assets, present or future, art. 1579 C. civ. provides that, to third parties, enforceability is achieved only through registration of assignment in the electronic archive, creating in case of successive assignees an order of priority claims. In this case, the complex relationships are governed by rule *prior tempore, potior iure*.
- (7) In connection with this notification is to remember that it can be done by both sides, the assignee and assignor. Transferor is not, however, legally obliged to make the notification. So it is done, most often by the assignee because it has the interest. As it is made by one or other of the parties, it produces different effects: 1. If it is done by the transferor, the assigned debtor must execute the performance directly to the transferee, enforceability is made from the communication of notification; 2. If the notification is made by the assignee, the debtor has the right to claim a written evidence of the transfer and to suspend payment until this moment; until the communication of the written proof to the debtor, notification is not effective.

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Patients' Rights and Medical Liability within Off-Label Prescription

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Abstract

Off-label prescription refers to the use of a medication beyond what it is established in the respective Marketing Authorization (MA). This broad definition encompasses situations in which the drug was used for a therapeutic indication not authorized in the MA; with a different dosage or with a different frequency than those mentioned in the MA; introduced in the patient's body by a different procedure, not stated in the MA; or to a group of patients not specified in the MA.

The freedom of prescription is a defining note of the medical profession; therefore, the doctor has the power to choose which drug to use, even disregarding the content of the MA, provided the medical decision complies with medical *leges artis*.

However, when a drug is prescribed off-label this means that it is being used in a medical scenario for which it has not been specifically authorized (i.e., the drug was not submitted to clinical trials for that particular medical situation). Because of the lack of scientific evidences regarding the efficacy and safety of the drug the patient can suffer serious injuries and, consequently, the doctor and the pharmaceutical company are more susceptible of being sued.

This is the reason why it is of outmost importance to provide proper legal protection to patients' rights (namely, the right to informed consent) and to guarantee that the doctor acts for the benefit of patient's safety.

Keywords: off-label prescription, patient's rights, informed consent, medical liability, producer's liability

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Introduction: Definition of off-label prescription

Every drug that enters into the market requires a proper Marketing Authorisation (MA), aimed to evaluate its safety, quality and efficacy (Feldschreiber, 2008: 103-110; Feldschreiber & Breckenidge, 2008: 3-21; Lisman & Schoonderbeek, 2005: 27-37; Permanand, 2006: 1-68; Raposo, 2014: 35-77; Rogers, 2008: 23-69).

The MA works as a kind of “identity card” for the drug. In fact, the drug’s therapeutic indications, its frequency, dosage, route of administration and type of patients are set by the MA in accordance with the material submitted by the manufacturer for approval by the competent authorities. These indications are subsequently included in the Summary of Product Characteristics (SmPC) (Working Group of Nsw Tag Inc, 2003). In this sense, both documents – the MA and the SmPC – constitute the “script” that the doctor must follow when prescribing any drug.

However, sometimes they both are disregarded and the drug is used outside its label. Off-label prescription refers to the use of a medication beyond what it is established in the respective MA. This broad definition encompasses situations in which the drug is used for a therapeutic indication not authorized in the MA; with a different dosage or with a different frequency than those mentioned in the MA; introduced in the patient’s body by a different procedure, not stated in the MA; or to a group of patients not specified in the MA.

When a drug is prescribed off-label this means that it is being used in a medical scenario for which it has not been specifically authorized, i.e., the drug was not submitted to clinical trials concerning that particular medical situation. Because of the lack of scientific evidences regarding the drug’s efficiency and safety the patient can suffer serious injuries and, consequently, the doctor faces an increased risk of medical liability. This is the reason why it is imperative to issue adequate regulation to provide a legal framework to this practice in order to protect doctors from litigation and to protect patients from injuries.

Medical liability in off-label prescription

Off-label prescription does not necessarily violate medical *legis artis* (Kon, Iličkovi & Mikov, 2015; Ma & Lou, 2013; Raposo, 2014) nor does it automatically carry medical liability for the doctor. Quite the opposite, sometimes are *leges artis* themselves to impose off-label prescription, as it is the case when there is no drug specifically approved for that situation or, though there is an approved drug, it does not work successfully regarding a given patient. Therefore, if in those scenarios the doctor does not resort to off-label prescription he may be violating medical *legis artis* and he may be held liable (De Nayer, et al., 2013). Confirming this idea is the fact that the English Medical Council (2013) has explicitly allowed off-label prescription, although demanding certain requisites. In sum, off-label prescription frequently corresponds to the best medical standard of care.

In spite of the imposition of mandatory MA stipulated by the European Union (EU) law, the fact is that there is no European rule forbidding off-label prescription or forcing the member States to forbid it.

Furthermore, off-label prescription can also be grounded on the principle of freedom of prescription, which is nuclear to the medical profession, meaning that the doctor can freely choose which drug to prescribe, without being bound by the existence and content of a MA. Indeed, whereas the preparation, promotion and marketing of a drug are strictly regulated, drug prescription falls on the physician's free evaluation, provided it complies with the patient's well-being.

However, when prescribing off-label the risk of medical malpractice increases (Francisco, 2013; Lenk & Duttge, 2014; L'Ecluse et al., 2013; Plate, 2009; Raposo, 2013). Although litigation is not a necessary consequence of off-label prescription, this practice involves more risks in terms of patient's safety and, consequently, imposes a higher set of obligations to be complied with by the doctor. Thus, complaints and lawsuits became far more frequent when the doctor is prescribing off-label, with the aggravating circumstance that insurance policies for professional medical liability rarely cover damages resulting from off-label prescription; therefore, in case of a conviction chances are that the doctor alone will bear the payment of the compensation.

The problem is intensified by the lack of a clear legal definition of off-label prescription, and by the absence of defined requisites for lawful off-label prescription. All these omissions turn the exact legal contours of this practice quite blurred. Therefore, it is imperative to create a law establishing the legal framework for off-label prescription in every legal order, i.e., the requirements to be complied by doctors and the rights that patients have in an off-label scenario.

Requisites to be complied by the prescribing doctors

Off-label prescription is commonly considered a risky medical practice. It's a fact that studies present different conclusions regarding the risk of adverse events in off-label uses (FDA, 2014; Obermann, 2013; Pretorius et al., 2013; Velo & Minuz, 2009). Nonetheless, it is undeniable that a drug not specifically tested for a certain use carries a higher percentage of adverse reactions than the one submitted to proper research and clinical trials; thus, it endangers patient's safety (Gillick, 2009; Repucci, 2011). Of course that not all off-label uses involve adverse reactions, but surely this circumstance increases the likelihood of their occurrence (Walton, et al., 2008).

For this reason physicians should comply with certain requisites while prescribing off-label in order to respect medical *leges artis* and, therefore, to avoid lawsuits (AMA, nd; Barrios Flores, 2014; GMS, 2013; L'Ecluse, Longeval & T'Syen, 2013; Medicines and Healthcare Products Regulatory Agency, 2009; Obermann, 2013; Raposo, 2014; Riley & Basilius, 2007). Some of the requirements are already established by law in the legal orders that created a regulation for off-label prescription, while others simply result from professional guidelines and common sense.

First, doctors should only prescribe off-label if there is no therapeutic alternative duly authorised (Dresser & Frader, 2009). The reason is that if the drug was not submitted to proper clinical trials for that specific medical use its guarantees of safety and effectiveness are much lower comparing with drugs properly tested and approved.

However, this requirement encompasses some exceptions. One of them is still based in medical considerations: suppose that the patient has developed an intolerance to the approved drug due to his/her particular genetic conditions; in this case off-label prescription will be allowed. The other exception is much more debatable, but it is being applied in many countries due to financial concerns: off-label prescriptions based on cost-saving consideration, in order to reduce drug's expenditure, especially when there is a huge price difference between the (more expensive) authorised drug and the (cheaper) off-label alternative.

In addition, the off-label use in question must have solid scientific grounds, for instance, because it has been approved by several scientific studies or because it corresponds to a practice already settled among health professionals.

Following the previous requirement, off-label prescription must be aimed to the patient's well-being; in other words, it has to correspond to the patient's best interest instead of financial purposes. Nonetheless, the correct interpretation of this requisite may be tricky, since when the treatment is paid by the patient himself and the on-label drug is not affordable, the off-label option may be the one that satisfies the patient's interests, since the alternative would be to have no treatment at all.

But in any case the patient must be informed that it is an off-label drug use and provide his consent (European Commission, 2013). In the US the rule of informed consent is not applicable in this regard, since courts tend to consider that medical freedom of prescription also includes the decision to use a drug off-label and that this information is not relevant to the patient. Conversely, in Europe the patient is required to consent regarding off-label drug uses and most of the existing litigation regarding off-label prescription concerns the lack of informed consent.

Another decisive requisite for lawful off-label prescription is the existence of a previous medical evaluation of the patient's condition. Therefore, it is imperative that the decision is taken by the attending physician himself and not by any other decision maker; namely, it cannot be taken by the hospital administration or by the government. This requirement is being growingly waived and off-label decisions are nowadays being currently taken at a higher level. In fact, based on budget constrictions, many governments are encouraging, or even imposing, the off-label use of cheaper drugs, even though there is a fully approved therapeutic alternative (the Avastin-Lucentis case is paradigmatic in this regards). So, some hospitals belonging to the National Health Care System are not even purchasing the most expensive drug, "forcing" doctors to prescribe off-label. But since in this case the decision is not freely taken by doctors – as it should be – they cannot be held liable for any injury suffered by the patient due to the off-label use. Therefore, the only option is to sue the government for bad management of health resources and for putting public health in risk.

Finally, the doctor is obviously required to comply with the usual rules of the medical profession, but in more demanding terms. Thus, because off-label prescription is considered a risky treatment, the doctor is required to input all information related with the off-label drug use on the patient's medical record and to proceed to the patient's follow up in particularly strict terms.

The scope of medical freedom of prescription

Freedom of prescription is a defining note of the medical profession; therefore, the doctor has the power to choose which drug to prescribe and how to use it, even disregarding the content of the MA, provided he complies with medical *leges artis*. However, the scope of freedom of prescription has different understandings in the US and in Europe.

In the US this principle is accepted in very wide terms and the competent agency to monitor the production and marketing of drugs - the Food and Drugs Administration (FDA) - does not intrude in any way in drug's prescription (Fairbairn, et al., 2011; Tiwary, 2003). The FDA itself affirmed this position in various statements, declaring that the physician can use a product for an indication not included in the approved label, without the FDA's authorization or notification (FDA, 1982; FDA, 2011; FDA, 2014), and even without informing the patient's that it is an off-label prescription, which is nothing but surprising having in mind the relevance of the patient's informed consent in the US legal order.

Differently, in Europe it is assumed that although the doctor can freely choose which medicine to prescribe, he must inform the patient of all relevant circumstances surrounding the prescription, such as the fact that the drug is being used off-label.

The requirement of solid scientific justification

One of the main requisites for a save off-label prescription is the existence of sound scientific grounds. The doctor has to clarify why he decided to prescribe off-label and justify his decision in proper scientific evidences regarding the safety and efficiency of the off-label use.

Within off-label prescriptions the imposition of sound scientific grounds is especially stringent due to the fact that the drug is being used – at least theoretically – in riskier terms. In spite of it, according with several studies around 70% of all off-label prescriptions lack strong scientific ground (Egualé et al., 2012).

When the off-label use comes recommended by reliable academic research or when it constitutes a common practice already settled on the medical community, these facts suggest that it corresponds to the best standard of care (thought this is a rebuttable presumption)

Of course that this requirement cannot be accepted as rigorously where there is no approved drug for that specific situation, because the alternative would be not to treat the patient at all. Nonetheless, and even in the absence of a properly approved drug for that condition, the existence of data suggesting the likelihood of adverse events should strongly discourage the doctor from prescribing off-label.

The difficulty in satisfying this requisite lays in the absence of reliable scientific information regarding off-label uses. First of all, because pharmaceutical companies are forbidden of promoting off-label uses and the fact is that it does not come easy to distinguish the boundary between promotional activities and merely information

disclosure, so, some informational activities ended up being forbidden. But, and on the other hand, if pharmaceuticals were free to disseminate information on off-label uses, chances are that the data released were “shaped” in order to increase sales. The question is that scientific articles in peer-review journals are not exempted from suspicion in this regard, not only because those studies usually do not encompass a sufficiently wide range of studies and randomised trials; but especially because some of them are actually funded by pharmaceutical companies themselves, to increase off-label uses of their drugs and, thus, to increase the overall sales. In sum, pharmaceutical companies are not unbiased when disclosing information and even supposable neutral experts hired by them are not so neutral in the end (Rodwin, 2013; Steinman et al., 2006).

Informed consent

A crucial requisite of off-label prescription is informed consent (Stafford, 2008, Wilkes & Johns, 2008), required in every medical act but here taken in especially demanding terms. First of all, regarding the formalities to be respected, since it must be a written consent (European Commission, 2012). Furthermore, in what concerns the amount of information to be communicated to the patient. This information should clearly explain that it is an off-label drug use, expose the reasons for that medical option, refer possible negative outcomes that can derive therefrom and also the potential beneficial results expected, discuss other available alternatives (Weynants & Schoonderbeek, 2010) and mention that the respective cost may not be supported by the National Health Service or by the patient’s private health insurance (Ask, 2014; Lenk & Duttge, 2014). For instance, a Swiss patient was treated off-label with aesthetic polylactic acid, which was not part of the list of reimbursable medicines, and after a long litigation the health insurance company has won the case on the Swiss Federal Tribunal (Tribunal Fédéral K 147/06).

Actually, most of the European decisions convicting doctors for off-label uses were based on the violation of informed consent rules.

For instance, in 1996 the the highest German court, the Bundesgerichtshof, stated: “The patient must be informed about the use of a non-approved medication, because, whatever the actual quality or safety of the medication, it lacks the sanction of official approval, which may be essential for an individual patient's decision under the scope of the Medical Preparations Act” (BGH NSTZ 1996, 34).

In a decision from 2008 the French Cour de Cassation criminally convicted the doctor that prescribed off-label a vasodilator drug (papaverine) to treat the patient’s erectile dysfunction, but without informing him about the off-label nature of the treatment. Due to the drug the patient initially suffered a prolonged erection for more than 48 hours, which was followed by a complete and irreversible organic impotence. The Court did not consider that this off-label drug use violated, *de per se*, medical *leges artis*, especially since it was a treatment that had already presented good results in erectile dysfunction cases, even if it also had some known complications. However, since the off-label nature of the prescription and the risks possibly involved were not communicated to the patient, the doctor turned out to be convicted for the violation of informed consent (Cass. 1re civ., 18 sept. 2008, n° 07-15427).

In 2008 the Italian Corte di Cassazione upheld a doctor's conviction due to an off-label prescription (Corte di Cassazione Penale sez. IV 24/6/2008 n. 37077). The doctor had prescribed Topamax (topiramate), which is authorized to treat epilepsy, but that in the case was used to treat an obesity problem. The problem arose because neither the doctor explored other alternative treatments nor reported that this was an off-label drug use. Moreover, the doctor also failed in the patient's follow-up during the treatment and in addition refused to change the drug's dosage despite the fact that the patient was showing negative effects. But according with the Corte the most serious misconduct was the lack of informed consent (in the case from the patient and/or its parents – depending on the legal order – since the patient was a minor). The Court noted that, although off-label prescription is a lawful practice in light of the Italian law (Law Decree n. 23, from 17/02/1998), it is of crucial importance to provide the patient with complete information, including the possible adverse effects and contraindications of the therapy used, as follows from Article 32 of the Italian Constitution (Cass. 1re civ., 12 juin 2012, n° 11-18327).

In 2012, still the French Cour de Cassation ruled in his same sense. The case regarded a rheumatologist doctor who had administered an intradiscal injection, Hexatrione®, to relieve back pain. The treatment failed and the patient started to show calcifications, thus he filed a lawsuit against the doctor, arguing that if he had known that the prescription was off-label he would have refused the treatment. The Cour de Cassation concluded that the doctor violated the standard of care, by not informing the patient about the off-label character of the treatment and about the consequent risks (although this was a frequent treatment and without known risks). Thus, the patient was entitled to compensation.

Manufacturer's liability

Off-label promotion – that is, the advertisement of drug uses that are not included in the MA – is an unlawful practice in Europe (and actually in most legal orders), even if the patient's does not suffer any injury. So, this practice will carry a financial penalty for the pharmaceutical company, which may be a very large sum. This responsibility comes as consequence of the violation of the rule prohibiting off-label prescription.

Furthermore, the manufacturer may be held liable for the patient's injuries, in alternative or cumulatively with the doctor's liability. The pharmaceutical company will take the responsibility for injuries suffered by the patient if it promoted the off-label use or, even if there was no promotion, if the company was aware of the off-label use and in spite of it did not take any measure to prevent that use.

Therefore, many companies feel compelled to discourage off-label prescriptions, especially by including in the drug's leaflet the proper drug use and all the contraindications of the improper use, in order to be protected from eventual liabilities derived from the lack of information to the consumer (Abbott & Ayres, 2014).

Some companies even took active measures to prevent off-label uses of their drugs. For instance, in the aftermath of recent events related with the reimbursement of Avastin to treat ADM in some European countries, the pharmaceutical Roche – the manufacturer of Avastin – said in a statement to Bloomberg: “In general, Roche supports the overall approach that physicians should have the freedom to prescribe the

medicine they think is right for their patients” (...) “At the same time, it is our obligation to inform the medical community including physicians and patients about the known risks associated with the off-label uses of our medicines”.¹

However, if the producer was totally oblivious to the off-label use of its products – i.e., he took all reasonable measure in order to prevent that use or he was not even aware of it – the producer won’t be held liable for any injury suffered during the off-label use.

Conclusions

Off-label prescription is a medical practice that is not going to stop in the near future’ Quite the opposite, is being encourage by the astonishing speed of scientific developments, that always run faster than the bureaucracies of the demanding process of drug’s approval.

Actually, it is not even desirable that it stops, since all players in the health care sector are interested in the maintenance of off-label prescription: patients want it because frequently this is the only mechanism to have access to medicines likely to produce some kind of beneficial effect on them; doctors want it since off-label prescription may be the only alternative to treat some patients, instead of leaving them without any kind of treatment, thus, off-label prescription frequently allows the doctor to comply with the best standard of care; pharmaceutical companies also want it because off-label uses became an easy source of profit without much investment: governments want it since the off-label use of cheaper drugs is becoming a solution to cut expenses in the health care sector;

However, the danger is that these stakeholders get so seduced by the potential benefits that they end up disregarding the basic requirements that should guide every drug prescription, namely the patient’s well-being.

Ultimately, the decisive aim of the doctor must be to act in the patient's best interest instead of guided by commercial or economic reasons; and the patient’s best interest demands a therapeutic grounded in proper scientific basis. In other words, it is not because a certain medicine is cheaper that doctors must prescribe it (on-label or off-label), but because evidence based medicine and reliable scientific data justify the use of the drug in those conditions.

¹ <http://www.bloomberg.com/news/articles/2014-06-10/italy-to-fund-unapproved-use-of-roche-drug-to-cut-costs>

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Penal Mediation for Medical Dispute Settlement in Indonesia Perspective

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Abstract

In Indonesia, most of medical malpractices which were submitted before the court brought loss to the patients. Besides having high degree of difficulty, medical malpractice vindication usually needs more extra effort, particularly by employing the Law on Medical Practice. Therefore, the proposed main question is whether the medical doctor or professional medical staffs in hospital are couldn't be touched by law and justice. In Indonesia, the plausibility of Alternative Dispute Resolution to be included into criminal justice system in Indonesia. Indonesia actually has already have a settlement procedure out of the court through MKDKI (Board of Medical Discipline). In fact, the Indonesian are tent to choose the settlement on medical practice to the court because MKDKI is a non well-known institution in Indonesia society. Moreover, the MKDKI settlement couldn't give a compensation to the victim. This paper is a normative research and the methodology employed based on library research. Data will be analyzed investigation after conducting the investigation honestly and in accordance to the professional medical code of ethics on medical malpractice cases as undertaken by Indonesian Medical Honorary Assembly. Medical dispute settlement shall be in accordance to legal norms that live in society, which based on collective values or dealing with collective achievement (sinngebungen) to whom the protection on interests is going to be conducted on the basis of virtue since it is worth to achieve. Restorative models of mediation is the most appropriate alternative at this time because it involves a special mediator who indeed has been specially trained by an accredited institution. Although mediation is not yet up to the level of the criminal justice system, but the description of disputed and needs what is desired by both parties to the dispute.

Keywords. Medical dispute settlement, criminal justice system and social justice

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Introduction

Since the Law number 29 of year 2004 on Medical Practice was enacted, data of medical omission or medical malpractice¹ increasing. The total of medical malpractice cases in 2013, as collected by The Indonesia Board of Medical Discipline (*Majelis Kehormatan Disiplin Kedokteran Indonesia*) were 20 cases. Meanwhile, during 2006-2012, the data of medical malpractice had reached 183 cases in number.² Legal enforcement on medical malpractice which was committed by medical doctor or professional medical staffs is less plausibly conducted. Most of medical malpractices which were submitted before the court brought loss to the patients. Besides having high degree of difficulty, medical malpractice vindication usually needs more extra effort, particularly by employing the Law number 29 of year 2004 on Medical Practice. Therefore, the proposed main question is whether the medical doctor or professional medical staffs in hospital are couldn't be touched by law and justice. In the case that involved the case "centered on a caesarean practice performed by Ayu, Hendry and another doctor, Hendy Siagian, on 25-year-old Julia Fransiska Makatey at Kandou Hospital in the North Sulawesi capital of Manado in 2010. Julia was referred to the hospital from a primary health care centre due to delay in delivery that could have endangered her baby's life. Twenty minutes after the delivery, the baby was alive but the mother died. From the autopsy report, the forensic expert concluded that Julia died due to air embolism, rather than a failure in the delivery process. This condition is unpredictable, which was why the Manado District Court acquitted the three doctors. Before the trial, the Medical Ethics Council stated the three doctors were not guilty.³ Ayu, Hendy and Hendry, who were residents at the time, were charged with negligence resulting in death. A local court in Manado dismissed the charges, freeing the three to continue their work. In 2012 the case was reopened on an appeal at the Supreme Court, where a panel of judges overturned the prior verdict and sentenced the doctors to 10 months in prison, finding them guilty of negligence. But by the time the Supreme Court issued the new verdict, Ayu, Hendy and Hendry had disappeared. The three were ordered to report to prison and serve their sentence by prosecutors, who sent the doctors an official letter, shortly after the Supreme Court trial concluded. The notice was ignored and the three were placed on a fugitive list, where they remained until two weeks ago. Ayu was found hiding out in Balikpapan, working in the maternity ward at Permata Hati Hospital. She was detained on Nov. 8 and remanded to police custody. Both Hendy and Hendry remain at large. The Supreme Court took a different view on the case, finding, on Sept. 18, 2012, that three doctors were guilty of malpractice over the April 2010 death of Julia Fransiska Makatey during a routine caesarian section. The mother died of heart failure caused by a gas embolism — a pocket of air in her vascular system — after her child was delivered by staff at Manado's Rumah Sakit Umum Pusat Prof. Dr. R.D Kandou

¹ Medical malpractice is defined as *A doctor's failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances*. Bryan A. Garner. 1999. Blacks Law Dictionary. St.Paul, Minn, p. 971

² Data was collected during January 2006 until April 2013, <http://www.republika.co.id/berita/nasional/umum/13/04/13/ml6i4y-masyarakat-diminta-tak-takut-laporkan-malapraktik> *see* <http://dokterindonesiaonline.wordpress.com/2013/12/02/malpraktek-medis-terheboh-di-dunia/> *see* <http://www.tempo.co/read/news/2013/03/25/058469172/Sampai-Akhir-2012-Terjadi-182-Kasus-Malpraktek>

³ <http://www.thejakartaglobe.com/news/obgyns-strike-over-gynecologist-arrest/>

government facility.⁴ Finally, The Supreme Court (MA) has issued a ruling granting a case review request filed by three doctors who were sent to prison on malpractice charges. The panel ordered that the three doctors be freed from prison. “The panel found the doctors had violated none of the regulations while performing the operation [in question]. Therefore, the panel’s ruling has cancelled out an earlier ruling made by the appeal panel. The Supreme Court panel was led by judge M. Saleh and four other members, namely Maruap Dohmatiga Pasaribu, Surya Jaya, Syarifuddin and Margono. Judge Surya Jaya had filed dissenting opinion.”⁵

Those data also were supported by the result of investigation after conducting the investigation honestly and in accordance to the professional medical code of ethics on hundreds of reported medical malpractice cases as undertaken by Indonesian Medical Honorary Assembly. It showed that 99 percent of medical malpractice cases were failed to be proved.⁶ The term of medical malpractice actually was unknown by law.⁷ It is merely an expression that refers to the medical doctor who has been definitely proved committing omission when undertaking his/her job or doing certain activity which is out of his/her competence.

The above data indicate a failure in solving the medical occur during this time in Indonesia. This issue will not occur, if used in the completion of restorative models of penal mediation which emphasizes the description of disputed and needs what is desired by both parties to the dispute. Criminal sanction in jail is not the only way out in case of medical negligence.

Problem Statement

1. How is medical dispute resolution mechanism through restorative models for penal mediation in Indonesia perspective?
2. How is the legal relationship between doctor and patient in Indonesian law?

⁴ <http://www.thejakartapost.com/news/2013/11/28/malpractice-and-criminalization-doctors.html>

⁵ <http://www.thejakartapost.com/news/2014/02/08/ma-grants-reviewmedical-malpractice-case.html>

⁶ <http://www.surabayapagi.com/index.php?read=Tubuh-Bocah-Waru-Melepuh;3b1ca0a43b79bdf9f9305b8129829621fc50417a91a837566f28afeb5d6958> The obvious example can be found at hospital RSAB Prima Husada Waru Hospital: Sumaji (35) dan Sutiah (30), resident of jalan Kolonel Sugiono 38 Waru, who found that their daughter Husnul Khotimah (9) having terrible cough attempted to cure her illness by bringing her to RSAB Prima Husada Waru Hospital. However, the outcome of their attempt was a big failure for their daughter got terrible skin blister on her entire body after receiving treatment from the hospital. Husnul Khotimah was not the sole victim of hospital treatment, some patients of RSAB Prima Husada Waru also experienced similar blister. Unfortunately, the patients who submitted this case to the court was defeated during the trial. The judge argued that the patient was failed to prove their damages. See Harian Surabaya Pagi Online 1/7/2010 Tubuh Bocah Waru Melepuh,

⁷ See KUHP or Law number 29 of years 2004 in Medical Practice, Law number 36 of years 2009 on Healthcare

Literature Review

Regarding to the issue of medical malpractice, there is an argument which assumes that medical malpractice and medical dispute are different matters.⁸ The main reason is it is part of consented (or non-consented) therapeutic contract which later producing disappointment from the patient or his/her family, for example on the case of disheartened patient/family by the result of medical treatment from medical doctor or the hospital which later on causing the patient submit report or complaint to mass media. On such illustrated case, some argue that not all the entire medical failure is the consequence of medical malpractice, since it should be categorized as medical dispute.⁹

Aside from the controversy on the term, the article 29 of Law number 36 of years 2009¹⁰ on mediation provide is a solution which is expected to bring “win-win solution” for both disputed parties.

Mediation¹¹ is one of settlement model/mechanisms through ADR (Alternative Dispute Resolution).¹²

ADR basically was developed by business community that demands fast dispute settlement mechanism and at the same time it is also able to produce “win-win solution”. Such mechanism is “alternative” procedure through the court. This procedure is definitely an alternative from of conservative civil proceedings law which two (or more) parties having dispute on case of civil and business law.¹³

The concept of penal mediation was actually acknowledged within the criminal law concept since a long time ago, even though it utilized different term. Ilyssa Wellikoff, for example, employed the term of *Victim-offender mediation* that derived from concept of *Restorative Justice*.¹⁴ Moreover, she argued that it is applicable for non-serious criminal act, such as juvenile delinquency case, crime that involving the property and other kind of petty offence.¹⁵ Some scholars prefer the term of *Mediation practice in the Criminal Justice System* which is defined as:

⁸ Made Kornia Karkata. *Malpraktik atau Sengketa Medik?*

<http://www.balipost.co.id/balipostcetak/2004/10/13/o2.htm>Article.

⁹ Ibid

¹⁰ Article 29 of Law number 36 of years 2009: When the professional medical staff is allegedly committing omission in undertaking his/her job, such omission shall be settled through mediation beforehand

¹¹ Mediation is a process by involving third party as advisor in settling the dispute. See Kamus Umum Bahasa Indonesia. Departemen Pendidikan dan Kebudayaan. 1988. Balai Pustaka: Jakarta, p. 569

¹² Elizabeth Plapinger and Donna Stienstra. 1996. *ADR and Settlement in the federal District Courts (a sourcebook for Judges and Lawyer)*. Federal Judicial Centre and the CPR Institute for dispute resolution, p. 4 **See also** *Guide to Judicial Management of Cases in ADR*. 2001. Federal Judicial Centre, p. 102, it stated that the ADR process in US, as example, is in the format of mediation, arbitrage, *Early neutral evaluation* (ENE), *summary jury trial* and *Minitrial*.

¹³ Mardjono Reksodiputro. 2009. *ADR dikaitkan dengan sistem hukum pidana Indonesia*. Menyelaraskan Pembaruan Hukum. Komisi Hukum Nasional: Jakarta, p. 73

¹⁴ Ilyssa Wellikoff. 2004. *Victim-Offender Mediation and violent crimes: On the way to Justice*. Cardozo Online Journal <http://cardozoocr.com/issues/volume-5-1/note-1/>

¹⁵ Ibid

*Is a process of finalizing a criminal matter by placing an emphasis on the wills of a victim and offender who are parties of a criminal matter.*¹⁶

The term of *médiation pénale* is used in French, it includes the research report which was performed by Jacques Faget¹⁷ on the successfulness of penal mediation in settling the case that hit the percentage 76%.¹⁸

North America employed the term penal mediation since 70's, as followed by Great Britain (England), French, and Scandinavian countries on 80's and later the entire Europe. The objective of penal mediation concept has one common similarity: "*better consideration of victims' problems, making offenders feel more responsible, giving the community a greater role in conflict regulation.*"¹⁹

Penal mediation in Spain is applied for juvenile delinquency case which is popular with the term "*Juvenile Penal Mediation.*"²⁰ Meanwhile, Belgium introduced Penal Mediation term in their criminal justice system since 1994.²¹ Penal mediation was enforced in Belgium due to several scandals that affected Belgium Police legitimation within Belgium's criminal justice system.²²

Penal mediation term was also introduced in Argentina explicitly since 1990's on corruption case as *a pilot project in penal mediation.*²³ It is because of people's trust on judicial system that getting worsened besides public negative assumption on prison that was not enough since it was fully occupied by corruptors.²⁴

In Indonesia, Prof. Mardjono Reksodiputro proposed an interesting statement that questioning the plausibility of ADR to be included into criminal justice system in Indonesia²⁵. He argued that mediation as inseparable part of ADR in criminal law is possible, but its characteristic has to be distinct from the ADR in the field of civil and business law since one party has been represented by police and general attorney. Therefore, the victim is not independent in deciding the mechanism of dispute settlement. Such duty is carried out by the police and general attorney literally in relative sense since it depends on report from the victim that triggers the trial of criminal proceeding. It means there is alternative choice for the victim to back off

¹⁶ Cumhur Sahin. 2009. *Mediation Practice in The Criminal Justice System*. New Horizons: UNDP Turkey Monthly Newslette

¹⁷ Jacques Faget. 2005. *The double life of victim-offender mediation*. ADR Bulletin, Volume 7, number 10, p. 2

¹⁸ Ibid. The research was conducted on 1200 cases in French court during 1998-1999 (juvenile delinquency crime case, crime involving property, fraud, robbery and crime that deals with profession)

¹⁹ Jacques Faget. 2004. *Mediation and Domestic Violence*. Quoted from champpenal.revues.org/356

²⁰ Anna Mestitz and Simona Ghetti. 2006. *Victim-Offender Mediation with Youth Offenders in Europe An Overview and Comparison of 15 Countries*. Department of Justice of the Autonomous Government Of Catalonia, Spain

²¹ Anne Lemonne. 2000. *Development of Restorative Justice: The Case of Penal Mediation in Belgium* In. *Kriminalisk Arbog*.

²² Ibid

²³ The victim and the offender are contacted beforehand by facilitator in separated forum. Later on, they discuss the substance of dispute, including their expected outcome from the process and predicting the thoughts or reaction of opposed party. See *Restorative Justice Online*, October 2001.

²⁴ Ibid

²⁵ Ibid hal. 75

from filed the lawsuit to the court.²⁶ In the case of domestic violence in Malaysia, for example, the victim is represented by Polis diRaja Malaysia and the Jabatan Kebajikan Masyarakat in the format of IPO (*Interim protection Order*) and PO (*Protection Order*).²⁷

Medical Dispute Resolution Mechanism Through Restorative Models For Penal Mediation In Indonesia Perspective

Mediation penal developed it rests on the idea and principle of work (working principle) Consist of:

1. Conflict Handling

The task of the mediator is to make the parties to forget the legal framework and encourage those involved in the communication process. This is based on the idea that a crime has provoked interpersonal conflict. Conflict that is intended by the mediation process.

2. Process Orientation

Penal mediation is more oriented to the quality of the process rather than outcomes, namely: realize criminal of his guilt, unresolved conflicts and tranquility needs of victims of fear.

3. Informal Proceeding

Penal Mediation is an informal process, not bureaucratic, avoiding legal procedures ketat`

4. Active and Autonomous Participation

The parties (perpetrator and victim) is not seen as an object of criminal law procedure, but rather as a subject who has a personal responsibility and ability to act. They are expected to do on his own.²⁸

Issues of mediation in criminal cases has been on the agenda at international level, namely the Congress of the United Nations 9/1995 of Crime and the Treatment of Offenders and Penal Reform International Conference, 1999.

International Meeting was to encourage the emergence of three international documents related to the issue of restorative justice and mediation in criminal cases, namely :

1. The Recommendation of the Council of Europe 1999 No. R (99) 19 tentang Mediation in Penal Matters
2. The EU Framework Decision 2001, the Standing of Victims in Criminal Proceedings
3. The UN Principles 2002 (draft Ecosoc), Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

²⁶ Ibid hal. 73

²⁷ See Domestic Violent Act (Akta Keganasan Rumah Tangga Malaysia) 521 of years 1994

²⁸ Stefanie Trankle, The Tension between Judicial Control and Autonomy in Victim-Offender Mediation-a Microsociological Study of a Paradoxical Procedure based on Examples of the Mediation Process in Germany and France, http://www.iuscrim.mpg.de/forsch/krim/traenkle_e.html.

The background idea of penal reform, among others, the idea of protection of victims, the idea of harmonization, the idea of restorative justice, particularly to find other alternatives of criminal imprisonment²⁹

The Recommendation of the Council of Europe 1999 No. R (99) 19, Mediation in Penal Matters stated that:

The idea of mediation unites those who want to reconstruct long foregone modes of conflict resolution, those who want to strengthen the position of victims, those who seek alternatives to punishment, and those who want to reduce the expenditure for and workload of the criminal justice system more effective and efficient.³⁰

Jacques Faget categorized penal mediation into two model, they are **legal mediation model** and **restorative mediation model**. On legal mediation model, the dispute settlement is applicable to any criminal case. The mediation is determined by the court or place which has been determined by court. The victim and the offender who are involved into mediation process are facilitated by third party (not all mediator is accredited one). The time allocation for mediation forum process is even relatively fast and brief.

On the other hand, restorative mediation model involves special mediator that has been trained by certain accredited institution. Such mediation model has not reached criminal juridical system level yet, the main topic of discussion in mediation process is not limited only on vindication, but also on the description of disputed matter as well as the interests of both disputed parties. The allocated time for mediation process is relatively long, which brings better solution than legal mediation model since the disputed parties has to uphold several meetings during the mediation process happens.

Both models are described on following simple table:

Attributes legal vs restorative models of Mediation³¹

Attributes	Legal model	Restorative model
Place	Centres for Justice and Law Court	Local Associations
Mediators	<ul style="list-style-type: none"> - Individuals or associations Men - Sessional employees - Legally trained - No specific training in mediation - No Supervision 	<ul style="list-style-type: none"> - Associations Gender Balance - Professionals or volunteers - Trained in the social sciences - Specific training in mediation - Analysis of practice
Process	Offender/victim Short period of time	Complainant/offender Median or long period of time

²⁹ Barda Nawawi Arief.2012. Mediasi Penal, penyelesaian perkara di luar pengadilan. Pustaka Magister, Semarang

³⁰ Recommendation No. R (99) 19 by the committee of Ministers of The Council of Europe, Mediation in Penal Matters, <http://sfm.jura.uni-sb.de/archives/images/mediation>

³¹ Jacques Faget. The Double Life...Loc cit

	One meeting	available
	Significant % of agreement	One or more meetings
		Average % of agreements

Restorative mediation model has been performed in French since long time ago, specifically on Juvenile delinquency cases, cases of ownership upon property and any case that deals with professional dispute.³² Most of mediation on medical dispute/malpractice in French, practically, is performed by dividing both disputed parties into different caucus and into separated room. Each caucus is attended by mediator in separate sessions. Afterwards, the mediator will describe the advantage and weakness points of each disputed party. If the agreement is reached (*joint meeting*), the draft of agreement between both disputed party is compiled and endorsed.³³

Up to this time Indonesia have no single standard of medical procedure. The medical procedure which is exist are different between one and another area. Not all of the Hospital in Indonesia have the same standard because of the different in hospital capability and technology.³⁴

One of the obstacles that occur in Indonesia because it has a very wide area so that standard hospital facilities have criteria based on the type of the hospital itself. Each region has a different standard. For example between Yogyakarta and East Nusa Tenggara. So in case of negligence in medical practice will also consider the geography of the region. Moreover, each hospital has a Standard Operating Procedure (SOP), which vary, depending on facilities owned by the hospital. So that the demands of malpractice must be seen case by case basis. Can not be generalized things like what the malpractice, and which are not.

For example in the case of doctors Setianingrum in Pati in 1979. The incident was caused by injections of streptomycin 1 cc in patients who can not tolerate the drug. Having asked to see a doctor, the patient explained that he never went to another doctor and injected streptomycin. Doctors believe, after the injection is done, it turns out the patient died. In this case there is clearly a role of a patient on his death. By Pati District Court and the High Court declared one of Semarang doctor for negligence that caused the death of people. But the Supreme Court level the doctor found not guilty. The consideration is that although the defendant as a new doctor who experienced four years of serving in government clinics all limited ingredients. Setianingrum so doctors can not perform medical measures to prevent death, for example, the injection of adrenaline straight to the heart or intravenous fluids, administration of acidic substances and other actions that require complex means.³⁵

Nonetheless, this case opened up opportunities for debate among legal persons. Does this act into the act of medical negligence or not. However, the terms of the inner attitude of doctors is part of the malpractice. Eg circumcision Javendra Case (2006) can be categorized as negligence. Doctors gave her a general anesthetic that caused

³² Ibid

³³ Ibid

³⁴ <http://www.beritasatu.com/kesehatan/152342-indonesia-belum-punya-standar-pelayanan-medis.html>

³⁵ Putusan Mahkamah Agung (Supreme Court) Number 600/K/Pid/1983, 27 July 1984

the death of the patient. Supposedly, doctors thought about the harmful effects of a general anesthetic because it is more risky than local anesthesia.³⁶

As consideration, if it is viewed from the perspective of article 29 of Law number 36 of years 2009 on Healthcare, the alternative mediation is an introduction settlement effort outside the court if medical dispute happens. Mediation process of one of the obstacles that occur in Indonesia because it has a very wide area so that standard hospital facilities have criteria based on the type of the hospital itself. Each region has a different standard. For example between Yogyakarta and East Nusa Tenggara. So in case of negligence in medical practice will also consider the geography of the region. Moreover, each hospital has a Standard Operating Procedure (SOP), which vary, depending on facilities owned by the hospital. So that the demands of malpractice must be seen case by case basis. Can not be generalized things like what the malpractice, and which are not.

Mediation process can be chosen through MKDKI or Police. The Indonesia Board of Medical Discipline (Majelis Kehormatan Disiplin Kedokteran Indonesia/MKDKI) (see article 66 of Law number 29 of years 2004),³⁷ or the Police may appoint an accredited mediator. As the result, public owns choice of process which is considered brief and simple. Therefore, even though the police has received the report or complaint, the case is not automatically proceeded through criminal proceeding system. However, if the consent fails to be reached, criminal judicial proceeding system is performed. Regarding to the draft of mediation which has been approved by both disputed parties, the Police/MKDKI may submit it to the court for gaining endorsement.

The possibility of alleged medical malpractice in Indonesia consist of three steps. First, The Board of Medical Ethic which analyses the implementation of medical ethic by the MD. This board will give the ethic sanction to those who proved omitting the ethic. Second, The Board of Medical Discipline (MKDKI) which determine the medicine implementation. The Board of Medical Discipline have 3 kinds of sanctions: written warning, obliged the MD/hospital staff to join the re-education program, abolition the registration letter permanently or temporary. Third, compliance to the law, it means that the patient could proposed a complaint to the court through penal or private procedure using the basis on Law on Medical Practice or Penal Code especially on the article of intention and negligence. Restorative models of mediation is an alternative that is most appropriate at this time because it involves a special mediator who indeed has been specially trained by an accredited institution. Although mediation is not yet up to the level of the criminal justice system, but the description of disputed and needs what is desired by both parties to the dispute. The time provided in the resolution is quite long, so that the number of meetings conducted by the parties to the dispute would be to produce a solution that is much better than the model of judicial procedure in court.

³⁶ Adam Chazawi. 2012. *Malpraktik Kedokteran*. Bayu Media: Malang, p.93

³⁷ Article 66: Whoever find out or whoever the interests is damaged by action of doctor or dentist when undertaking medical practice duties may propose complaint in written form to The Indonesia Honorary Medical Discipline Assembly (Majelis Kehormatan Disiplin Kedokteran Indonesia/MKDKI)

The Legal Relationship Between Doctor And Patient In Indonesia Law

Although the position of medical doctor and patient is supposedly balance since both of them are dependent, the fact shows opposite result. Commonly the patient is on weaker side if the medical dispute occurs. It occurs due to several assumptions:

First, from the perspective of legal relation, the form of agreement between medical doctor-patient in juridical aspect belongs to “best effort agreement” (*inspanningsverbinten*). Therefore, there is an assumption that doctor cannot give maximum guarantee on the success of his/her effort in curing the illness of the patient, because the result of medication depends on some related factors (age, degree of seriousness of the illness, the type of illness, complication, etc).

Second, there is assumption which claimed that the standard and medical procedure are not fixed matter since in a certain period evaluation has to be performed in order to play catch up with rapid development of science and technology. The standard and medical procedure which possesses relative characteristic ultimately bears result on imbalance legal standing between the medical doctor and patient.

Third, which party is liable if there is allegation on medical malpractice? Regarding to the consumer protection, the party which liable on the damage is business actor, including the doctor and hospital. In the consumer protection perspective, the consumer have no obligation to prove weather any business actor fault or not because the consumer protection applied the legal burden of prove. However, in fact, if the omission occurs, there is no legal certainty for the patient who stands on the position of consumer.

Specifically, the article 29 of Law number 36 of year 2009 on Healthcare that replaces Law number 23 of year 1992 provides dispute settlement effort through mediation mechanism. Mediation is performed in case that involving professional medical staff who allegedly committing omission when undertaking his/her job. Such omission shall be settled through mediation beforehand.

Mediation concept in the Law number 36 of year 2009 is an effort to settle any dispute between medical staff and the patient as consumer of healthcare service. Such mediation has purpose to settle dispute outside the court by employing a mediator who has been chosen and agreed by both disputed parties.

The main concern is, considering the legal standing between professional medical staffs and the patient is imbalance, on appropriate model of mediation that is able to facilitate the conflicting interests from both parties diametrically.

Nevertheless, due to their knowledge on illness and medical technology, medical staff (doctor, nurse, midwife, physician) legal standing is more superior to the patient. The patient's knowledge on illness and medical science is much limited compared to healthcare service provider. If it is viewed from the consumer protection perspective, the patient as consumer of healthcare service is the party which supposedly shall be protected. Therefore, the mediation model needs to be reviewed carefully in order to find the appropriate one if the medical dispute/ medical malpractice occurs.

The special feature of the medical profession, among others, are autonomous, have a certain identity, has a certain value system, have specific binding kemunitas physician behavior both among colleagues and members of the community. Professional standards in Indonesia are determined among doctors themselves. A profession that is autonomous, ie, all the provisions concerning the implementation of the work profession determined by professional groups. In Indonesia set in law the practice of medicine and health Act which requires doctors to follow professional standards and operational standards in their profession.

Until now Indonesia has not had a medical professional standards that apply nationally. The absence of professional standards is due to the circumstances of each hospital in a different area because of the constraints of geography that are difficult to reach with transport and the limited number of physicians treating patients. When enacted uniform standards will make a difference in the treatment of patients.

Furthermore, Informed consent is the standard protocol for protecting the interests of patients and doctors from the beginning. In Indonesia, informed consent stipulated in Law No. 29 of 2004 on medical practice, informed consent is consent given by patients or their families on the basis of a description of the medical procedure to be performed on these patients.

According to article 45, paragraph (3) of Law No. 29, 2004, informed consent can be:

- a. Diagnosis and procedure of medical action
- b. The purpose of medical action undertaken
- c. Another action alternatives and risks
- d. Risks and complications that may occur
- e. Prognosis for their actions

Informed consent dual function. For doctors, it can make sense in running a medical procedure on a patient, and can be used as a defense against possible claims or demands of patients and their families when arising from unintended. For patients, informed consent is an appreciation of their rights by a doctor and can be used as a reason for a lawsuit against a doctor in case of deviation from the mean doctor's office gave approval service.

Informed consent must be made in writing to the medical treatment is a high risk, such as injury, disability or death are carried out in a hospital or clinic and must make a medical record.

People are entitled to give informed consent is essentially the patients themselves. However, if the patient is in forgiveness, can be provided by the next of kin. However, if the patient was unconscious or in conditions allowing immediate explanation is given then made approval,

Although legally known who is responsible if there is suspicion of negligence / malpractice, but in fact the position of the doctor and the patient is balanced because both need each other, because the principle of the informed consent incorporated into the class of "covenant best efforts" (inspanningsverbintenis), standards and

procedures medical is relative and who is responsible if there is suspicion of negligence / malpractice.

Conclusion And Recommendation

Indonesia actually has already have a settlement procedure out of the court through MKDKI (Board of Medical Discipline) based on Law Number 29 Year 2004 on Medical Practice. In fact, the Indonesian are tent to choose the settlement on medical practice to the court because MKDKI is a non well-known institution in Indonesia society. Moreover, the MKDKI settlement couldn't give a compensation to the victim.

The problem is Indonesia have no single standard of medical procedure therefore medical malpractice cases were failed to be proved.

Connected with penal mediation on medical dispute, the settlement of medical dispute shall be performed based on good faith from both disputed parties in order to reach fair dispute settlement.³⁸ Jurgen Habermas, a German philosopher, even commented that good communication between disputed parties is worthwhile for it represents a good will to provide space for communication by considering moral rights, human rights and sincerity from both parties.³⁹ Moreover, medical dispute settlement shall be in accordance to legal norms that live in society, which based on collective values or dealing with collective achievement (*sinngebungen*) to whom the protection on interests is going to be conducted on the basis of virtue since it is worth to achieve.⁴⁰ However, in terms of knowledge about diseases and medical technology, patient position inferior to medical health professionals (doctors, nurses, midwives, paramedics). Knowledge of the disease and medicine from the patient's side is more limited than on knowledge of health service providers. considering the position of the parties between medical health workers and patients who were not balanced it needs a lot of rethinking the right model to bridge the interests diametrically opposite.

Restorative models of mediation is an alternative that is most appropriate at this time because it involves a special mediator who indeed has been specially trained by an accredited institution. Although mediation is not yet up to the level of the criminal justice system, but the description of disputed and needs what is desired by both parties to the dispute. The time provided in the resolution is quite long, so that the number of meetings conducted by the parties to the dispute would be to produce a solution that is much better than the model of judicial procedure in court. But there are principles that need to be considered, such as: standard disease management protocols, the capacity of physicians who treat patients in accordance with medical standards or not. Medical risks have been delivered or not patients and families. Each region has a different standard, because the geographic areas of Indonesia are vast territory.

³⁸ Hon Robert L. Harris. 2003. *Mediation: Better Resolution of Medical Malpractice Claieme*. McCammon Group: USA

³⁹ Donal O'Reardon. 2010. *Mediation and Philosophy*. Sullivan University, dikutip dari Mediate.com

⁴⁰ Jan Rummelink. 2004. *Hukum pidana*. Gramedia pustaka utama, p. 3

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Acquisitive Prescription as a Mean of Acquiring Ownership: An Albanian Perspective on The DCFR

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Abstract

Acquisitive prescription has been for centuries a consolidated institute through which becomes possible the acquisition of ownership. The goal of this article is to analyze the real impact of DCFR (Draft of Common Frame of Reference) in creating a uniformity for acquisitive prescription rules in European Union (with a special emphasis in Albania.). After the entrance in EU, the legal provisions of Albania ought to be changed in accordance with the EU legislation. The aim of the research is that through the comparison of the legislation of some EU countries and Albania we can conclude if there are problems and how to alter some aspects of this institute in Albanian law. Firstly we shall examine the current Albanian Law and afterward the provisions of acquisitive prescription in the DCFR. In order to assess that which alterations shall be more reasonable it is important to make a comparison between some European countries (France, Germany, Italy, Spain, Greece, England) regarding: peaceful and continuous possession, Good faith versus bad faith acquisitive prescription, rei vindication suit versus acquisitive prescription suit, the amount of time elapsed, acquisitive prescription with title and without title. The sources of research work include the legal provisions of these countries, the court decisions and the recent studies of the most prominent scholars of the field. In conclusion we shall give a judgment if DCFR, aiming to a “justice” standard, can really create a uniformity in European law and which aspects of Albanian law need to be changed.

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1.Introduction

Following the decision of the European Court of Human Rights, *Pye vs United Kingdom* there has been launched an effort to reform the acquisitive prescription institute. Many scholars have suggested not only the changement of the possession period but also the annulment of the entire institute.¹ Among the countries that have introduced a reform of this institute are for example Hong Kong where the Reform Commission of law was convened in 2012 to suggest whether the possession deadlines should be reviewed² or India, where the Law Commission collected in 2016 is conducting research on some very sensitive issues regarding the institution of acquisitive prescription.³

The European Court of Human Rights on the issue *JA Pye (Oxford) Ltd vs United Kingdom*⁴ considers highly important the time of possession and considers that in the legislation should prevail "lengthy, unchallenged possession toward formal land ownership".⁵ It is precisely the extension of the possession in time and the behaviour of the possessor as a real owner during this time⁶ that leads to the loss of the property right and the application of the institute of acquisitive prescription.⁷

In Albania, possible future changes in the possession period we think that should be carried out precisely because of the provisions of the DCFR.⁸ DCFR draft recognizes the application of only two deadlines for acquisitive prescription, 10 and 30 year. The period for acquisitive prescription in good faith, of movable and immovable property is 10 years.⁹ For acquisitive prescription in bad faith it is applied the 30-year period, both for movable and immovable property. These provisions, which Albania will have

¹ The determination of the appropriate periods of acquisitive prescription has been seen as a "a subject of controversy" (Katz; 2007)

² The committee supported the idea that the time of possession is very important. It is exactly the passage of time the element that leads to the acquisition of property. That is why, according to the Commission, this term protects the general interest.

³ This committee is considering issues such as: should there still exist the institute of acquisitive prescription, is there a need to increase the deadline for the possessor in bad faith, should there not be applied any more the institution of acquisitive prescription of state-owned land. (LCI; 2016, <http://lawcommissionofindia.nic.in>)

⁴ "Pye argued that in many other European states the limitation period was often considerably longer than the 12 years applicable in their case" (Panesar, S et; 2007)

⁵ Martin. S, 2008, page 2

⁶ Important for the acquisition of property is the behavior of the holder at the time of possession and not the inaction of the owner during this time. (Mazzon; 2013)

⁷ In civil law countries the institute of prescription is one of the few institutes that can limit the right of ownership as "to establish time limits to the property right of the owner can come in contradiction with the concept of the right of ownership itself." (Unifying Decision of the Supreme Court. Nr. 5, date 31.05.2011, page 9)

⁸ Draft Common Frame of Reference

⁹ These terms which are proposed in the DCFR are similar to the terms of the Italian Civil Code of 1865. The Civil Code "foresaw only two terms: one thirty-year, attributable to both immovable and movable property assets and another ten-year, restricted to immovable goods and real property rights thereon, purchased in good faith, by virtue of a title transcribed and that wasn't null because of its form defects." (De Giorgi; 2012, page 24)

to adopt after the entry into the European Union, in fact are different from Albanian law.

Thereupon a series of questions can be raised, such as: Should the term of acquisitive prescription in bad faith in the Albanian legislation be modified to 30 years for immovable property? Should there be applied different terms depending on the type of item which can be gained by acquisitive prescription?

For the above reasons it is required to analyze whether it is necessary to make changes in the acquisitive prescription period in Albania.¹⁰

2. Importance Of Time

For many researchers (Voet, 1829; Ellickson, 1989; Holmes, 1897; Abass, 2014; Galati, A., 2013; Mazzon, 2013) the possession period is one of the only elements that can serve to justify the institution of acquisitive prescription.¹¹ And as Ballantine claimed¹² “A possession which has continued for a long time without interruption, ought to prevail against all the world.”

But how many years should be “a long time”.¹³ In all the world the possession periods are quite different and vary not only depending on the legal family, but also within the countries of the same legal family. The survey of prescription deadlines in different legal systems tells us that “there is no clear pattern as regards the length of limitation periods.” (LCI, 2016).

As to whether the prescription period should be a time limit which changes depending on the situation or should be a fixed period which is set by law and changes in a few different situations, most authors (Merrill, 1986; Marais, 2011; Stubb, 2014; Radin, 1986) suggest applying a fixed period defined as mandatory by law.¹⁴

3. Factors That Determine The Possession Period

a. The connection between the possession period in acquisitive prescription and whether the right of the owner to proceed the restoration suit is prescribed or not.

¹⁰ The institute of acquisitive prescription has not had the approach that it ought to have by the Albanian researchers for the simple fact that the right of ownership was of little importance from 1945 to 1990 “Right of ownership of land faded gradually and in 1967 “de facto” there was no private property on land while with the constitution of 1976 “de jure” was finally sanctioned the fact that the land was owned by the state. (http://www.zrpp.gov.al/new/?page_id=234)

¹² Ballantine, H.; 1919

¹³ The enforcement of proof of possession lies on the possessor, who has to prove the possession has extended along all of the period prescribed by law. (Mazzon, 2013, page 57)

¹⁴ If a number is chosen, that number would be based upon the socially acceptable or “right” time it takes to become attached/detached.” (Radin, 1986, page 749)

In literature there are different opinions in relation to the fact whether the claim for restoration should be prescribed or not.¹⁵ Some authors (Burns,2011) believe that to restrict by law, within a limited time frame, the right of the owner to set up an action for the restoration is an "arbitrary restriction."

But how does the fact that the claim for restoration is limited in time in determining the periods of possession of acquisitive prescription. If the revindication lawsuit is prescribed, one of the main effects is the increase in the number of property conflicts. The owner is promoted to open as soon as possible a judicial process for the protection of his right to property. As a result of this, the monitoring costs of the owner will be higher. On the other hand, as a rule, if the monitoring costs of the owner are high, the statutory terms are generally short. So the trend is towards shorter possession deadlines, if the right of the owner to set up an action for the recovery is limited by law.¹⁶

In general, in common law countries, where the action for restoration is prescribed and the owner is encouraged to file recovery lawsuit as soon as possible, the prescription deadlines of extinguishing and acquisitive prescription are shorter. Whereas in the civil law countries where the lawsuit for restoration is considered irrevocable¹⁷ the monitoring costs are lower and generally the statutory deadlines are longer (the case of France, Germany) . Moreover "French lawyers do not see any possibility of ownership without revindication." (Jansen,2012,page 160)

In Albania, with the unified decision of the Supreme Court, No. 5, date 31.05.2011, the lawsuit for restoration of the owner is considered irrevocable. Before this decision was taken, the Albanian legislation and the researchers as well thought the restoration lawsuit was revocable, since there was no specific provision in the legislation that would recognize it as irrevocable. The Supreme Court considered this lawsuit as irrevocable based on "the nature of the institute of ownership". According to the Supreme Court the owner does not lose his right to property by not using it, but because of the mere fact that someone else has exercised an unopposed right over the property during the term of prescription.

b. Good faith or bad faith of the possessor.

If the holder is in good faith he should have a greater protection from the legislation. As a result of this possession periods should be shorter. In the civil law countries there are applied different terms to the holder in good faith and to the possessor in bad faith. On the other hand, common law countries do not recognize acquisitive prescription in good faith. For the legislation of these states, in order for the property right to be gained through prescription it is sufficient to exist an "actual and

¹⁵ The prescription of the restoration claim means that over a period of time determined by law, the owner does not have the right to sue for the recovery to demand the return of the item from the non-owner occupier. "The recovery lawsuit is a "real lawsuit" and it protects the right of ownership over individually specified items, whether they are movable or immovable." (Unifying Decision of the Supreme Court, Number.5, date 31.05.2011)

¹⁶ We say "in general" because there are countries, especially the East United States, where statutory time limits are too long, 30-40 years, although the claim of restoration is prescribed.

¹⁷ In the Civil law States the restoration lawsuit was considered irrevocable since the period of the Roman Empire. (Jansen;2012,page155)

uninterrupted"possession (LCI,2015,page 13).The common law countries such as England,USA,Canda,Australia apply a single term for both types of possession,good or bad one.But in the recent years,it has been suggested that the common law countries apply different deadlines for the holder in good faith and in badfaith.(Fennell;2006)

c. The type of registration system

In the distinguishment between two main types of registration systems,the constitutive one¹⁸ and the declarative one¹⁹Albania is part of the declarative system²⁰

Until 2009 Albanian registration system was biased more on the constitutive type,resulting also from the literal interpretation of Article 83 of the Albanian Civil Code of 1994.²¹According to this article it was necessary the signature of a notarial act of the sale of immovable property and at the same time the registration of this notarial act at the Office of Immoveable Property Registry,in order for the property to pass to the buyer.If these two conditions weren't met simultaneously,the ownership can't be passed.

But the Albanian Supreme Court,in the Unifying Decision Number.1 ,date.06.01.2009 with the highly extended interpretation that made to this article claimed that "the transcription or recording is not nothing but a necessary tool to give publicity to the contract,to make known its existence and that of the owner to the third parties.The transcription has a declaratory publication function.The selling contract,as a mutual legal action,if it fulfills the requisites for its validity even if it is not recorded in the register of immovable property,it is completely valid between the parties who have undersigned it. "

In the declarative system,the property registry does not always show the true owner because ownership may have passed but the contract is not yet recorded in the register.The possessor finds it harder to ferivy the ownership through the control of the public registers.That is why a longer period of possession would justify the acquisition of property and would protect the legitimate owner who has not yet enrolled the contract in the public records.

¹⁸Constitutive system (positive system) means that "the recording has constitutive effect". So the right is obtained only at the moment of registration,and at this moment the right of ownership passes to the buyer.

¹⁹Declarative system (negative system) means that "the registration has declarative effect on the third parties.So the property right passes at the moment of the signature of the contract.Only after the registration of the contract in the property register,the person who has acquired ownership can protect the property right against third parties and gains the right of disposition.It is named a " negative system" because the recording has blocking effects (only if the registration is done,can be transferred to the third parties the right that the purchaser has acquired.)

²⁰Unlike most of the central and eastern European countries,which applied a system of registration with constitutive effects,Croatia,Czech Republic,Estonia,Hungary,Slovakia,Slovenia.(Schmid,et;2005)

²¹ Legal action for the transfer of ownership of immovable property and the real rights over them, must be made in the form of a notary act and be registered, otherwise it is invalid.The legal action that is not made in the form expressly required by law,is invalid 'Article 83, Civil Code of Albania 1994.

Another feature of the declarative system is the fact that the possessor without title and in bad faith is not required to be registered during the time that he possesses the object (as it happens in the constitutive system in Germany, where the holder must be recorded in the property register throughout all the period that he possesses the object in order to obtain the ownership at the end of the limitation period). This registration requirement is a defense mechanism for the owner and makes it harder to gain property by acquisitive prescription. Even though this mechanism does not exist in Albania, because it has a declarative registration system, it can be offset by the extension of the statutory deadline.

d. State-owned land or private property land.

In many states the possession time limit depends on the nature and the legal significance of the goods which constitute object of possession. Generally there are applied longer terms for the acquisition with acquisitive prescription without title of the state-owned land, 60 years in England and Hong Kong, 30 years in Tasmania and New South Wales (Mulliss, 2009), 30 years in India. In some countries, such as in India, it has been suggested to remove entirely the possibility of the application of the institute of acquisitive prescription to the state-owned land (LCI, 2016). Some states, like the USA, unlike other common law and civil law states has prohibited the acquisition of ownership by prescription on state-owned land.²² In Albania, it has been prohibited during the communist regime.

Regarding the fact as to whether Albania should apply a same or different statutory time limits for state-owned land and private land, we suggest that there should be applied the same time limit. The reason is that there should be an equal treatment between the state owner and the private owner, natural or legal person. Why should the state be protected more as an irresponsible owner who hasn't taken care of his property, more than a natural or legal person (the latter can be a non-profit organization or a commercial entity.)

e. Soil type and its value (coastal land, agricultural land)

Since the period of the Roman Empire the type of land has led to the determination of the term of acquisitive prescription. The Roman Law recognized different terms for the Italian land and other terms for the provincial land.²³ This principle still applies today in some countries of the common law system (New York applies a longer term, 60 years for agricultural land and pastures, the UK applies the 60-year deadline for acquisitive prescription of coastal property.)

Agricultural and coastal lands are lands with higher value and greater impact on the economic development of the country, especially for agricultural countries like Albania. The higher the land value is, the more important is the reduction of insecurity

²² There are viewpoints (Fennell, 2006) which have suggested that this provision should be changed and there should begin to be applied in the USA too acquisitive prescription on state-owned land.

²³ For prescription with title of immovable property the 10-year period is applied to non-provincial land and the 20-year period is applied to provincial land. (Lesaffer, 2005)

costs. It is a known fact that insecurity costs²⁴ are lower if the possession period is shorter. So the higher the land value is, it has more interest for the society the shortening of possession periods. The shorter the possession periods are, the more uncertainty is reduced and the transactions for passing of property are facilitated. (Stake, 2001) This logic has been followed by the Italian legislator who applies shorter possession periods for agricultural land, known as "small rural Propriety".²⁵

This negative relation between the value of the land and the length of the period of possession was noticed in USA by a study conducted by Netter, Hersch and Manson, who studied the causes of differences in the statutory deadlines between different states of Northern America. One of the main reasons was the value of land, which provides how long should the prescription period be. "When the property has great value, there is simply a higher return to be obtained from ending potential disputes about ownership that arise from mistakes."²⁶

f. Historical factors

To see how historical factors can affect the prescription period we can analyze two countries.

First, Australia where it is noted that the statute of limitations are lower in some Australian states and higher in others. If we compare the states that have the statute of limitation of 12 years they have the population density respectively: New South Wales 9 inhabitants/km², Queensland 2.6 inhabitants/km², Western Australia 0.9 inhabitants/km² and Tasmania 7.4 inhabitants/km². Meanwhile countries with longer terms are only two, Victoria and South Australia. But both of them have a population density that differs greatly: Victoria 25 residents/km² and South Australia with only 1.6 inhabitants/km².²⁷ So we can see that the various statute of limitations in Australia do not depend heavily on population density but on other factors. If we make a more detailed analysis of the Australian map we can see that in general the statute of limitation are lower in western and northern countries, countries which were occupied after the arrival in 1788 of the First Fleet of British Ships in Sydney, south-east Australia. The short prescription periods helped the occupation and development of the northern and western part, which were colonized later.

Secondly, in the USA it is the same situation, where the statutory terms range from 5 years to 40. Longer periods are applied in eastern states.²⁸ While in western

²⁴ Insecurity costs are costs which the possessor of the object faces.

²⁵ Article 1159 of the Italian Civil Code. For the agricultural land it is: *Usucapione Ordinaria* (for the possession in bad faith, with or without title) the period is trimmed from 20 years to 15 years, and *Usucapione abbreviata* (possession in good faith with title) from 10 years it is shortened in 5 years. (D'Isa; 2013)

²⁶ Bouckaert, B.; Depoorter, B.; 1999, page 24.

²⁷ https://en.wikipedia.org/wiki/Demographics_of_Australia#Population_density

²⁸ 25 years in Pennsylvania, 20 years in Delaware, Georgia, Massachusetts, New Jersey and 15 years in Connecticut, Virginia. (Sprankling, J.; 1994)

countries, which were occupied several years later after the American discovery²⁹ periods are shorter, ranging from 10 to 7 and 5 years. (Sprankling, J.; 1994) These periods were such due to historical impact, to promote tillage and development of large surfaces of arable land. (Daniel; 2014). The shorter the limitation period, the more the legitimate owner is encouraged to develop and control the land, and the more the possessor, who works the land for years and cares for it as if he were the owner, is protected.

Thereupon we emphasize that the main factor that determines the differences between prescription periods are cultural differences between countries and how a culture perceives which should be the appropriate period to create a stable relationship with the object.³⁰

g. An object which must be registered or not in the public registers.

First, regarding the land, we note that when the immovable object is registered in the public registers, this fact leads to the reduction of the insecurity of the holder, as he can easily verify who is the real owner of the item. Also, the registration of the land means that the legal situation of the owner in relation to his neighbours is stabilized, as the boundaries of the land are now clearly defined. That is why the registered land must have a greater legal protection.³¹ For this reason, many countries do not recognize acquisitive prescription in bad faith on registered land or define longer prescription terms for registered land. For example in Canada, where except the state of Alberta, other regions do not recognize the acquisition by acquisitive prescription of registered land.

However paradoxically, many states have reduced the time of possession for the acquisition with prescription of a registered land.³² For example, in England and Wales the Land Registration Act 2002 reduced from 12 to 10 years the period of limitation for the registered land. But for the unregistered land the 12-year period is still applicable.

Secondly, the movable property which are recorded in the public registers (cars, boats, airplanes)

To these items, because of the importance they have in the civil circulation, we think that should be made a similar treatment like immovable property. While in the case of movable items that are not subject of registration in the public registers we think that should be applied shorter possession periods. The main reason is that usually, the movable items which are not recorded in the public registers are items which are consumed fairly quickly and their value is lost or reduced within a very short period of time.

²⁹ Western states of America became part of it through the "Louisiana Purchase" in 1803. Through this purchase the United States bought most of the land between the Mississippi River and the Rocky Mountains.

³⁰ "Might the long time required in common law England and in the colonies, and the shorter time required in the American West, be related to cultural differences" (Radin, 1986)

³¹ This is also the opinion of the researcher Dockray, who supports the application of longer statutory limitations in the case of registered land. (Marais; 2011, page 171)

³² Report; BIIC, 2006, page 4

h. The population density.

This factor affects mainly the acquisitive prescription of land. From the research conducted by researchers Netter, Hersch and Manson, in 1986 it was observed that longer terms were applied in those countries where "the rate of growth of population density" was the highest. (Jeffrey, Netter, 1986). For this reason, especially in the western areas of Albania it is fully justified to increase the prescription period.

i. The residence of the holder and the owner.

The residence of the parties was the main criterion in ancient Rome, where deadlines were shorter, 10 years, if they lived in the same province (*inter praesentes*) and the longest, 20 years if they lived in different provinces (*inter absentes*).³³

This rule is currently applied in France, where if the residence of the owner is not in the city where the immovable property lies, the statutory limit doubles. (LCI, 2016, page 12). It is clear that this rule protects the owner, and if he doesn't have the residence in the city where the property lies, it becomes more difficult for him to control the use of land by illegitimate holders. We think that this rule should be applied in the Albanian legislation providing greater protection for the owner.

4- Should The Possession Period Be Shortened Or Extended

Researchers are divided about whether the statutory deadlines should be shortened or extended. Most of them (Cobb, 2007; Fox, 2007; Marais, 2011; Stubb, 2014; Abass, 2014; Shepard, 2011) think that to specify a right period, thus to specify which should be "a Reasonable time", is difficult.³⁴ In general the acquisitive prescription institute has turned into a "Font of litigation". (Merril, 1986; Stake, 2001) So it is difficult to determine which is that moment in time when the object has become enough irrelevant to the owner and enough relevant to the holder³⁵ in order to be justified the transfer of property to the possessor. (Marais, 2011; Shepard, 2011).

The extension of the periods and their shortening should be examined in relation to the consequences that they bring. These consequences are of two types: micro-level effects (the impact that they have on the owner of the property and in relation to the holder) and secondly macro-level effects (how the period influences the society in general).

The trend has generally been towards reducing these deadlines. (Bouckaert, B., Depoorter, B. 1999; Dick, A., 2007; Daniel, 2014). If we analyze the micro-level effects of shorter deadlines, we can say that the shorter this period is, the more the uncertainty is reduced in favor of the holder of the object but at the same time the costs of prevention and monitoring of the owner are increased. Regarding the macro-level effects the lower the statutory deadlines are, the

³³ Sherman, 1911, page 154

³⁴ Although Epstein has suggested the application of concrete periods, 6 to 10 years for possession in good faith and 12 to 20 years for possession in bad faith.

³⁵ "but why is peace more desirable after twenty years than before." (Shepard, 2011, page 565)

easier it becomes for the society to prove judicially the possession and much more the costs of resolving disputes are reduced.(Stake,2011;Salomons.A,2011;Pozzato,2010).This macro-level effect increases the level of legal certainty in the society in general.But on the other hand, the short periods should not be favored in the case of bad faith without title possession,as they lead to the promotion of theft and fraud.(Bouckaert.B;Depoorter.B,1999;Merril,1985;Netter,Hersch,Manson,1986;Fennell;2006). On the contrary we believe that the short periods should be applied and can be quite useful in the acquisition of property with prescription on movables.(SLC;1976,page5)³⁶

Regarding the long terms,they are negatively correlated with monitoring costs.(Fennell,2006;Marais,2011;Epstein,1986)The longer the term,the more the uncertainty of the owner is reduced.This reduction of insecurity in the micro-level is reflected simultaneously in the macro-level too,because the longer periods lead to the extension of the uncertainty state of the legal situation of the parties.This state of uncertainty undermines the legal colludes in the society,resulting as a major effect the reduction of transactions between owners for the transfer of ownership.That is why the longer the limitation period is,the greater the possibility to lose evidence and to be violated the stability of the business.

In general,in developing countries,it is intended not to let the land to stay for a long time "idle",hence the possession period in these countires tends to be shorter.Prescription's main role is to provide legal certainty,³⁷and this constitutes the reason why the possession periods must be shorter in the case when the ownership system in general is in transition.The longer the time distance between a legal fact and the decision that has to be taken in relation to this fact,the more are grown the costs for the entire system in general.

But after crossing the transition phase in a country,we think that short terms of possession,regarding only acquisitive prescription without title of immovables,should not be favoured.The reason is that short deadlines encourage the loss of the proprietary ownership by accident or neglect.(Ellickson RC;1986).

Otherwise than above,we believe that the prescription periods must be shorter for prescription with title,³⁸for movable and immovable property too (whith "title" we mean the expression of the will from the owner).As the owner has expressed his own will,and especially in the case when the title was with remuneration,which is determined by the reciprocal agreement of the parties,we think that there is no reason why prescription periods should be too long,5 or 10 years,as they are applied today in the Albanian legislation.The reduction of the deadlines would help the efficiency

³⁶ Scotland undertook a study in 1976 by making a comparative analysis of the acquisitive prescription institute.In this study it was reached the conclusion that there must not be favored very long prescription periods.Short periods of a maximum of 5 years should be applied to movable objects. And for the prescription period without a title to immovable property,the Commission suggested the application of the term of 10 years,instead of the suggested period of 20 years.

³⁷ "the desirability of peace" (Shepard,2011,page 565)

³⁸ The title may be with or without compensation.

increase and the flow of goods.³⁹ A typical case is that of Portugal and Spain, which apply a 3-year period for movables and a 2 year period for movable assets which are recorded in the public registers. Whereas, concerning prescription without title, a 30-year long term will bring positive consequences in Albania.⁴⁰

5. Recommendations

We emphasize that in Albania there must be made a change in legislation, foreseeing a wider variety of prescription deadlines. Such changes have taken place years ago in other states too. For example, the current Italian Civil Code, unlike that of 1865 brought a variety of statutory deadlines, which vary depending on the type of items.⁴¹ These changes we suggest that should be applied in Albania too and not only should the terms of prescription be amended, but also should be provided specific deadlines for some kind of objects which are important for the economic development of the country. But further studies should be carried out for the alternation of the periods of acquisitive prescription, in order for these deadlines to have a positive impact on the economy in general.

First, as the drafters of the DCFR have provided, we recommend that in the case of possession of land without title, the prescription period in Albania should be extended up to 30 years. But the 20-year limit should be maintained for at least two decades, as this would help the resolution of ownership conflicts⁴². An extension of the period should be made only after the property conflicts in Albania are resolved, after the end of the process of legalization, of restitution and compensation of land and the process of registration of agricultural land.

Secondly, in the coastal lands or agricultural lands must be provided shorter prescription periods than the 30-year period. It must be noted that these areas are of great value for the development of the economy. And the greater the value of land is, the shorter the prescription period should be in order to lead to a quick conclusion of disputes.

Thirdly, for items which are recorded in the public registers should be applied longer prescription deadlines than the normal statutory deadlines.

Fourthly, we recommend that the prescription period must be shorter for movable assets that are not recorded in the public records and longest for movable assets that are recorded in the public records.

a) In relation to movables, which are not registered, the period of acquisitive prescription in good faith with title, we believe that should be reduced to 1 year and 3

³⁹ “is more efficient to leave the asset with the possessor in good faith if the owner has already replaced it by a similar one.” (Salomons, A.; 2011, page 25)

⁴⁰ The 30-year-old is applied in Germany, France, Austria, Belgium, Switzerland, South Africa.

⁴¹ De Giorgi, 2012

⁴² Applying prescription institute is suggested in those countries that have suffered for too long from conflicts of ownership, as in Cambodia. “Neither a definition nor concept of squatters exists in Cambodian laws, that is why the legal protection of those people is interpretably vulnerable.” (Phalthy; 2007, page 5)

years for the items that must be registered.⁴³ A 3-year period is considered as the most appropriate and reasonable option to be applied for acquisitive prescription with title in good faith, by various scholars. (Salomons, A.; 2011) and by the drafters of the DCFR.⁴⁴

b) The prescription period for acquisitive prescription with title in bad faith for movable assets which are registered should be reduced from 10 years that it is now.⁴⁵ This is a very long-term and potentially difficult to be applied in practice because many movable objects are consumed after the expiration of this deadline or they simply no longer exist. Therefore we suggest that a 5 year period would be considered as acceptable to be applied in today's consumer society. While the prescription period for possessor with title, in bad faith of movables that aren't registered should be 3 years.

It is precisely the existence of the title and the good faith of the holder which justifies the shortening of the periods in the case of acquisitive prescription with title in good faith. In this case should be applied shorter terms than all other types of prescription.⁴⁶

Fifthly, should be applied longer terms if the residence of the holder and the owner of the immovable item is not in the same place, or if the owner has the residence in a different city than where the property lies.

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⁴³ In the debates prior to the composition of the DCFR two ideas prevailed, first the 3-year period for movable assets not registered in public records and secondly the 10-year period for items that are registered in the public records.

⁴⁴ Three years "seems to be the most frequently chosen solution"; (Salomon A, 2011)

⁴⁵ This term actually recommended by the drafters of the DCFR.

⁴⁶ De Giorgi; 2012

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Public Debt and Improvement of Laws on Public Debt Management in Vietnam

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Abstract

In the highly unstable context of current world economy, public debt has become a hot issue that many countries are concerning. In Vietnam, in the industrialization and modernization progress, the country needs more capital and technology to restructure the economy and facilitate economic development, social stability and sustainable direction. Over the years, Vietnam has organized to mobilize capital through various forms of debt, such as government bonds, ODA, etc. In fact, Vietnam's public debt is now so high and having an upward trend, while the budget deficit is increasingly heavy and investment is non-stop expanding leading to inflation and rising interest rates. This has caused Vietnam's debt situation to become more serious. In the meanwhile, public debt management in Vietnam has really been focused in recent years, which is marked by the promulgation of Public Debt Management Law. Besides, the laws on public debt management is incomplete and not compatible with international standards such as the shortage of the concept of public debt, the regulations on issuing, using, paying plan and management of all kinds of public debts, regulations on publicizing, monitoring the information of public debt. Therefore, some suggestions for improvement of Vietnam's public debt management laws can be withdrawn based on some guidelines of World Bank and International Monetary Fund and experience of China.

Keywords: public debt management, law, Vietnam

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Introduction

Vietnam's public debt is now extremely high and experiencing an upward trend while the growing budgetary deficit and continuous investment is leading to inflation and rising interest rates. This has caused Vietnam's debt situation to become more serious. In the six years from 2006 to 2012, public debt had increased sharply from 91,757 billion VND (22.7%) to 989,300 billion VND (41.1%) and the public debt to GDP ratio grew significantly from 41.5 % to 55.6%.¹ However, public debt management (PDM) in Vietnam has been under focus in recent years, marked by the issuance of the Law on Public Debt Management in 2009 which is incomplete and not compatible with international standards. Therefore, improving the legal framework concerning PDM has become an imperative issue in Vietnam.

This paper aims to analyze the situation of PDM in Vietnam, to explore the shortcomings of the present laws, and to suggest some solutions for the management of public debt in the future. In this research, guidelines on the legal framework for PDM laid out by international organizations, as well as the experiences of China is selected as comparative targets to make recommendations for the management of public debt in Vietnam in the future.

This paper is structured as follows: Part 1 will introduce an overview of public debt. Part 2 will review the situation of PDM in Vietnam. Part 3 points out some shortcomings of current laws on PDM in Vietnam, while Part 4 and Part 5 explore the suggestion of international organizations and the experiences of China on setting the legal framework for PDM. Finally, suggestions for improving the laws on PDM in Vietnam will be made in Part 6.

1. Overview of public debt

It is evident that public debt is an inevitable solution to financing a budget deficit and for development investment. From a legal perspective, the definition of "public debt" is crucial because "it has implications for the types of public institutions and instruments that are governed by the requirements of the PDM legal framework."² However, currently, "there is no universally accepted definition of 'public debt' and various jurisdictions define this differently, with varying policy implications."³ Therefore, it is important that the legal framework of a given jurisdiction clarifies the scope of public debt.

In the narrow sense, public debt includes the debt obligations of a central government, local government, and the government guaranteed debts of independent organizations. In most countries, public debts comprise government debts and government

¹ See, HOANG NGOC NANG HONG, THUC TRANG NO CONG VA QUAN LY NO CONG O VIET NAM [Status of Public Debt and Public Debt Management in Vietnam] (September 17, 2013), *available at* <http://tapchitaichinh.vn/nghien-cuu-trao-doi/nghien-cuu-dieu-tra/thuc-trang-no-cong-va-quan-ly-no-cong-o-viet-nam-31983.html> (visited January 7, 2016)

² International Monetary Fund, *Designing legal frameworks for public debt management*, 15/147 INTERNATIONAL MONETARY FUND WORKING PAPER 1, 12 (2015), *available at* <https://www.imf.org/external/pubs/ft/wp/2015/wp15147.pdf> (visited January 7, 2016)

³ *Id.*, at 12

guaranteed debts.⁴ In some jurisdictions, public debt also includes debts of local government (such as in Vietnam,⁵ Taiwan,⁶ and Romania⁷) and debts of state owned enterprises (SoEs) (such as in Macedonia⁸ and Thailand⁹).

According to international organizations and some countries, “public debt” is defined in a broad sense. The International Monetary Fund (IMF) and the World Bank (WB) often refer to a public debt as a “debt of the general government and in some cases, the debt of the entire public sector”¹⁰ and the debts that are collected from debt instruments.¹¹ In another report, the IMF considers “public debt” as the debt of the entire public sector, “which includes financial and nonfinancial public enterprises and the central bank.”¹²

This approach is also relatively similar to the notion of public debt in the Debt Management and Financial Analysis System of the United Nations Conference on Trade and Development,¹³ in the Guidance on Definition and Disclosure of Public Debt of the International Organization of Supreme Audit Institutions,¹⁴ and in some countries such as Mauritius¹⁵ and Moldova.¹⁶

It is undeniable that “[w]hether the broader public sector debt is included or excluded from the scope of application of the legal framework will vary from country to

⁴ Vuong Dinh Hue, *Improving public debt management* (April 15, 2011), available at <http://english.tapchiconsan.org.vn/Home/Focus/2011/169/Improving-public-debt-management.aspx> (visited February 17, 2016)

⁵ See, Article 1, Vietnam’s Public Debt Management Law (2009)

⁶ See, The Amendment of Taiwan’s Public Debt Act (2013)

⁷ See, Law No. 273/2006 on Public Finance and the GUO no 64/2007 concerning public debt, and Căruntu Roxana Corina, *Public debt: Structure and Characteristics – Romania’s case* (March, 2013), p.31, available at http://www.utgiu.ro/revista/ec/pdf/2013-03/5_Caruntu%20Roxana%20Corina.pdf (visited January 7, 2016)

⁸ See, Article 2, Law on Modifications and Amendments to the Law on Public Debt No. 35/11 of Republic of Macedonia (2011)

⁹ See, Section 4, Thailand’s Public Debt Management Act, B.E. 2548 (2005)

¹⁰ See, *supra* note 2 and International Monetary Fund and World Bank, *Guidelines for Public debt management* (2014)

¹¹ There are six different instruments that comprise gross debt: debt securities; loans; other accounts payable such as trade credits and advances and miscellaneous other items due to be paid or received; Special Drawing Rights (SDRs) which are international reserve assets created by the IMF and allocated to its members to supplement existing reserve assets; currency and deposits; insurance, pension and standardized guarantee schemes. See, International Monetary Fund, *Public Sector Debt Statistic – Guide for Compilers and Users* (2013), p.3, available at <http://www.tffs.org/pdf/method/2013/psds2013.pdf> (visited January 7, 2016)

¹² INTERNATIONAL MONETARY FUND, FISCAL MONITOR – PUBLIC EXPENDITURE REFORM: MAKING DIFFICULT CHOICES 89-90 (2014), available at <https://www.imf.org/external/pubs/ft/fm/2014/01/pdf/fm1401.pdf> (visited January 7, 2016)

¹³ See, United Nations Conference on Trade and Development, *Debt Management and Financial Analysis System Programme* (2011), available at http://unctad.org/en/Docs/gdsdmfasmisc2011d1_en.pdf, (visited February 17, 2016)

¹⁴ See, International Organization of Supreme Audit Institutions, *Guidance on Definition and Disclosure of Public Debt* (1995), p.9, available at http://www.issai.org/media/13000/issai_5421e.pdf, (visited January 7, 2016)

¹⁵ See, Section 6 (1) and (2), Mauritius’ Public Debt Management Act (2008)

¹⁶ See, Article 2, Moldova’s Organic Law No. 419 on Public Debt, State Guarantees and State On-lending (2006). Accordingly, “public debt” also includes the debt from internal and external borrowings of enterprises where the State or/and administrative-territorial unit own more than 51%.

country, depending on the nature of the political and institutional framework.”¹⁷ In fact, it is not necessarily obligatory for all members of the above international organizations to adhere to these definitions. These definitions are some guidelines on public debt statistics that help researchers, statistical experts, and users of statistical data to properly use data in accordance with their analytic purposes. IMF member countries are encouraged to collect, aggregate, and report on public debt data under the standard definition of IMF to create consistency among statistics, aggregation, and classification, and to allow for comparison of public debt data between countries.

1. The situation of PDM in Vietnam

In fact, Vietnam’s public debt has been increasing sharply for a long time, whereas PDM has only been a focus in recent years, marked by the promulgation of the Public Debt Management Law in 2009. In recent times, the state has issued many legal documents that are part of an important legal base regulating PDM activities. The situation of PDM can be described as follows:

First, all public debts have been paid fully and timely up to now, so Vietnam has not entered into insolvency yet. Public debt to GDP indicators are in line with the objective of the country’s Strategy of Public Debt and External Debt in the 2011-2020 period.¹⁸ Based on the assessment of the IMF, the WB, and the Asian Development Bank, “Vietnam is at low risk of external debt distress... and total public debt are below vulnerability thresholds,”¹⁹ contributing to the strengthening of the national credit rating and the reduction in the country’s cost of capital mobilization. However, because the management of public debt may be affected by potential risks, such as interest risk and exchange rate risk, and increasing domestic debt may lead to some negative impacts on the economy, the PDM should be watched carefully.

Second, public debt has been mobilized in various forms and in diverse currencies meeting the need of the additional demand for development investment and the balance of state budget. Many infrastructure projects, poverty reduction programs, job creation projects, programs for environmental and social welfare improvement are financed by funds from public debt sources.²⁰ However, the scale of the government bond market scale is still small, with Vietnam at only 14% of GDP and 63% of the bond market scale; therefore, it is difficult for the government to continue to increase the scale of domestic capital mobilization in the coming years.²¹

Third, the usage of public debts in Vietnam is not reasonable, timely, and efficient. The first reason for this is that “delays in the disbursement of investment capital from

¹⁷ *supra* note 2

¹⁸ MINISTRY OF FINANCE OF VIETNAM, BAO CAO CONG TAC HUY DONG VON, TINH HINH NO CONG, DINH HUONG VA GIAI PHAP BAO DAM AN TOAN NO CONG [Report on the Raising of Capital, Public Debt Situation, Orientation and Solutions for the Safety of Public Debt] (December 30, 2015) (on file with the author)

¹⁹ Asian Development Bank, *Macroeconomic and Debt Sustainability Assessment*, p.1, available at <http://www.adb.org/sites/default/files/linked-documents/47293-001-sd-04.pdf> (visited January 17, 2016)

²⁰ *See, supra* note 18

²¹ *Id.*

the State budget and government bond funds take place quite often,”²² especially in the progress of construction in infrastructure projects. This constraint, “together with a lack of financial discipline in public investment and in the operation of SoEs results in scattered investment, waste, loss of investment capital”²³; therefore, it has “exposed Vietnam to numerous risks”²⁴ in PDM. The second reason is low investment efficiency demonstrated by the Incremental Capital to Output Ratio (ICOR) i.e., the additional capital required to increase one unit of output. The lesser the ICOR, the more efficient is the investment.²⁵ In Vietnam, for instance, the ICOR index surged to a high level (more than 8) in 2009 while investment as a whole was 42% of GDP and the growth rate just reached 5%.²⁶ This means that Vietnam needed to invest 8 units of capital to gain 1 unit of output.

Fourth, “Vietnam has just only paid attention to mandatory debt management, but not hidden debt management”²⁷. Hidden debts are not the liabilities of the government to repay, but they depend on economic and social functions of the state. In fact, hidden debts are unstable, and because they are relatively difficult to estimate, then can create high potential risks for debt sustainability. One famous example of hidden debt in Vietnam is the case of Vietnam Ship Industry Group, a state economic group (hereinafter VINASHIN). “In 2005, Vietnamese government issued US\$750 bonds in the international financial market to finance VINASHIN. Moreover, VINASHIN still borrowed at least US\$600 millions from foreign banks. This company also got a huge amount of funds, especially credits from state banks, as it required. But, due to the bad management with many crazy investment projects and corruption, in June 2010, its total debt was at least... US\$4.6 billions, which were equal to 83% of its total assets.”²⁸ When VINASHIN came into bankruptcy, the government had to pump a lot of money into it, leading to a huge burden on the state budget and a negative effect on the public debt sustainability of the country.

Fifth, the information and data on public debt in Vietnam have not been aggregated and publicized sufficiently. In fact, the MoF just publicized information and data on public debt in the Bulletin of Public Debt by the end of 2013. Therefore, it is difficult for the state and the people to supervise and effectively implement the management of public debt.

²² Central Institute for Economic Management, *Public investment, Public debt and State budget Sustainability* (2013), p.4, available at <http://www.vnep.org.vn/Upload/PUBLIC%20INVESTMENT.pdf> (visited January 17, 2016)

²³ *Id.*

²⁴ *Id.*

²⁵ See, MAI THU HIEN AND NGUYEN THI NHU NGUYET, TINH HINH NO CONG VA QUAN LY NO CONG O VIET NAM, [The situation of public debt and public debt management in Vietnam] (July, 2011), p.3, available at <http://www.cantholib.org.vn/Database/Content/2520.pdf> (visited January 17, 2016)

²⁶ *Id.*

²⁷ See, *supra* note 22 at 5

²⁸ Nguyen Nhu Binh, *The Recent Economic Situation of Vietnam and Investment Risks*, A-2 CRR DIS. P. S. 12 (2010), available at <http://www.econ.shiga-u.ac.jp/10/2/3/res.9/DPA2Binh201012change1220.pdf> (visited January 17, 2016)

2. Shortcomings of current laws on PDM in Vietnam

First, there is “the limited understanding of public debt, as a result, incorrect evaluation of Vietnam’s public debt”²⁹. The scope of government debt does not include the debts of SoEs, extra-budgetary units/accounts, and social security funds such as Vietnam Bank for Social Policies and Vietnam Development Bank. This is not compatible with the IMF’s suggestion on public debt³⁰ and the decisions on the establishment of Vietnam Bank for Social Policies and the Vietnam Development Bank. According to Decision No. 131/2002/QĐ-TTg, dated October 4, 2002, on the establishment of Vietnam Bank for Social Policies and Decision No. 108/2006/QĐ-TTg dated May 19, 2006, on the establishment of Vietnam Development Bank, these social security funds are set up in order to implement credit policies for social security and development investment but not for profit purposes. Accordingly, the payment capacity of the Vietnam Development Bank and the Vietnam Bank for Social Policies is guaranteed by the government and they are exempt from paying taxes and other state budget revenues. In fact, these loans are considered government debts because they are mobilized on behalf of the government in order to perform the tasks assigned by the government. Therefore, when the debts of Vietnam Development Bank and Vietnam Bank for Social Policies are not included in government debts, it will be impossible to get accurate information about Vietnam's public debt, making it difficult to control the public debt of the country. In addition, contingent debts, like the debts of SoEs, debts arising from the privatization of the state, and solving the problem of bankruptcy of credit institutions, the expenses for environmental remediation and recovering from natural disasters, etc. have not been noted, leading to high potential risks for public debt sustainability.

Second, Vietnam still lacks instruments to manage and handle with public debt risks, such as interest rate risk, exchange rate risk, etc., as well as the mechanisms and tools for controlling public debt risk. These shortcomings have negatively impacted on the sustainability of public debt and the effectiveness of the management of public debt.

Third, the publicity of public debt via a MoF bulletin has not been regulated in detail by the law. Therefore, much important information on public debt, such as information on local administration debts, contingent debts, and the use and repayment of all kinds of public debt, has not been mentioned in the public debt bulletin. As a consequence, the reduced transparency of public debt could reduce the effectiveness of the management of public debt and the mechanism for early warnings. In the meantime, it would let international entities and foreign countries continue to calculate the data on the public debt of Vietnam in their own ways, causing inconsistency of Vietnam's public debt information and reduction of the national credit rating and preventing the international economic integration of the country.

²⁹ Phan The Cong and Chu Thi Hao, *Vietnam’s public debt management today and some resolution*, 7 SOCIAL SCIENCES INFORMATION REVIEW 3, p.36 (September, 2013), available at <http://vjol.info/index.php/ssirev/article/viewFile/18143/16051> (visited January 7, 2016)

³⁰ See, Vietnam Institute for Economic and Policy Research (VEPR), *Characteristics of Vietnamese Public Debt* (December 11, 2015), p.1-2, available at <http://vepr.org.vn/upload/533/20160218/PD%2003%20-%20Eng%20-%20Final.pdf> (visited January 7, 2016)

Fourth, the law regulates the audit of programs and projects using loans from public debt but does not specifically stipulate the tasks and responsibilities of auditors in the management of public debt. The pending regulations on these issues can lead to unclear and inaccurate data on public debt, abuse of the debt management agency, and serious affects to national financial security.

Fifth, there is no regulation on sanctions for non-compliance of debt managers, leading to confusion or delay in publicizing data on public debt or the abuse of power of competent authorities, reducing of the effectiveness in the law implementation.

3. Suggestions of international organizations

In order to provide guidance for countries to review and improve their legal frameworks for the management of public debt, the IMF and the WB designed a comprehensive set of the following benchmarks for a PDM legal framework.

First, the legal framework for PDM in a jurisdiction should define explicitly the scope of public debt, which “has implications for the types of public institutions and instruments that are governed by the requirements of the PDM legal framework.”³¹ Accordingly, the scope of public debt “reflects the public institutions whose debt liabilities are subject to the requirements of the PDM legal framework.”³² In addition, the scope of public debt should “cover all debt instruments”³³ representing debt obligations of public institutions according to the law and “encompass the main financial obligations over which the central government exercises control, including both marketable and non-marketable debt.”³⁴ Moreover, the concept of debt may include guarantees and other hidden obligations to ensure that they are subject to the same safeguards.³⁵ However, from a statistical perspective, “specific contingent liabilities are not required to be included in the compilation of debt, but reported as a memo item in the public sector debt statistics.”³⁶

Second, “a key component of the legal framework is the mandate to borrow.”³⁷ The framework for PDM should clarify the authority and capacity to conduct debt management operations “and to subject such activities to clear governance and transparency safeguards typically applicable to Government borrowing, to the extent applicable.”³⁸ Meanwhile, the authority to repay debt, related costs, and expenses also need to be provided in the law.³⁹

Third, the law should clarify the types of debt instruments that may be considered as the hidden obligations of the government, legal authority to create government’s hidden obligations, and circumstances under which implicit hidden obligations may become actual obligations. In addition, provisions requiring the risk assessment, risk

³¹ *supra* note 2

³² *Id.*

³³ *Id.*

³⁴ International Monetary Fund and World Bank, *The Guidelines on Public Debt Management* (2014)

³⁵ *See, supra* note 2 at 13

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*, at 19

³⁹ *See, Id.*, at 20

management, and reporting responsibility should be clarified in the law to mitigate potential risks from contingent liabilities.⁴⁰

Fourth, transparency is “a key tool for promoting fiscal accountability and responsibility”⁴¹; therefore, the transparency framework should include the following requirements: (i) publication of public debt information on the official website of the PDM agency, and local newspapers; (ii) publication of borrowing plan and the expenditure and revenue of the state budget; (iii) the disclosure of the composition of public debts, currencies, maturity profiles and interest rate structure, and loans owned by the government; (iv) periodic publication of debts of local administration and other public sector entities; and (v) annual report to the National Assembly on the effectiveness of the management of public debt.⁴²

Fifth, enforcement mechanisms (often including reporting and sanctions) should be stipulated by the legal framework. Sanctions for non-compliance of managers “could be personal or institutional, and civil or criminal.”⁴³ Civil sanctions for the violation of the law may “include court action to recover payments received under any non-compliant debt transaction”⁴⁴ while criminal sanctions may “involve fines and prison terms.”⁴⁵

4. Experience of China

From shortcomings in the legal framework on PDM, it is believed that the situation of public debt in China recently has no longer been sustainable.⁴⁶

First, PDM in China has never been regulated by law other than certain regulations under the Law on State Budget in 1994. This caused the ineffectiveness in PDM in China.

Second, according to the State Budget Law, public debt does not include SoEs’ debts and local government’s debt (direct borrowing or by guarantors). In addition, a local government could not borrow public debt but it could establish a company to obtain nominal debt. These companies operated under different forms; a few companies are due to direct local government management while others are in the form of joint ventures.⁴⁷ This could result in an increase of contingent liabilities for the entire country.

Third, regarding competent authority of PDM, China’ PDM system “involves close cooperation between several different government agencies and between departments

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See, Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See*, Szu Ping Chan, *China's debt explosion threatens financial stability, Fitch warns* (April 4, 2016), available at <http://www.telegraph.co.uk/business/2016/04/06/chinas-debt-explosion-threatens-financial-stability-fitch-warns/> (visited May 27, 2016)

⁴⁷ *See*, National Audit Office of the People’ Republic of China, *The Positive Role of Audit in Public Debt Management in China* (June 23, 2015), available at <http://www.audit.gov.cn/en/n746/n753/c66608/content.html> (visited June 27, 2016)

within those agencies.”⁴⁸ Within the scope of the management of public debt, National Development and Reform Commission will make plans; the MoF is responsible for controlling fiscal policy and day-to-day financial issues; the People’s Bank is responsible for monetary policy. The division of responsibilities between departments and agencies may lead to difficulties in communication and cooperation in the management of public debt.⁴⁹

Fourth, China especially paid attention to the management of public debt structure through setting up and developing the strategy of the management based on government bonds market in order to minimize borrowing costs and gradually increase debt maturity.⁵⁰

Fifth, public debt information is publicized in many ways: the central government’s debt and provisions relating to PDM are publicized on the MoF website; the National Debt Association of China provides data on the issuance of debt the central government debt and local debt on its website; the National Debt Association also publishes annual reports on China’s debt market and the Government’s debt and financial market. However, the publicity and transparency of public debt information is still limited (the proper information on China’s public debt was first published in June 2011).⁵¹

5. Suggestions for improving the legal framework for PDM in Vietnam

To meet the requirements of debt management in areas of effectiveness, publicity, transparency in the context of international economic integration, and maintenance of security for national finance, it is imperative for Vietnam to improve the legal framework for PDM.

6.1. Improving regulation on the scope of public debt

To ensure that the amount of public debt is calculated accurately and adequately and to ensure the consistent data on public debt in seen by Vietnam, international organizations, and foreign countries, the law on PDM should be adjusted to include all kinds of public debt and take contingent debts of the country under the consideration.

First, the debts of extra-budgetary units/accounts and social security funds, like the Vietnam Bank for Social Policies and the Vietnam Development Bank, should be included in the scope of public debt. This suggestion is not only compatible with international standards but also in accordance with the decisions on the establishment of the Vietnam Bank for Social Policies and the Vietnam Development Bank.

⁴⁸ World Bank, *Subnational Debt Management and Restructuring – Lessons from international experience* (October 22, 2015), p.13, available at http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2016/01/13/090224b08405b94f/2_0/Rendered/PDF/Subnational0de0national0experience.pdf (visited May 27, 2016)

⁴⁹ *Id.*

⁵⁰ See, VIETNAM’S MINISTRY OF FINANCE, BAO CAO KINH NGHIEM VE TO CHUC VA QUAN LY NO CONG O MOT SO NUOC CHAU A VA ASEAN [Report on Experience on organization and management of public debt in some Asian and ASEAN countries] (September, 2012), p.9

⁵¹ See, *Id.*

Concerning a SoE's debt, putting all debts of SoEs into public debt is still a controversial opinion because: (i) a state company should be responsible for its debts and the government does not intervene in repayment capacity of state companies, except in government-guaranteed debts; (ii) it is unknown when SoEs will become bankrupt, causing the government to turn corporate debt obligations into the government's liability to rescue the SoEs; (iii) not all SoEs operate inefficiently or create debt burden for the state budget. In fact, there are still many SoEs that operate effectively and make a positive contribution to the annual budget and the economy. Therefore, if the law does not include SoE's debt into the structure of public debt, the SoE's debts still need to be calculated, analyzed, and reported along with other public debts.

Regarding other contingent debts like debts arising from the privatization of the state and solving the problem of bankruptcy of credit institutions, expenses for environmental remediation and recovering from natural disasters also must be considered like public debts because of their high potential risks for national financial security.

6.2. Supplementing regulations on debt instruments and risk control

To strengthen the capacity of monitoring and management public debt, it is necessary to supplement the system of monitoring indicators of debt safety, such as debt limits on debt mobilization and debt repayment. These indicators and limits can be divided by type of debt and presented in both nominal values and in percentage. In addition, it is important to provide reasonable limits. If they are too low, they can hinder the government in implementing necessary reactions during a crisis because the adjustment or approval of new regulations takes a lot of time. In contrast, if the limit is set at too high a level, they are ineffective.

Concerning controlling risks of public debt, the law should stipulate (i) the provisions on the principle of risk controlling and risk handling and the authority and responsibility of the relevant authorities and (ii) tools for handling financial risks of public debt.

6.3. Improving regulations on publicizing information on public debt

In recent times, information disclosure and data transparency on public debt have become key reforming priorities in many countries. To ensure the transparency on public debt and to strengthen the effectiveness of PDM, the law should regulate specifically the data on all kinds of public debt (including data on local administration debts, contingent debts, the use and repayment of all kinds of public debt) in the public debt bulletin and other means of publicizing information on public debt.

6.4. Complementing regulations on the audit of public debt

To create the legal basis for auditors to take part in the management of public debt, the law should regulate clearly the audit tasks and responsibilities of auditors. Auditors are responsible for examining and certifying the data of all kinds of public debt and debt indicators, clarifying the purpose of using debts, evaluating the effectiveness of the using debts, examining the debt payment, and defining the

security and sustainability of public debt. Due to the different demands in the management of each kind of debt and the difference in loan users, the audit of public debt should be conducted regularly and annually.

6.5. Complementing sanctions for non-compliance

To secure the effectiveness of the management of public debt, the law should regulate an enforcement mechanism by imposing sanctions for non-compliance of managers. The sanctions would recover payments received under any non-compliant debt transaction or related to fines and other punishment forms that would be imposed for individual or agencies.



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***Strengthening the Independency of Indonesian Corruption Eradication Commission
Through Redesigning the Recruitment Mechanism of its Chairman***

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Abstract

The Indonesian Corruption Eradication Commission was formed as a special government institution to combat corruptions. The institution is constitutionally granted an authority to combat corruption. Thus, it is important to be an independent institution which is free from other institutions' interference. The independency requirement of the Corruption Eradication Commission is very crucial in order to maintain its function to perform social justice in Indonesia and to protect human rights. However, the recruitment system of the institution is not independent, it is proven by the strong authority of the Indonesian Parliament in the election process of the Commission member including the chairman. In the process to determine the Corruption Eradication Commission members and the Chairman is not purely based on the best candidates who fulfil all requirements, but it is based on the candidates who can compromise with a certain interest of political parties. The paper analyses comprehensively why it is necessary to redesign the recruitment mechanism system of the Corruption Eradication Commission's Chairman. The paper is a normative research and the methodology employed in this paper is library research. While the approaches employed in the paper are statute approach and conceptual approach. The research finds that redesign the recruitment mechanism of the institution is urgent, since the involment of the Indonesian Parliament in the process of recruitment affects the function of the institution.

Keywords : corruption, social justice, human rights, and political parties

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A. Introduction

Corruption in Indonesia has growth very rapidly into a very worrying state and is widespread in almost all facets of public life. Over the years every aspect of corruption has been increasing, either in the number of cases, the amount of state financial losses and in terms of quality of the criminal offenses. They are getting much more systematically and penetrating to all aspects of community life. Increase on the uncontrolled quantity and quality of corruption will carry a terrible disaster, not only undermine the foundations of national economy which interrupts the manifestation of fair and prosperous society, but also pose a real threat to the fields of education and public services. Furthermore, it will also influence the mentality of the authorities and endanger national political stability. Finally, corruption mostly could endanger the stability of national life.

The data shows that, per 30th April 2016, in 2016 the Corruption Eradication Commission (later mentioned as the Commission) is handling 28 cases, investigating 32 cases, and prosecuting 19 cases. As many as 17 cases are *inkracht*, and 24 cases have been executed. From 2004 to 2016, total handling of corruption case is 780 cases; 500 cases under investigation, 408 cases in prosecution, 337 cases stated *inkracht*, and the execution has been carried out for 357 cases.² Various international studies show that corruption is widespread and systematic in Indonesia which has made Indonesia as the most corrupt country in the world. Corruption cannot be longer classified as an ordinary crime; it has become an extraordinary crime. Then it requires extraordinary effort to overcome and eradicate crime of corruption.

Law enforcement process in eradicating corruption as extraordinary crime by using conventional way is proven ineffective and often finding obstacles and constraints in the implementation. The available law enforcement officials (human) and legal instruments (regulations/law) are not considered inadequate. An extraordinary law enforcement is needed, and the establishment of independent state institutions that possess broad authority and are free from any intervening powers may become a solution. The state institutions are expected to carry out the reduction and eradication of corruption in an intensive, effective, optimum, fast, and sustainable way.³

In this context, the Commission's presence is very important. The preamble of Commission Law states that the establishment of the corruption eradication commission KPK is in consideration of: (a) that in order to establish a fair and prosperous society based on Pancasila and the 1945 Constitution, eradication of corruption has not been able to be implemented optimally. Therefore, the eradication of corruption needs to be improved in a professional, intensive and progressive way because corruption has hurt state financials, the economy of the state, and impede national development; (b) that the government agencies that deal with corruption cases do not function effectively and efficiently in combating corruption.

² <http://acch.kpk.go.id/statistik-rekapitulasi-penindakan>

³ Constitutional Court Decision of Indonesia Number 012-016-019/PUU-IV/2006, pg. 64

Institutionally, the existence of Corruption Eradication Commission is not explicitly mentioned in the 1945 Constitution. However, in line with the rule of law determined by Article 1 (3) of the 1945 Constitution, the Commission can still be said to have a very important position in constitutional law. Moreover, constitutionally its existence can be tracked by the implicit command provision of Article 24 paragraph (3) of the 1945 Constitution which states, "Other agencies whose functions are related to the judicial authority regulated by constitution". Therefore, law enforcement agencies formed under the legislation such as the Commission can be said to have "constitutional importance" as the constitutional institution outside the 1945 Constitution.⁴

The Commission (KPK) is not established to take over the task of eradicating corruption from institutions that existed previously. Explanation part of the Commission Law mentions the role of the Commission as a trigger mechanism, which functions as a stimulus to efforts carried out by existing institutions to combat corruption are to be more effective and efficient. The task of the Commission is to coordinate and supervise with the institutions authorized to eradicate corruption, to make inquiry, investigate and prosecute criminal acts of corruption. The Commission also take measures to prevent corruption and monitor the implementation of state government.

One of many factors that can lead to the success of this Commission is the independence of the institution.⁵ Some studies suggest that the success and effectiveness of anti-corruption institutions need independence. Hence, Article 3 of Commission Law asserted, "Corruption Eradication Commission is a state institution that is independent in carrying tasks and authorities and is free from the influence of any." The self-reliance or independence of the Commission is needed in order to accelerate the eradication of corruption involving state administration at all existing lines, either in the executive, legislative, and judicial branches. On the contrary, the Commission dependence is one of the entrances to undermine aspirations to build the state of Indonesia as a country that is free from various forms of corruption.

When independence is defined as free from the influence of any, then one of potential factors that led to influx of intervention from other powers, especially legislative power to the Commission, is the recruitment process of the commissioner. The commissioner election mechanism by the House of Representatives does not have objective standard value and is even suspected to have political objectives. Therefore, the public questions the authority of parliament in determining the desirability of the Commission leaders which is widely misused to elect only certain people who can cooperate. The parliament intervention is understandable because members of The House are very concerned about the fact that most corruption cases investigated by the Commission involve members of the House of Representatives. According to the data tabulation on Corruption Actors by Position Years 2004-2016 (per 30 April 2016), members of The House (DPR and DPRD)

⁴ Jimly Asshiddiqie, *Lembaga-Lembaga Negara, Organ Konstitusional Menurut UUD 1945*, pg, 3-4

⁵ John S.T. Quah, *Defying Institutional Failure: Learning from The Experiences of Anticorruption Agencies in Four Asian Countries*, Crime Law Social Change, 2010 and John R. Helbrunn, *Anticorruption Commission: Panacea or Real Medicine to Fight Corruption?* Word Bank Institute, Washington, The Word Bank, 2004

involved in corruption cases extend to great number of 112.⁶ A survey even indicates that the House of Representatives is one of the most corrupt institutions in Indonesia.

B. Problem Statement

1. Why the Indonesian Corruption Eradication Commission need to be Independent?
2. How to Strengthening the Independency of Indonesian Corruption Eradication Commission?

C. Literature Review

Corruption Eradication Commission is classified as State Commission. State Commission is often defined in several different terms. In the United States, it is known as administrative agencies. According Asimow, the state commission are units of government created by statute to carry out specific tasks in implementing the statute. Most administrative agencies in the executive branch fall, but some important agencies are independent.⁷

An independent state commission is a state organ idealized to be independent and therefore it is outside the executive, legislative and judiciary power branches; it has the function of 'mixer' of all three instead.⁸ In the language of Funk and Seamon, independent commission often possesses the rule of quasi-legislative, executive power and quasi-judicial.⁹ Independent state commission is different from usual state commission. Asimow concluded that regular state commission is only a part of the executive, and has no important role.¹⁰

Furthermore, citing the United States Supreme Court decision in the case of Humphrey's Executor vs. United States, Asimow argued that the definition of independent is closely linked to the dismissal of members of the commission which only can happen based on the reasons set out in the law establishment of the commission. It is not like the regular state commission which can be dismissed by the president at any time, for it is firmly part of the executive's job.¹¹ Identically, William F. Fox Jr. stated that a state commission is independent when it is clearly defined by the Congress in the relevant commission law. Or, when the President is limited not to freely decide (discretionary decision) the dismissal of the commission leadership.¹² Besides the issue of dismissal which is free from the intervention of the president, Funk and Seamon added that the independent nature is also reflected in: (1) collective leadership is, not "a" leader; (2) the leadership is

⁶ <http://acch.kpk.go.id/berdasarkan-profesi/jabatan>

⁷ Michael R. Asimow, *Administrative Law*, West Academic, 2002, pg. 1

⁸ Jimly Asshiddiqie, *Struktur Ketatanegaraan Indonesia Setelah Perubahan Keempat UUD Tahun 1945*, makalah dalam Seminar Pembangunan Hukum Nasional VIII, Denpasar 14-18 Juli 2003

⁹ William F. Funk dan Richard H. Seamon, *Administrative Law: Examples & Explanations*, 2001, pg. 23-24.

¹⁰ Michael R. Asimow, *Op., Cit*, pg. 2

¹¹ *Ibid*, pg. 20

¹² William F. Fox Jr, *Understanding Administrative Law*, Lexis Publishing, 2000, pg. 56

not dominated by certain political parties; and (3) The incumbency of the commission's leaders does not run out simultaneously, but alternately (staggered terms).¹³

In theory of state administration, when formulating a state institution outside the executive, judiciary and legislative, there are three theories that are often offered. (i) the separation of powers which typically do not accept the presence of supporting institutions, so that the existence of those state commissions can be summed up as an extra constitutional. (ii) the separation of function, which is able to accept their presence as long as they still relate to the functions of the executive, legislative or judicial. (iii) the checks and balances theory which fully accept the presence of other supporting institutions as part of the 4th or 5th power principles after the legislative, judiciary and executive powers.¹⁴

Conventional models of separation of power which only assume three branches of power in a state - the executive, legislative and judicial - no longer answer the complexities of a modern state. It is inseparable from the development of government system around the world with the emergence and development of the welfare state doctrine. Therefore, independent regulatory agencies are needed to complete the modern constitutional institutions, with a model of mutual relations and more complete control among state institutions (state organs). The development of independent bodies is also happening in the United States as expressed by Ackerman that: ... the American system contains (at least) five branches: House, Senate, President, Court, and independent agencies such as the Federal Reserve Board. Complexity is compounded by the bewildering institutional dynamics of the American federal system. The crucial question is not complexity, but whether we Americans are separating power for the right reasons.¹⁵

Hamdan Zoelva defines Independent Bodies as an institution formed due to the urgency of the special task that cannot be accommodated in government institutions (conventional) with a certain uniqueness. Independent bodies have the urgent task characteristics and are unique, integrated and effective.¹⁶ The presence of various independent state commission is not only a phenomenon that occurs in Indonesia, but also in many countries of the world, such as in the UK, South Africa, Thailand, United States, etc. In general, the presence of an independent state commission is aimed to enhance the democratization process that continues to evolve with the changing of social and political conditions that occur in the community.¹⁷

On the other hand, the existence of the independent state commission in many democratic countries is also a correction form on the existing classification of state government authority, in which branch of state power is only grouped into three: the power to make

¹³ William F. Funk dan Richard H. Seamon, Op., Cit, pg. 7

¹⁴ Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and Fourth Branch*, 1984, *Columbia Law Review.*, John H. Garvey and Alexander Aleinkov, *Modern Constitutional Theory*, West Publishing and Co, Minnesota, USA, 1994, pg. 296.

¹⁵ Bruce Ackerman, *The New Separation of Powers*, The Harvard Law Review vol. 113, 2000, pg. 728

¹⁶ Hamdan Zoelva, *Tinjauan Konstitusional Penataan Lembaga Non-Struktural di Indonesia*, Jurnal Negarawan, Sekretariat Negara RI, November 2010, pg. 65

¹⁷ Constitutional Court Decision of Indonesia Number 6 PUU-XII-2014, pg. 28

laws (legislative), the power of government (executive), and the judicial power (judicial). The three branches of power are considered no longer capable of doing their tasks, even partially assessed to have declining credibility. An institution outside those three is required to cover up weaknesses.

Jimly Asshiddiqie stated that the establishment of an independent state commission in third world countries is driven by the fact that the bureaucracy in government cannot yet fulfill public's demand of public services with quality standards and increasing diversity.¹⁸ Meanwhile, Muladi explained that one of the reasons on the formulation of independent bodies is a democratic transition, as quoted from Klug that "each new wave of state reconstruction seems to produce new variations in the division of power, between center and periphery and between different organs of government, as well as new conceptions of the relationship between different branches of government."¹⁹

Generally, there are several factors behind the establishment of independent bodies, some of them are:²⁰ (i) The lack of credibility of the institutions that already exist as a result of the assumption (and evidence) about corruption that is difficult to eradicate; (ii) There is no such independent state agencies that they are not immune enough from intervention of a state authority or other authorities; (iii) inability of existing government institutions to perform urgent tasks during transition to democracy due to bureaucracy issue and corruption, collusion and nepotism; and (iv) pressure from international institutions, not only as a prerequisite to play the global market but also democracy as the only way for countries under authoritarian rule.

D. Redesigning the Recruitment Mechanism of The Corruption Eradication Commission's Chairman

The establishment of anti-corruption institutions in various countries around the world, including in Indonesia, according to Jeremy Pope, is as a result of the increasingly complex and sophisticated way of corruption perpetrators. In addition, conventional law enforcement institutions such as the police force is also seen increasingly no longer able to uncover and bring major corruption cases to court.²¹ Therefore, the Commission institution must be handled by great people who are able to conduct maximum efforts to combat corruption. The entrance to produce qualified the Commission's leaders must be started from the arrangement of recruitment mechanism. Bad recruitment procedures will inevitably result in incompetent Commission's leaders either.

¹⁸ Jimly, *Beberapa Catatan Tentang Lembaga-Lembaga Khusus dalam Penyelenggaraan Pemerintahan Negara*, Seminar Nasional Lembaga-Lembaga Non Struktural, Kementerian Pertahanan, Maret 2011, pg. 2.

¹⁹ Muladi, *Penataan Lembaga Non-Struktural (LNS) Dalam Kerangka Reformasi Birokrasi serta Upaya Formulasi Kebijakan Strategis Kelembagaan Negara*, Jurnal Negarawan, Sekretariat Negara RI, November 2010, pg. 24.

²⁰ Firmansyah et al, Assidique, Indrayana, dan Budiono dalam *Kajian Desain Kelembagaan Pemerintah Pusat (Arsitektur Kelembagaan Tahun 2014-2019)*, Pusat Kajian Kinerja Kelembagaan Deputy Bidang Kelembagaan & Sumber Daya Aparatur Negara, LAN, Jakarta, 2013, pg. 78

²¹ Jeremy Pope, *Strategi Memberantas Korupsi: Elemen System Integritas Nasional*, Jakarta, yayasan obor Indonesia, 2003, pg. 177

Generally, there are some factors in determining criteria for electing a public servant in government, are:²² (i) having a variety of quality such as intellectual quality, moral integrity, and visionary. (ii) possessing the optimal level of honesty because honesty is the best policy. Thus, leader's honesty should actually be top priority. A leader must be honest to people, honest to himself and honest to God Almighty. (iii) capable of making sacrifices in his personal interests for benefits of larger public interest, the nation and the state. (iv) possessing good characters, not easily to get angry, not reactive, emotional, etc.

One of the effort to assess the candidates for public office is through the mechanism of fit and proper test. This mechanism is considered a better guarantee for a democratic election process. Through the fit and proper test, it is expected that each candidate's personal profile is revealed in connection to occupy a public office. On the implementation of fit and proper test, the prospective officials will be asked about various things including: (a) curriculum vitae of candidates, (b) general knowledge of positions offered, and (c) vision and mission to be performed related to the post the candidate will be assigned to.

By using a fit and proper test, someone can be considered proper and reasonable enough to occupy a certain position. Managerial skills, knowledge, vision and mission to the organization and high integrity can be used as a fit and proper assessment of whether a candidate is qualified enough or not. Information on the profile of the individual will therefore be obtained during fit and proper test and the whole process of such testing is conducted openly so that the public can identify and assess the results of tests performed. Fit and proper test has an important role in generating the candidate standard. Even with the fit and proper test the targets that have been set by the organization can be achieved. If the system of the test is carried out well, it may result in the election of competent human resources who meet the standards set. However, implementation of the fit and proper test still has some weaknesses, for instance the existence of a potential influx of political intervention. This is due to the involvement of parliament in the selection of the Commission's leaders. In practice, fit and proper test in Indonesia is determination of state officials as representation of interest group rather than electing candidate based on the qualification.²³

The involvement of parliament in the election of the Commission leadership will not only produce incompetent leaders, but also will cause political intervention that will result in independent institution of the Commission. Independence is very needed by the Commission as one of the conditions for the success and effectiveness of the work. The independence of anti-corruption units is the starting point in building successful policies for countering corruption.²⁴ The independence of a specialized anti-corruption institution is considered to be a fundamental requirement for the proper and affective exercise of its

²² Zaenal Arifin, dkk., *Laporan Akhir Pengkajian Hukum Tentang Fit And Proper Test dalam Proses Pemilihan Pejabat Negara*, Badan Pembinaan Hukum Nasional Departemen Hukum Dan Hak Asasi Manusia R.I, Jakarta, pg. 19-20

²³ *Ibid*

²⁴ Rositsa Dzhekova, et., All., *Countering Police Corruption: European Perspectives*, Center for the Study of Democracy, 2013, pg. 13

function. This consensus is reflected in all major international legal instruments. Reason why the independence criterion rank so high on the anti-corruption agenda are closely linked with the nature of corruption. Corruption in many respects equals abuse of power.²⁵

One of the indicators that can be used to measure the independence of the Commission is variable recruitment patterns of the institutional leaders. Is the recruitment pattern created open space or actually close any chances of power intervention in the duties and authority of the state institutions? If the recruitment pattern set turns out to open space for intervention, the independence will be polluted, and in turn the ideals of the Commission formation will never be achieved or is difficult to achieve. Therefore, the idea of dissociate the recruitment process led independent state commission whose job is related to law enforcement and the judiciary from power of political interest should be supported in many ways. However, political interests will always try to influence the process of law enforcement in any way.²⁶

Based on the provisions of Article 30 of Commission Law, the Commission's recruitment process is conducted through the following steps: (a) selection is made by the Selection Committee formed by the government consisting of society elements and government; (b) the selection committee will determine names of candidates of leaders to the president in doubled number from the positions needed; (c) the president gives the names of candidates for the Commission's chairmen to parliament; (d) The House votes and determines the candidates of the Commission's chairmen and the arrangement of its chairman and vice chairman of the Commission; (E) parliament delivers the elected candidate to the president; and (f) the president determines and assigns the elected candidates as leaders of the Commission.

Article 30 paragraph (2) and (3) of the Commission Law as the legal foundation of the government in forming the Selection Committee states that members of the Selection Committee are composed of representatives of the government and society. Thus, the Selection Committee has involved people as "the owner of sovereignty" as a manifestation of Article 1 (2) of the 1945 Constitution. In addition, the Selection Committee also invites the involvement of NGOs and other civil society communities to be involved in providing input and overseeing the process of recruitment conducted by the Selection Committee. That is why there is a track record of data, background happenings and other information from the prospective Commission given by NGOs and civil society groups through the process of previous investigation and study. Based on this, parliament should no longer need to make the selection of candidates for the chairmen that have been proposed by the selection committee, but the House just need to approve it. Moreover, the facts show that the existing selection process by the parliament is only a technical selection followed by a "potential conflict of interest" and "political intervention".

²⁵ OECD, *Specialised Anti-Corruption Institutions; Review of Models: Second Edition*, OECD Publishing, 2008, pg. 24

²⁶ Constitutional Court Decision of Indonesia Number 6 PUU-XII-2014, pg. 31

Now the number of positions filled by the election by the House continue to multiply. Each Act or Law that introduced the establishment of new state institutions or commissions is always associated with the authority of parliament to make a selection of the commissioners or members. Parliament's involvement in the recruitment of public officials is actually just a variant course of the oversight function of the parliament as stipulated in the 1945 Constitution. In the United States, for example, it is associated with the right to confirm the appointment of certain public officials by president (right to confirm) as part of the political oversight function of the governmental process. However, in Indonesia, the term "right to confirm" tends to deviate on the function from a political nature to a very technical one. In practice, "the right to confirm" has evolved into "the right to elect," and more technically rise to "right to select" and even "right to test". The negative impacts are certainly more numerous and widespread. Productivity of legislative program continues to decline, both in quantity and quality. The political sense in the recruitment of technical officials has also become increasingly inevitable and later affects the performance of state institutions.²⁷ In this case, role of the president and the parliament should be limited, so that the space intervention in the process of filling existing positions can be reduced as minimum as possible. At the same time, the recruitment pattern by involving non-partisan and professional figures is opened more widely.

The reason of parliament involvement in the selection of the Commission's leaders is usually intended to establish a mechanism of checks and balances. In the constitutional law theory, the mechanism of checks and balances is the relationship between agencies that are in a similar position. For example, if the Commission's leaders' candidates are selected by the government or the President, by reason of checks and balances, the government authorities should get checks or reassessment from the parliament. But when the president no longer has a role in the selection process, it is also the same reason for the Parliament not to choose for checks and balance reason. the parliament will no longer have the authority to choose, but simply to approve or disapprove. At the same time, they only need to pick through the selection process, including fit and proper test that is fully submitted to the selection committee (consisting of professional groups and community representatives). The process will narrow the space for political intervention that could threaten the independence of state commission.

The Commission's leaders must be people who are free from certain political interests because they will carry out law enforcement duties in which members of parliament are also parts of the people who are likely to be prosecuted by the Commission. On this basis, the authority of the House of Representatives to choose and assign chairmen of the Commission shall be limited to only a mere grant approval.

E. Conclusion

Independence is really needed by the Commission. Some studies suggest that the success and effectiveness of anti-corruption institutions need independence. The independence of

²⁷ Jimly Asshiddiqie, *Liberalisasi Sistem Pengisian Jabatan Publik*, makalah, Disampaikan dalam rangka Konferensi Hukum Tata Negara ke-2, di UNAND, Padang, September 2015, pg. 9

a specialized anti-corruption institution is considered to be a fundamental requirement for the proper and affective exercise of its function. This consensus is reflected in all major international legal instruments. Reason why the independence criterion rank so high on the anti-corruption agenda are closely linked with the nature of corruption. Corruption in many respects equals abuse of power. So, the independence of anti-corruption units is the starting point in building successful policies for countering corruption

I urge redesign of the chairman's selection mechanism. The change is mainly focused on the involvement of the parliament in the process. As what has happened in several countries, the representatives only possess rights to agree but they don't have rights to select as well as rights to retest the candidate of public officials including the Commission's commissioner/chairman.

Actually, the parliament's involvement on public officer selection through the authority of right to confirm does not only take place in Indonesia. It is also possessed by parliaments at almost all countries. In the constitutional law theory, it is called the principle of checks and balances. However, parliament's authority in some countries - except in Indonesia - is only to give approval (right to confirm), not to do selection (right to select) or even to conduct testing (right to test) as what happens in Indonesia

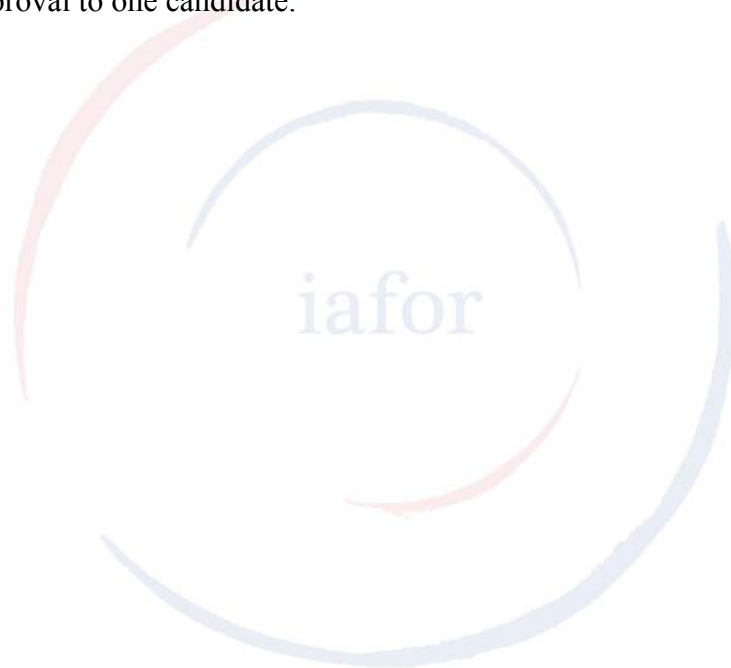
However, in Indonesia, the term "right to confirm" tends to deviate on the function from a political nature to a very technical one. In practice, "the right to confirm" has evolved into "the right to elect," and more technically rise to "right to select" and even "right to test". The negative impacts are certainly more numerous and widespread. Productivity of legislative program continues to decline, both in quantity and quality. The political sense in the recruitment of technical officials has also become increasingly inevitable and later affects the performance of state institutions.

The parliament involvement in selecting public officials has caused recruitment process is full of corruptive practices and intervention of political interest. It means that the election of state officials is no longer based on the capability and integrity. What means a lot is how much money that can be offered to parliament members or at least how far the candidates are willing to compromise with the parliament political interests. As a consequence, many state institutions in Indonesia whose chairmen are elected by the parliament experience public confidence crisis due to unaccountable and subjective recruitment process. The further effects of this phenomenon is the decline of some state institutions' performance because the lack of competence from the in-charge public officials. This really endanger democratization process that is developing in Indonesia.

Suggestions for redesigning of the Commission's Chairman recruitment to strengthen its existence in Indonesia; (a) The president forms selection committee consisting of government and society elements who have integrity and competence in their own fields. The committee is then instructed to conduct selection process on Indonesian citizen registering as candidate of the Commission's chairman; (b) The committee carries out selection process including administrative and competence tests from the candidates and also conducts track record research to find out the integrity of the candidates; (c) The

selection committee submits names of candidates who have passed all administrative, competence, and integrity tests to the president; (d) The president hands the names to the parliament; (f) The parliament gives approval on the names of the candidates.

In giving the approval, the parliament does not need to conduct competence test again and only need to recheck the selection process carried out by the selection committee whether it runs fairly or not. Furthermore, the parliament may give opportunity to the public to bring in some suggestions and inputs. If the surveillance result from the parliament on the selection committee performance matches with the existing regulation and the selection is done fairly, then the parliament may directly give approval on the entire candidates submitted by the president to further be decided as the Commission's chairmen. However, if the parliament finds out that the selections process is not conducted fairly and/or there is some objection and complaints from the public, that the candidates selected by the committee have questionable track record, the parliament may deny giving approval to one candidate.



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***Improvement of Law on Anti-Money Laundering through Vietnamese
Commercial Banking System in Vietnam - Some Lessons from some ASEAN
Countries' Anti-Money laundering Law***

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1. The formation of legal and regulatory system on prevention from, combating against money laundering through commercial banking systems in Vietnam

1.1. Demand of building legal and regulatory system on prevention from, combating against money laundering in Vietnam

Nowadays, money laundering activities become more complex, sophisticated, and money laundering crimes target commercial banking systems as financial intermediaries. As a member of Asia/Pacific Group on Money laundering (“APG”), Vietnam actively participates in preventing money laundering with international communities. However, application of preventing money laundering in Vietnam is still limited.

In Vietnam, corruption and money laundering are the hot topics and national concerns. One of the solutions to stop corruption is preventing money laundering activities through commercial banking systems. In recent years, there are many scandals related to money laundering activities through Vietnamese banking systems. According to a report provided by Financial Action Task Force (“FATF”), Vietnam is listed as a potential target for money laundering crimes because of Vietnamese economy’s extraordinary growth. Participating in bilateral and multilateral activities and international organizations not only brings a lot of opportunities but also faces many challenges.

Although Vietnamese government has inserted guidance and anti-money laundering regulatory system on 1999 Criminal Code, 2009 amended version, The Law on the State Bank of Viet Nam on 2010, the Law on Credit Institutions on 2010, and the Law on Prevention of money laundering Law of Prevention on 2012, a lot of issues need to be revaluated and resolved. Legal and regulatory systems on preventing money laundering activities are not unified. Investigating, accounting, and customer information systems are limited, and major of trading activities are unofficial and by cash. All of the above factors make the control of trading activities more and more difficult. Therefore, in order to prevent money laundering, revaluating and unifying existing legal and regulatory systems are necessary and urgent.

In Asean countries, legal and regulatory systems get more attention from governments and become more specific and effective. However, the actual application of prevention on domestic and international anti-money laundering activities is the topic that Vietnamese legal specialists mainly focus on. For example, Vietnamese legal specialists focus on Thailand government’s investigation of 16 individuals relating to money laundering, tax abusing scandal that was publicly published by Panama Paper on April 4th, 2016 and Thailand government’s report on April 9th, 2016. Legal and regulatory systems in Singapore, Indonesia, and Thailand are similar with legal systems from countries that have effective money laundering preventions such as United Kingdom, France, and United States. Also, economic and social conditions of Asean countries have similarity with Vietnam. Furthermore, as a member of Asean organization since March 31st, 2016, it is necessary to understand other members’ legal and regulatory systems. Therefore, studying and understanding Asean countries’ legal systems and their applications are essential and urgent.

1.2. Legal methods for limited money laundering through commercial banking system

In order to limit and control money laundering, international standards, international legal instruments and national laws must be considered and used worldwide, including Vietnam and other ASEAN countries.

The first legal instrument is the 40 and IX Recommendations released by the Financial Action Task Force (“FATF”) in 2012. The recommendations introduce two main points: a) establishing a legal basis to identify, trace, isolate and confiscate illegal money laundering and terrorism, b) providing solutions to prevent money laundering and terrorism financing. These recommendations have been amended with 40 new recommendations/ benchmarks to establish a comprehensive guidance and framework. From here, FATF members can use these recommendations as a guidance to establish their own legal system and modify to fit into their economic conditions.

The second legal instruments are the United Nations (“UN”) Convention against money laundering and financing of terrorism, the 2000 Palermo Convention against transnational organized crime, and the 1999 international Convention for the suppression of the financing of terrorism. These conventions require the member countries to establish legal and regulatory systems on prevention of money laundering.

The third legal instruments are the guidelines of the Basel Committee on Banking Supervision. One of these guidelines’ emphases is commercial banks’ anti-money laundering compliance. The Basel committee pays a very close attention on the compliance risk because of its tremendous impact on the legal system of each country and the internal regulations of each commercial bank. Indeed, the Basel committee provides policies and procedures on preventing and detecting money laundering and cross-border banking.

The fourth legal instrument is the national legal and regulatory system of prevention on money laundering and other relating laws such as the Law on State Bank (the Central Bank Law), the Law on Credit Institutions (Banking Law), Criminal Law, Investment Law, etc. Vietnam and other ASEAN countries have issued the necessary legal documents to concretize the recommendations and international commitments mentioned above.

2. Basic content and assessment of law enforcement against money laundering through Vietnamese commercial banks comparing to other ASEAN countries’ laws

2.1. Basic concept of anti-money laundering

Under Article 4, Clause 1 in the Anti-Money Laundering Code (2012), laundering is individual or organization’s behaviors seek to legitimize the origin of proceeds of crime, including:

- The action is defined in the Criminal Code
- Support and assist organizations and individuals whom evade liability by legalizing assets derived from criminal activities;

- Possess property (knowing that property is crime-related) to legalize the origin of property.

Thus, it indicates that the sources of dirty money are varied, but they often have a common characteristic: results of illegal activities such as smuggling, embezzlement, fraud, such as:

- Receive money from corruption, bribery, embezzlement of National executive leaders, local
- Taking advantage of political positions and status in the state apparatus to receive insider information of incoming policies, planning, etc. in order to profit.
- Insider trading
- Cash acquired from transfer pricing activities, extortion, organized gambling, etc.

The term “laundering” is important as a basis for understanding the subject, defining the implementation of obligations and responsibilities involved. This term basically meets the general standards of the international treaties to which Vietnam is engaged (the UN Convention against Trafficking in narcotics¹, the Convention against organized crime transnational²) and in line with the concept set out in the international standards on combating money laundering³.

2.2. Anti-money laundering system and mechanisms for coordination among active agencies in anti-money laundering

Before the Money laundering Prevention Act was enacted in 2013, Vietnamese government issued Decree No. 74/2005/ND-CP dated 06/07/2005 of the Government on the prevention from, combating against money laundering. According to this Decree, the Governor State Bank of Vietnam issued the Decision⁴ on the establishment of information center prevention of money laundering, later upgraded to Anti-Money Laundering Administration (“AMLA”). According to the international standards, The AMLA plays a role as a financial intelligence unit, under the Banking Inspectorate and Supervision Department of the State Bank of Vietnam (“SBV”). The AMLA collects, analyzes, and delivers information relating to money laundering. Furthermore, to adapt new situations, the Anti-Money Laundering Steering Committee (“AMLSC”), under a Deputy Prime Minister has been established⁵. This is a joint organization, in which members are representatives of 14 Line ministries, that assists the Prime Minister to administer and co-ordinate combating money laundering activities in the territory of Vietnam, under supervision of the SBV. The structure and placement of the AMLSC show the main goal of the Vietnam government in this period is to control, prevent from, and combat against money laundering through financial institutions system. However, it has not yet identified control objectives and monitored anti-money laundering activities in a comprehensive manner.

Comparing to Singapore, Vietnam establishes the AMLSC earlier. According to the

¹The Vienna Convention (1988)

²The Palermo Convention (2000)

³The FATF Forty Recommendations (2012)

⁴Decision No. 1002-QD-NHNN of the State Bank of Vietnam (SBV), dated July 8th, 2015

⁵Decision No. 470/QD-TTg of the Prime Minister, dated March 2nd, 2011

Monetary Authority of Singapore's ("MAS") announcement on June 13th, 2016⁶, Singaporean government will establish specialized agencies to combat money laundering and strengthen the ability of law enforcement to prevent money laundering bank on August 1st, 2016. This is the result of the fact that the MAS requests Bank for International Settlements ("BIS"), headquartered in Basel, Switzerland to close its branches in Singapore due to serious violations of regulations on anti-money laundering.

In Thailand, the Anti-Money Laundering Office ("AMLO") is an independent organization and separate from the executive authorities. Anti-money laundering law of Thailand⁷ defines the AMLO as "an agency that does not work under the Prime Minister, Ministers or Deputy". Moreover, the AMLO's functions and duties are clearly defined⁸ and are recognized in the Anti-Money Laundering Act, the highest level of legal documents.

To enforce the anti-money laundering law, the AMLA has

- Received and processed reports on suspicious transactions (Suspicious Transaction Report- STR) that commercial banks reported. According to statistics provided by the SBV Banking Supervision Agency, suspicious transactions increase from 360 cases in 2011 to 1351 cases in 2015.

Table 1. STR 2011-2015

	2011	2012	2013	2014	2015
State commercial banks	121	252	314	422	329
Commercial bank	185	189	267	297	869
State bank branches	54	32	90	91	153
Total	360	473	671	810	1351

Source: SBV Banking Supervision Agency

(State commercial banks are listed in Table 1 is 100% owned by government and commercial banks that government holds dominant shares)

The increase of suspicious transactions reported over the years shows not only the positive sign of Vietnam economy, but also the efforts of the anti-money laundering related departments. Compared to 2005-2010 period, the number of suspicious transactions (2005-2010) reported very small. According to the supervision of the State Bank, the period of 2005-2010 shows only 474 reports in total, which only equals to total cases in year 2011 of 2011-2015.

After receiving the report, AMLA analyzes, filters information and gives proper solution in accordance with internal procedures. In the end of the analysis, the results can be stored at AMLA (if no suspicious sign is found) or transfer to the investigation agency (if there are sufficient evidence found), or to more specialized agencies such as customs department or inspection agencies. Below is the report of 2011-2013

⁶MAS Sets Up Dedicated Departments to Combat Money Laundering and Strengthen Enforcement, <http://www.mas.gov.sg/>

⁷Article 40 of Anti-Money Laundering Act B.E 2542 (1999); Article 9 of Anti-Money Laundering Act (No.4) B.E 2556 (2013); Article 34 of Anti-Money Laundering Act (No.5) B.E 2558 (2015)

⁸Anti-Money Laundering Act B.E 2542 (1999) is amended multiple time to adapt to new and complex situation. For instance, Chapter V - Anti-Money Laundering Office is amended to clarify the duties and responsibilities of the AMLO. For further information, see Anti-Money Laundering Act (No.2) B.E 2551 (2008); Anti-Money Laundering Act (No.4) B.E 2556; Anti-Money Laundering Act (No.5) B.E 2558 (2015)

processed case provided by SBV Banking Supervision Agency:

Table 2. Processed STR 2011-2013

Department/Year	2011	2012	2013
Police Department	232	160	201
Inspection agency	5	5	38
Total	237	165	239

Source: SBV Banking Supervision Agency

- For large currency transaction reports (“CTRs”) and electronic funds transfers (“EFT”) report, these are some of the money laundering methods used by crimes that commercial banks have to report to AMLA. Data listed in Table 2 shows detailed and accurate numbers of transactions reported. This can be explained by the automatic reporting systems that were set up at commercial banks. Results of 2011-2015 are as follows:

Table 3. Total large CTR and EFT 2011-2015

Year	CTR	EFT
2011	15.885.465	5.051.079
2012	22.567.247	3.667.848
2013	22.195.553	3.159.938
2014	29.451.279	3.478.916
2015	30.305.708	2.628.968

Source: SBV Banking Supervision Agency

Not only represent the professional activities of domestic anti-money laundering, AMLA also coordinates and provides information to domestic and international agencies to prevent from and combat against money laundering and terrorism financing.

Memorandum of Understanding (MoU) between AMLA and Interpol Vietnam Office, Ministry of Public Security (“MPS”) 2009, Memorandum of Understanding between AMLA and the General Administration of Customs, the General Security I - MPS 2014, the General Department of Taxation 2015. In 2011-2015, the amount of information being exchanged with police agencies increases steadily: 2011: 38; 2012: 52; 2013: 51; 2014, 2012, 2015: 116 (Source: SBV Banking Supervision Agency).

AMLA has signed many MoU with equivalent agencies in many countries such as Russia, Taiwan, Australia, the UK, Singapore, China, Hong Kong, Japan, Indonesia (2010); Malaysia (2009); Laos (2011); Cambodia (2012); South Korea (2013); Thailand (2013); Japan (2013); Bangladesh (2014). AMLA also continues to negotiate and exchange information with the United States, France, the Netherlands, Germany, Belgium, Switzerland, Austria, India, and Canada⁹. AMLA also received and responded to many requests from foreign partners, of which most are Japan (20 requests/ 14 responses); Korea (12 requests/ 7 responses)¹⁰; both occur in 2013-2015.

⁹ Reference: <http://www.sbv.gov.vn> (Accessed 16.06.2016); <http://infonet.vn/ngan-hang-nha-nuoc-hop-tac-quoc-te-ve-dao-tao-va-trao-doi-thong-tin-pcrt-post181357.info> (Accessed 16.06.2016)

¹⁰ Source: SBV Banking Supervision Agency

Compare to the requirements of the Financial Action Task Force against money laundering, AMLA is fully implementing missions of this model.

2.3. Money laundering through commercial banks by receives services of commercial banking

Due to high demand of capital trading, transactions through commercial banking systems increase significantly. According to AMLA, SWIFT and some other official capital and money channels transfer to Vietnam 8,522 thousand billion VND through 156,430 transactions, and value of electronic money transferred abroad is 6,758 trillion through 621,885 transactions in 2015. Data in Table 3 shows the increase in number of transactions is proportional to international money laundering probability. International organizations of anti-money laundering warned that methods of money-laundering through commercial banks are more complex and difficult to detect. Clients can conceal money and use sophisticating technical methods such as multi-tier transactions to avoid bank staffs' attention. This sophisticating technique can be used in money transfer or the L/C mentioned above.

Commercial banks provide ATM services, which reduces cash payments from 16.36% of total payments in 2007 to 12% in 2015¹¹ with 96.2 million issued ATM cards (increases 210% from 2011), and 30% of adults has a bank account. This is a significant achievement in the field of banking business, but it also increases the likelihood of money laundering activities through deposit and withdrawal by credit card due to limited controls.

For bank's letter of credit (L/C) service, the accompanying documents of the L/C are difficult to forge, but commercial contracts can be fake, which is a risk to the transactions that the bank accepts to guarantee.

For international transfer of payment service, commercial banks in Vietnam are required to fill the questionnaire table and "Know your customer" (KYC), which are requested by correspondent banks for international anti-money laundering. Based on the results provided by Vietnamese commercial banks, correspondent banks evaluate the risk level and integrity of the transaction, and then determine transaction fee. If it has a high risk, the transaction fee will be very high or the correspondent bank can even deny the transaction, which leaves Vietnamese commercial bank with no benefits or revenue from transferring payments. Therefore, Vietnamese commercial banks may pass on or even lie when filing the questionnaire table in order to make the correspondent banks accept transactions. This is also a sign of money laundering because of the incompliance of commercial banks.

Transferring small money through Western Union or MoneyGram may also appear the similar issue of determining sources of income.

Regarding this compliance issue, Decree No. 96/2014 /ND-CP 17.10.2014 stipulates sanctions in money laundering¹², however, monitoring commercial banks' compliance

¹¹Source: State Bank of Vietnam

¹² Articles no 43, Decree No. 96/2014 / ND-CP 17.10.2014 stipulates sanctions in money laundering "The fines of VND 20,000,000 – 40,000,000 shall be applied to the failure of reviewing the clients and

in this area certainly does not take place regularly.

2.4. How to identify the risk of money laundering through commercial banks

The identification of the risk of money laundering through the commercial banks should be implemented through precautionous and provisional methods.

a. Precautionous method is a method that reporting entities (commercial banks) have to do to be able to timely detect and prevent money laundering signs by timely reporting and providing information to the competent authorities; recognizing and updating customer information; building internal policies and reporting specific transactions.

Recognizing and updating customer information:

Money Laundering Prevention Act 2012 provides situations in which bank has to identify customer, store, and update customer information. The noteworthy point is that the requirements on customer classification are based on the degree of risk of money laundering. For example, there will be a special monitoring mechanism for certain transactions from individuals that have political influence, correspondent-banking relations. This group of customers has a high risk of money laundering or terrorism financing. For these risky cases, banks may have to apply the additional procedures¹³ that comply with international standards on anti-money laundering, and terrorism financing.

Regarding requirements of updating client information, article no. 9 of the Law on Anti-money Laundering (2012) defines and lists all requirements and restrictions on collecting, and updating client information. However, commercial banks have not fully implemented this regulation practically, especially customer sensitive information such as occupation, social title, telephone number, and current address. This type of information is often difficult to complete and be accurate. Furthermore, updating information relating to genders (change in gender) might be difficult as well when Civil Code 2015 becomes lawful to recognize the right to change sex. This new code will make identification of the customer's appearance absolutely confusing and volatile. Prevailing Vietnam laws have not provided guidance on this issue. Internationally, other ASEAN countries that permit change in genders need to have restrictions, laws, and guidance regarding this issue¹⁴.

Building internal regulation system and policy against money laundering:

The content of internal policy is very important because the commercial bank systems are the one that approach and identify signs of money laundering. Money Laundering Prevention Act (2012)¹⁵ requires the commercial banks to issue internal regulations and policies on prevention of money laundering. The regulations/policies must

related parties named in black lists before establishing relationships with them or providing banking services to them"

¹³Articles no. 13, 14, 15 - Vietnam Anti-Money Laundering Law (2012)

¹⁴Source: According to recommendation provided by FATF, Thailand, Laos, Cambodia need to continue building legal framework and regulations against anti-money laundering, and terrorism financing (<http://www.fatf-gafi.org/media/fatf/documents/FATF%20Public%20statement%2022%20June%202012.pdf>),

Accessed 15.6.2016

¹⁵Article 20, Clause 1, Vietnam Law on Money Laundering Prevention 2012

include the following details: policies of accepting customer based on level of risk, approval/acceptance, and required documents for opening a new account; process of review, procedure of detection and reporting suspicious transactions, information security; reporting system, information center, and other regulations.

Regime of reporting and handling¹⁶:

Commercial banks are responsible for reporting information regarding prevention and combating against money laundering: large transactions (more than 300 million per day if the transaction is in cash, gold or foreign exchange transactions), report suspicious transactions, and report activities of money laundering for terrorist financing.

b. Provisional methods are methods that banks use to prevent adverse consequences such as dispersing the individuals and organizations' assets or carrying out transactions with money laundering or criminal signs

First method is delaying transactions. Commercial banks have to apply the delaying transaction methods when the involving parties are listed under blacklists or there is a reason to believe the requested transaction is related to criminal activities. The banks also have to immediately report in writing document to competent authorities. Note that the delay time of three business days is a form of temporary freezing method before an official decision of the authorities.

Second method is account blockading. Commercial banks freeze account after receiving decision from competent authorities such as People District Judge, Military District Judge, Chief of the Supreme People's Procuracy of Vietnam/ Chief of the Central Military Procuracy, Heads of investigation agencies. When conducting account blockade, commercial banks should immediately report to the State Bank of Vietnam regarding this decision.

The third method is sealing or taking account into custody. Commercial banks perform sealing and taking account into custody following competent authority's decision, which is also needed to report to the State Bank of Vietnam at the time.

3. Contents to be amended and supplemented to improve the law on the practical basis and experience from other Asean countries

3.1 Not yet written additional signs of money laundering the non-transparency of transactions

As mentioned above, the legal and regulatory framework of prevention from money laundering is primarily prescribed in Vietnam anti-money laundering law and each circumstance is prescribed in some relevant laws such as the Law on Credit Institutions; Anti-Corruption Law. However, it should be noted that the signs and measures to implement anti-money laundering are mainly prescribed in anti-money laundering law, and AMLA is the party to execute. Compared to Singapore, Thailand, and Indonesia, which have established anti-money laundering agencies in accordance with the Law on anti-money laundering, specific legal positions may be different.

¹⁶Article 21,22, Clause 1, Vietnam Law on Money Laundering Prevention 2012

Indonesian Financial Transaction Reports and Analysis Centre (“PPATK”) has a relative independence from the Central Bank of Indonesia (“BI”) according to Law of the Republic of Indonesia Number 8 year 2010 on combating money laundering, and was amended in 2002¹⁷. However, there are some following groups of transactions which may bear signs of suspicious signs of money laundering but not mentioned in the law governing:

Firstly, some may argue that money laundering does not only include provisions for individuals involving granting credit and investing in commercial banks which are expanding based not only on biological but also on mutual benefit relationships. In banking field, to reduce credit risks as well as operational risks, the State Bank issued Circular 36/2014/TT-NHNN dated 11/20/2014, amended) which specifically provisioned involving individuals¹⁸. There are two specific groups: one relating to an organization and the other relating to individual selves. The Circular content is consistent with that of Basel II and Basel III. However, they have not been recorded in the Enterprise Law of Vietnam in 2014. Despite having more specific regulations about involved people in Clause 17 Article 4, they are not sufficiently described as in Circular 36/2014/TT-NHNN 11/20/2014, amended. Therefore, we need to uniform the legal system on the issue of involving individuals. This then will be utilized to establish implementing the prevention of money laundering through transactions between groups of people.

Secondly, there have been no regulations on controlling the source of income. Although Vietnam has attempted to limit cash usage, cash utilization rate remains high, which shows inability to control the legitimacy of capital transactions and transferring funds. By using cash to purchase assets with high value, real estate transactions can use foreign currency or gold as means of payments which are approved widely. Since the transfer of ownership of registered real estate assets are legitimate regardless of the form of payment, unverified incomes which have been not classified as legal or not will become legal properties. Thus, there must be provisions which acknowledge possessions of a certain property is formed from transferring or purchasing only if the assignee can prove the source of payment is legal and paid through payment intermediaries.

3.2. Forms of money laundering in the commercial banks through unmonitored and unreported investment activities

Investment activities in commercial banks attract interest from investors whose purposes are different, including those who hold shares of commercial banks from illegal funds. Vietnam is one of the high risk countries where money laundering is likely to occur although there has not been any official investigation or surveys regarding scope of money laundering. At the summit leaders of Asian banks 17th (The Asian Banker Summit 2016) by the State Bank and The Asian Banker held from May 10th to 12th, 2016, Governor of State Bank of Vietnam stated that: "In the incoming

¹⁷Similar to Thailand, Indonesia government established Law on Anti-Money Laundering early (Law of the Republic of Indonesia Number 15 Year 2002 concerning the crime of Money Laundering Act and Law of the Republic of Indonesia Number 8 Year 2010 concerning Anti-Money Laundering Act)

¹⁸Article3, Clause 15, Circular 36/2014/TT-NHNN, November 20, 2014, stipulating minimum safety limit and ratios for transactions performed by credit institutions and branches of foreign banks (has amended)

reforming period, I look forward to seeing foreign investors participate more actively in the process of restructuring the banks in the country. I believe that this period will bring greater opportunities to all of us"¹⁹. Thus, the possibilities can occur are:

- The acquisition of shares of the joint-stock commercial bank with good prices (high prices) to become the largest shareholder and resell for a discount (withdrawal). The objective of the acquisition of shares is not towards operational profitability but to move illegally-sourced money to legitimate sources of income (partial recovery of capital investment). This may occur more frequently in Vietnam since operational restructuring commercial banks here are rushing.
- Receiving the transfer of shares from major shareholders to ensure compliance with the Law on Credit Institutions on shareholding limits. Receiving money/funds from foreign companies with fake business names and addresses is also a sign of international money laundering.
- Identification of investment with suspicious signs or "multilayer-cover" (forging owners or holders)

From Panamaprofile, we found that investing activities by illegal income on commercial banks possibly can happen if Vietnam does not have legal measures to identify this kind of investment. The layering can be executed under different ways. Money can be transferred abroad in cash. Forging investments under foreigners' name, which can carry out the real investors' plan by manipulating money transaction.

3.3 Money laundering by providing or receiving other activities of commercial banks

- When commercial banks are trusted to operate investment trusts. Individuals may use investment agreements, investment management trust agreements with commercial banks to invest, and trade securities. Organizations, including credit institutions, have investment management trust agreements with commercial banks to invest into those banks or other banks. Individuals' incoming funds may be illegal but income from investment management trust activities is legitimate. Individuals may open checking accounts at commercial banks for security trading activities, which make it difficult to control sources of money for stock trading.

- When commercial banks providing payment services to customers with suspicious signs

Article 22 Clause 6 of the Law on Anti-money laundering 2012 requires mandatory reports on suspicious transactions in gambling and rewards. However, the new regulations only touched the surface transactions that are legal in the beginning. "Request transfer money from gambling in casino without referring to the illegal act of gambling itself". If compared to Singapore's provisions of this issue, Singapore government has many laws (which is not only a provision) relating to gambling and the Law on payment instruments to identify and remove those proposals from the illegal income from gambling.

- Laws to handle money laundering through casing, especially for transboundary

¹⁹. Source: Speech by the Governor of the State Bank at Summit Central Bank leaders of the 17th Asian countries <http://www.sbv.gov.vn/>

casings (dirty money from Vietnam, hiring foreigners to forge contributing capital and purchasing shares in commercial banks)



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The Global Economic System is in a Reverse Direction and No One Repaired it

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Abstract

The way money has been handled is directly related to the multiple crises facing humanity. The existence of debt allows domination among social classes, among nations and, consequently, super-exploitation of the human being over nature. This study aimed to question the charging logic, which is the basis of the current global economic system. By observing nature, you can notice that nothing is charged: you don't have to pay for what you get (oxygen, the sun's light, water, food, life itself, etc.). The current global economic system, however, has inverted this logic: exploiting and charging people is often more valued than caring and giving to them. In this way, it is evident that nature, which gives too much and doesn't demand anything in return, will always be the most exploited. So, couldn't humanity replace the act of *charging* by the act of *giving*? In other words, if the price of a product or service were determined not by the seller or service provider, but by the customer or beneficiary, could the domination and exploitation of human beings continue to exist? Through this change, wouldn't it be possible to achieve ethical principles – considering the well-being of each one and of the humanity as a whole –, such as autonomy and emancipation of human relations, dignity, cooperation and exchange of pleasantries? Wouldn't it be possible to restore the meaning of the act of working and, furthermore, the interest, enjoyment and intrinsic motivation to perform it, regardless of its economic value?

Keywords: Charging, Dignity, Emancipation, Public Policy, Work.

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Introduction

The major environmental and sociocultural problems resulting from, among other causes, the capitalist economic system, have motivated the arising of many critical theories. This article seeks to promote reflections on the theme, make inquiries and questionings, and mainly address some issues that are not often discussed.

The contradictions of the current global economic system can be seen by the fact that while the world's hundred richest people have more wealth than half of the world's population, one billion people go hungry. According to Credit Suisse, while 0.7% of the population has 41% of all the wealth in the world (in assets), 68.7% of the population is left with 3% only. The Swiss Federal Institute of Technology has showed that 147 groups command 40% of global corporate capital, in which three quarters of it are composed of banks and other financial intermediaries, and not of producers. That is, *the tail wags the dog* (Dowbor, 2014).

It is interesting to notice that, in this situation, amid the financial crisis and growing social inequality, the greater the feeling of insecurity, the more people cling to money. In addition, the greater individualism and dependence on money, more people allow money to exert power over their lives without realizing the close relationship between crises, inequality and how our global economic system works.

[In the U.S.], in nineteen-thirties, prices being depressingly low, the obvious step was to increase the supply of money. Prices would then recover, business and employment would be stimulated. In 1933, this idea was adopted (...) by [president] Roosevelt. The gold content of the dollar was reduced: for the same gold there would be more dollars. It didn't work. (...). As money was created, people frightened as they were in those depression years, simply held on to it (Galbraith, 1977, p. 194).

Irving Fischer (1867-1947), mentioned by Galbraith (1977), discovered what people and even economists have been reluctant to admit: economic problems cannot be solved easily and cheaply just by money. If so, these solutions would have already been done, and all would be, at this time, free of economic depressions or inflation and, in general, prosperous and happy.

What is observed, however, is that the struggle for social justice has been confused with the struggle for equality in a modern colonial cultural pattern. This pattern is considered superior and, therefore, liable to be globalized (Porto-Gonçalves, 2015). The capitalist system tries to produce a positive image of its activities, creating notions of progress and development. It is argued the idea that the main purpose of human life is the unlimited growth of production (Castoriadis, 1987). Behind this ideal that moves contemporary society there is a meaning: economic growth brings progress and progress means happiness. That's the message of western capitalism (Kamp, 2003). The concept that the material conditions are the most important requirement to enable human happiness has made the human effort was deposited on formal work, on parameters such as Gross Domestic Product (GDP) and the generation of wealth obtained from exploitation of nature and of other human beings.

Thus, "instead of *economy being embedded* in social relations, social relations are embedded in the economic system" (Polanyi, 1944, p. 57). That is, modernization has contributed to the destruction of traditional loyalties, the rights and obligations of

customs, the experiences brought from ancestors generations, from tradition, etc., leaving economic rationality as the basis of social life (Bauman, 2000). And whenever economic rationality is not regulated and balanced by principles of reciprocity, redistribution and domesticity (Polanyi, 1944), the distance between those who get rich and those who contribute to society increasingly becomes. In fact, current yields of financial investments of those who have accumulated capital are higher than the annual growth rates of world production. The progressive loss and disaggregation of global governance are based on the breakdown of the *social contract*, on which the coexistence of human societies should be based on (Dowbor, 2014; Piketty, 2014).

Manner & Gowdy (2010) suggest that "if we drop the assumption that fitness is equated with the consumption of market goods, pure altruism is no longer fitness reducing, particularly in western societies" (p. 753). However, until that doesn't happen, the development continues to be based on the idea of domination over nature and over other human beings and, therefore, on the construction and continuous improvement of techniques to ensure the existence of political and legal conditions for such domination processes may occur (Porto-Gonçalves, 2015). For example, from the moment land, money and labour are considered goods, there are prices to be paid to get them: rent for the land, interest for money, salary for work, and profit for the sale of merchandise in general. And when labour and land are included in the market mechanism, society and nature are subject to the laws of the market. In this case, the profit becomes the main motivation of people. All transactions are transformed into monetary transactions and all income comes from sales. The disarticulation caused by these factors disrupts human relations and destroys the habitat (Polanyi, 1944).

The objective of this work is: to question the charging logic, which is the basis of the current global economic system. It is suggested that this logic is inverted and it is proposed another way to make it appropriate for sustaining human life on this planet.

The charging logic

In 2009, during a trip to Istanbul (Turkey), I¹ began understanding the logic of trade relations. Knowing one of the largest and oldest covered markets in the world, the Grand Bazaar, which has over 500 years (Köroğlu et al., 2009), I had my aroused attention to two points: I) The prices are not fixed, they are initially very high, but decrease after negotiation between seller and buyer. It creates the need of critical thinking about the value of the goods. It may bring people together because it requires them to negotiate, to dialogue, to consider at least minimally the interests and needs of each other. That is, *it establishes a relationship not between money and goods, mediated by people; but between people, mediated by the exchange of money and goods*. II) The sellers are almost all male. Trade is historically a male activity, which made me think about the historical division of human life into two spheres: the production of goods and services, historically designated for men; and the reproduction of biological life, historically reserved for women.

However, while it was given great value to activities historically assigned to men, such as economics, administration, politics and religion; the activities performed at

¹ Carolina Façanha Wendel, the first author of this paper.

home, such as child, elderly and sick care, cooking, educating, cleaning and tidying the house, etc., were not recognized as work and, therefore, were considered valueless (Viezzer, 2013). If the economy were based on the principles of reciprocity, redistribution and domesticity; biological reproduction could be linked to socioeconomic production, not separated from it (Polanyi, 1944). This separation has created an imbalance in which the overvaluation of money and wealth accumulation reproduces a *status quo* that is increasingly establishing itself against life support (Piketty, 2014; Viezzer, 2013).

About life support in this planet, if its bases come from nature, couldn't nature be considered the best professor of economics? By observing nature, it is possible to understand that the belief that an economic system must be based on accumulation of wealth obtained by the charging logic is wrong. Nature never charged for products or services provided to humanity. As well as a mother does not charge for breast milk that she gives to her baby. For nature, the expression *there is no free lunch* does not make sense, because nature gives everything to mankind for free.

But the global economic system, on the other hand, has inverted this logic developed over millions of years by nature. In today's societies, people tend to appreciate more what is charged than what is not. Thus, the ability to determine the value of everything is not well developed, especially when it comes to environmental, collective and systemic issues. Most people does not know about how the global economic system works, neither understands the mechanisms that involve money, despite the unquestionable importance of money in everyone's life, both the object of desire and the structuring of society, heavily interfering in the political, economics and social powers (Dowbor, 2014b). We are programmed to simply accept the predefined price. If there is something being sold at a very low or very high price, we usually think we are lucky or unlucky.

Likewise we do not think about what would be the right price for every product or service we consume, we are not encouraged either to think about what are our highest goals and ideals of life: the media and consumption culture are in charge of this function. Hence, people are at the mercy of market demands. They are so pressed that they don't have time or conditions to think about the logic of the system, and have even less time or conditions to reciprocate those who give them without thinking of returning (such as nature).

It creates a *vicious cycle* that becomes a *snowball rolling down a hill*: People are increasingly charging themselves and each other without actually knowing why they are doing it. The more they charge, the more environmental problems are created, so that, it generates more insecurity and more pressure to maintain their standard of living, and then people start charging more and more. In this sense, it is urgently required the development of a *chain reaction* able to transform this *vicious cycle* into a *virtuous cycle*.

Inverting to the logic of giving

To better explain the reversal of the charging logic it will be necessary to recapitulate the experience I lived in the Grand Bazaar in Istanbul. As mentioned earlier, in the Grand Bazaar the seller provides a very high price for their goods and then negotiates it with the client until reaching a price that is reasonable for both sides.

Now, imagine the same situation but done in reverse: imagine that the seller, instead of initially providing a very high price to the products, gives the product for free to the customers (as nature provides to humans: all for free). The buyer, by his turn, can accept the offer and take the product, without giving anything in return (as often we do with nature), or the buyer may reciprocate in some way, which may be in cash or by some other type of exchange (as we do when we want nature to continue to provide its products and services, for example, when we fertilize the soil in hopes of a good harvest).

In this sense, it is appropriate to reflect: if the remuneration for any profession were established by customer/beneficiary, not by the professional who holds it, would it not be possible for all people to begin developing their activities considering mainly pleasure and happiness they feel to do so, and the satisfaction of contributing to social welfare, regardless of its economic value? Would it not be possible to appreciate not only of what has a price and an owner, but of all that is priceless, whose value is inestimable? That is, if humanity decides to base its economic system in the offering (and not in the charging), it is possible that, finally, “the human being, and in general every rational being, exists as end in itself, not merely as means to the discretionary use of this or that will” (Kant, [1785] 2002, p. 45).

Thus, by inverting the charging logic, it may be possible to develop a different meaning for poverty and wealth: a meaning more related to the feeling of satisfaction and happiness, and less to how much money and wealth people have. According to Amartya Sen, winner of the Nobel Prize in Economics in 1998, poverty can be seen as the deprivation of opportunities and self-respect. It can be seen as a lack of freedom of people to achieve their own goals and to choose the life they want to lead (SEN, 2012).

In this sense, it is necessary to promote different forms of production, consumption, organization and relationships in human societies. New ways to promote not alienation prevalent in today's hegemonic capitalist societies, but dialogue and discussion about all this, enabling the pronouncement of dreams and utopias, critical debate facing the maturity and the coordinated construction of individual and collective projects. In this way, it may be possible to develop a continuous learning aimed not only the material aspects of life, but also the growth of the soul, so that each person will be able to thrive as a human being (SORRENTINO, 2013).

But how to do it?

Preliminary suggestions towards this direction

Konrad Lorenz, who won the Nobel Prize in Medicine in 1972 and is considered the *father of ethology* (the science of animal behavior) mentions, in his studies comparing

humans and other species, that humans are at a disadvantage due their own choices. He says that we are the only ones to use our differential (in relation to other species) against ourselves, not in search of preservation and enhancement. Thus, the verbal and the concrete and abstract reasoning, for example, have contributed for the technological development, but also for the development of feelings of ownership, for widespread competition, for indoctrination, passivity and corruption. Nevertheless, the author states that there is a way out based on human unpredictability, which ensures the possibility of a change of course (Fischmann et al., 1998; Fischmann, 2007).

One must keep in mind that this change of course depends on the people, and "*it may simply not be possible to convince human beings, rationally, to take a long-term view*". People do not focus on the long term because they *have* to, but because they *want* to" (Senge, 1990, p. 210). That is, the engagement and participation of the people in a project requires free will and freedom of choice of each person. In this sense, it proposes to start valuing the truth, as opposed to the habit of using lies as an instrument to gain advantage in the competition (Lorenz, 1986). Senge (1990) also asserts that "we may begin with a disarmingly simple yet profound strategy for dealing with structural conflict: telling the truth" (p. 159).

Telling the truth is part of social rules. Reciprocity standards, for instance, rely on reputation and trust. The people's reputation increases when they are able to keep promises and, consequently, contributes to the realization of costly actions in the short term, but with long-term benefits (Ostrom, 1998). Sincere communication is, therefore, an essential factor for the success of collective action. It contributes to provide cooperation: enables the exchange of experiences and successful strategies, facilitates the introduction of changes in the collective agreements, increases trust among group members and, hence, expectations about their behavior; creates and reinforces standards and values, and contributes to the development of a group identity (Cunha, 2004). People with high reputation of reciprocity tend to associate with each other, and avoid those who are not worthy (Ostrom, 1998).

Another factor that supports collective action is the capacity to implement innovations. Empirical experience shows that systems based on the diversity of rules designed and strengthened by members of the community, and on the implementation of these rules throughout a continuous process of trial and error in order to modify the structures that cause social conflicts, have been considered satisfactory by the communities involved (Ostrom, 1998).

These factors, however, are not well studied because "almost *all* economic models assume that all people are *exclusively* pursuing their material self-interest and do not care about 'social' goals per se" (Fehr and Schmidt, 1999, p. 817). The models explain why there are people who act only for the sake of individual benefits and short-term, such as free-riders², causing the "tragedy of the commons" described by Garret Hardin in 1968 (Mankiw, 2014), but are not capable of explaining the reasons why other groups have been successful in the collective management of natural

² *Free-riders* are individuals that receive public goods benefits but do not pay the cost of the collective action necessary for obtaining them (Cunha, 2004).

resources, ensuring the sustainable and equitable use in the long term on a local scale and without the intervention of an external authority, ie, without rewards or imposed sanctions in order to maintain cooperation (Berkes et al 1989; Cunha, 2004).

Some scriptural passages considered by different people can contribute to the explanation of the success of these communities because they bring orientations to ensure collective benefits in the long term. Lao Tzu (2001, p. 172³), for example, in chapter 46 of the *Tao Te King*, mentions: "There is no greater crime than greed. Who is content with the necessary will always have enough". Buddha (Kyokai, 1996, p. 169-170³) in *The Doctrine of Buddha*, mentions that "the practice of charity away from selfishness", and "true charity is one that arises spontaneously from a pure and compassionate heart without any thought of reward and want to clarify more and more". Jesus Christ (Biblia Sagrada, 2005³) mentions in chapter 22, verse 34 of the *Bible* that "you shall love your neighbour as yourself", and in chapter 6, verse 19-2, that "you should not lay up treasures on earth, where moth and rust consume and where thieves break through and steal; but lay up for yourselves treasures in heaven, where neither moth nor rust doth corrupt, and where thieves do not break through nor steal. For where your treasure is, there will be your heart". In *The Analects*, Confucius (2016) mentions that "the noble man cares about virtue; the inferior man cares about material things. The noble man seeks discipline; the inferior man seeks favors" (chapter 4:11), that "if you do everything with a concern for your own advantage, you will be resented by many people" (chapter 4:12), and that "the noble man is aware of fairness, the inferior man is aware of advantage" (chapter 4:16).

Confucius said that, based on self-reflection, control of selfish desires and developing virtues (kindness, respect, honesty, justice, wisdom, righteousness, trustworthiness, loyalty, compassion, etc.), one can improve oneself individually. From that individual improvement it would be possible to harmonize the basic social relations (couple, parents and children, siblings, friends, and rulers and people). And from the harmonization of social relations, it is possible to pacify the country and the world (Cheng et al, 1985, 1986).

That is, if everyone had a place to contribute and from which to survive, if all people could take care of themselves and the community (especially children, the elderly and mothers raising their children by themselves), there would be so many crimes? (Cheng et al., 1985; 1986). Contradictions between the individual and the collective could be resolved if the culture that has historically valued more to dominate, exploit and charge each other were replaced by a culture that valued the care and offer it to each other. If humanity replaces the act of charging for the act of offering, couldn't the "tragedy of the commons" be transformed into the "harmony of the commons"?

For this, it is first necessary to create a new rationality, which is able to regulate access and use of common resources so that the dilemmas of collective action can be overcome (Cunha, 2004). However, with a linear mindset, unable to see the processes in a systemic way, people tend to blame someone other than themselves, or blame the system for the problems they face. They understand they must only *react* to changes, and not *create* changes. It is true that there are people who have greater ability to

³ Translated by Alvaro Castellani Neto.

create changes than others, but when all the people start understanding, (in a systemic way) the forces that create the current reality (such as politics) and their points of leverage (such as money), there comes a new perspective field for development goals (Senge, 1990).

In this sense, it is essential that current and future generations understand the bases of the global economic system, as well as how it was developed throughout history until reach the present times (Huberman, 1961; Carmack & Still, 1996; Martin, 2014). It is also necessary that all become aware of the *consequences* of the logic on which this economic system is based (Table 1). Thus, armed with this powerful knowledge, communities will be able to propose and implement changes in this system, *so that citizens start to have dominion over the money, instead of being dominated by it*.

Table 1: Comparison between an economic system based on the charging logic and an economic system based on the logic of giving.

Economic system based on charging logic	Economic system based on logic of giving
The sellers inform the price (sellers demand a payment). Stimulation for consumption is needed.	The consumers inform the price (consumers pay if and as they want, and how much they want). Education for citizenship is needed.
It manipulates, vitiates, generates insecurity, causes chronic diseases and allows people to die of hunger.	It emancipates, liberates people (both physically and mentally), and provides autonomy and security to people.
It creates unnecessary demands, a sense of lack and scarcity, perceived obsolescence, planned obsolescence.	Demands are created based on actual needs of the people, considering individual and collective scale.
It overestimates money and devalues life. "Profit over people".	Life, dignity, solidarity, creativity, social welfare and tolerance are more valued than money and material possessions. "People over profit".
It generates individualism, selfishness self-centeredness and fear of the others (fear of being robbed, deceived, manipulated, exploited, etc.).	It brings people together, creates dialogue and exchange of pleasantries, values works that can improve the quality of life for all citizens.
It engenders unemployment, lies, omits powerful knowledge and patents the quality of life.	It generates honesty (values the search for truth), cooperation, altruism, empathy, gratitude, and disseminates powerful knowledge.
It creates environmental damages.	It protects the environment.
It establishes cold and competitive relationships. "Commercial relations". Subject-object relationships.	It establishes communal, cooperative, warm, close and affectionate relationships. "Solidary relations". Subject-subject relationships.

First of all, it is necessary to develop an education for citizenship. The school curricula, for example, could manage the teaching content based not on the traditional duties imposition (Sacristán, 2008), but on the dignity (Senge, 2012), on the virtues (Cheng et al., 1985; 1986), on the dialogue (Freire, 2011), on the orientation of the

autonomy and of the emancipation of each one, by a way that they can synergistically interact, ie, by a way in which the liberty of some people do not effect negatively the liberty of others. General media (involving the plots of the series, novels, films and documentaries, newspapers, magazines, radio programs, internet, etc.), in turn, could cooperate to maintain the economy working towards the human emancipation and the sustaining of life on Earth, and not towards the alienation and ecologically irresponsible consumerism. Thus, it would be possible to encourage people to devote their lives to serve themselves and to improve the welfare of their community, and not to serve the money. According to Montesquieu [1748] (2005), popular democracy will only become viable if people are educated to frugality.

For that, it is necessary to create public policies that provide conditions for the market, science and technology can properly value the work aimed at solving social and ecological challenges, such as hunger, disease, human conflicts (intra and interpersonal) and pollution. Examples of such works are: production of organic foods, clean and renewable energy, cars powered by electric and/or solar energy, efficient public transport means; therapeutic techniques to reduce stress and maintain physical, mental, emotional and energetic health, such as psychotherapy, acupuncture, chiropractic, bioenergetic synchronization technique (Hawk, et al., 2006), grounding/earthing (Chevalier et al. 2012; Oschman et al, 2015), informational quantum homeostasis (Ceccato Filho, 2015), breathing, meditative and physical exercises; change of eating habits, so that food ensures health and not disease; development of technologies for production of nutritious, tasty and healthy plant foods, which obviate the need for the sacrifice of animals for human consumption; cleaning-up of rivers, lakes, seas and oceans; construction of urban gardens, planting fruit trees in public spaces, construction of recycling and composting plants; development of media and school curricula based on powerful knowledge capable of generating empowerment, self-awareness, autonomy, personal development, compassion, social and environmental responsibility, commitment to truth, commitment with yourself and with others, self-respect and respect for differences; considering that *there is no person, culture or nation that might be considered perfect or evolved: we are all learners in a constant process of evolution.*

In short, it is necessary that public policies are developed to promote that the time and energy of human beings can be used to carry out activities that generate happiness, satisfaction and improving the quality of human life on this planet, in the short, medium and long term; regardless of income or financial return of the activity performed.

Conclusions

The charging logic, which has been one of the basis of the current global economic system, has led mankind to a path contrary to sustaining life on Earth. In this context, it is proposed to replace the act of *charging* for the act of *offering*. Thus, it is supposed that the nature and all that is priceless, but whose value is immeasurable (such as life itself, health, water, etc.) can naturally be valorized. It was assumed that, in this manner, global governance can develop a *social contract* capable of providing welfare for everyone, in a just and concrete way. A way not based on alienation but, certainly, on dissemination of powerful knowledge, commitment to truth, in the

development of dignity, empowerment and autonomy of every human being, every culture and every nation.

The alienation prevalent in hegemonic capitalist societies creates feelings of fear, mistrust and insecurity. However, if we begin to observe one another, we could see that each one of us is all the time pursuing pleasure and happiness, and avoiding suffering. It is imperative, therefore, that knowledge and appreciation of the virtues (honesty, fairness, respect, loveliness, wisdom, etc.) are part of the daily lives of people, so that what is considered good for everyone individually can also be good for all.

There are several concrete and objective paths that can provide transition processes to fairer, healthier, happier and more sustainable societies. There is not a recipe. There is not an only way to achieve it. The objective of public policies is to stimulate communities to find their own ways.

Based on the arguments in this work, it is worth mentioning a Confucius' thought: "Lead through policies, discipline through punishments, and the people may be restrained but without a sense of shame. Lead through virtue, discipline through the rites [good manners], and there will be a sense of shame and conscientious improvements" (Confucius, 2016, chapter 2:3). Linking it with the thought of the banker Mayer Amschel Rothschild: "Permit me to issue and control the money of a nation, and I care not who makes its laws" (Tiessen, 2014, p. 56), it is possible to conclude with the following assumption: *let people increase their level of virtue, and they care not who issues and controls the money.*

Reversing the charging logic may seem naive or even impractical in today's world. However, it is precisely the provocation of the unthinkable that we want to encourage. If we never think of the possibilities, we shall never seek solutions in this regard. Education of virtues is essential because it allows the human being to become more altruistic. It may be obtained by teachings of many of the great sages of humanity. If everyone (from the individual who makes purchases in the local grocery shop to public policy planners and implementers) possess high character and integrity, consequently the economy will become altruistic and virtuous. The reflections of this article are a little contribution towards an ecological, fair, equitable and ethical economic system.

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